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REPORTS

OF

All the Cases decided by all the Superior Courts

RELATING TO

MAGISTRATES, MUNICIPAL,

AND

PAROCHIAL LAW.

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REPORTS OF ALL THE CASES

DECIDED BY

All the Superior Courts

RELATING TO THE

LAW ADMINISTERED BY MAGISTRATES

AND TO

PAROCHIAL AND MUNICIPAL LAW.

HOUSE OF LORDS.

Nov. 17, 18, *and* 21, 1904.

(Before the LORD CHANCELLOR (Halsbury), Lords DAVEY and ROBERTSON.)

ROSSI *v.* LORD PROVOST OF EDINBURGH AND OTHERS. (*a*)

ON APPEAL FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Burgh—Powers of magistrates—Ice-cream vendors — Licence — Conditions — Ultra vires — *Edinburgh Corporation Act* 1900 (63 *&* 64 *Vict. c. xxviii.*).

By the Edinburgh Corporation Act 1900, *s.* 80, *it is enacted* (inter alia) *that any person selling ice cream, except in a duly licensed hotel, without a licence from the magistrates, "who are hereby empowered to grant the same," shall be liable to a penalty; provided that such licence shall run from the date of issue until the* 15*th May ensuing, and upon renewal from the date of the expiration of the licence so renewed to the* 15*th May following, "unless the same shall be sooner forfeited, revoked, or suspended," and that "every person licensed . . . to sell ice cream under the provisions of the Act who shall . . . sell ice cream except during the hours between"* 8 *a.m. and* 11 *p.m. "on any lawful day, or at such extended hour at night as the magistrates may" permit in special cases, shall be liable to a penalty. The statute did not provide any form of licence. The magistrates proposed that the licences issued by them to vendors of ice cream should contain the following conditions:* (1) *That the licensee should not keep open his premises, or sell ice cream therein, on Sundays, or on any other days set apart for public worship by lawful authority;* (2) *that he should not keep open his premises, or sell ice cream therein, before* 8 *a.m. or after* 11 *p.m.;* (3) *that the magistrates, or any of them, might at any time revoke or suspend the licence.*

Held (reversing the judgment of the court below), that the proposed conditions were ultra vires, *and that an ice-cream vendor was not bound to accept a licence containing such conditions.*

APPEAL from a judgment of the Second Division of the Court of Session in Scotland, consisting of the Lord Justice-Clerk (Lord Kingsburgh), Lords Young, Trayner, and Moncreiff, who had affirmed a judgment of the Lord Ordinary (Lord Kincairney).

The case is reported 5 F. 480; 40 Sc. L. Rep. 375.

The appellant Rossi carried on business in the High-street of Edinburgh as a vendor of ice cream. He raised an action against the corporation, concluding for declarator that the magistrates were not entitled to issue, and that the appellant was not bound to accept, a licence for the sale of ice cream containing certain conditions to which he took exception. The conditions were as set out in the headnote.

The contention of the appellant was that insertion of these conditions was *ultra vires* of the magistrates.

In 1900 the Corporation of Edinburgh obtained an Act (63 & 64 Vict. c. xxviii.) which by sect. 80 empowered the magistrates to grant licences for buildings where ice cream might be sold, and directed the imposition of penalties on persons selling ice cream without a licence, and under a penalty of 10*l.* limited the sale of ice cream in licensed buildings to the hours between 8 a.m. and 11 p.m. on any lawful day.

The respondents did not attempt to enforce this section of the Act of 1900, but they promoted a provisional order in the following year, making certain amendments to it.

The respondents intimated to the appellant and his fellow-traders who dealt in ice cream

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

that they would not be permitted to carry on that business unless they were prepared to accept a licence containing the conditions referred to above.

The appellant, on behalf of himself and his fellow-traders, submitted to the respondents that they had no statutory or other warrant for inserting such conditions in the licence, but as the respondents declined to remove them this action was raised to test the legality of the conditions, and to try the question whether the respondents could attach such conditions to licences issued under the Act.

The Lord Ordinary and the Second Division assoilzied the respondents from the conclusion of the summons, and decided that it was within the power of the magistrates to insert the conditions objected to.

J. Crabb Watt, K.C., *Morrison* (both of the Scotch Bar), and *J. Crabb Watt* appeared for the appellant, and contended that the section in question was one in restraint of trade. It is a penal section, and must be strictly construed. It contains no warrant for the addition to the licence of any by-laws, and the first two conditions are illegal restrictions on the appellant's business. It appears that in addition to ice cream, firewood, confectionery, bread, biscuits, fruit, tobacco, aerated waters, and a variety of other commodities are sold in ice-cream shops, and the effect of the restrictions in the licence would be to destroy a considerable portion of the appellant's trade which he and other vendors had, at considerable expense, established by many years' trading. The true meaning and effect of the statute is to render any person liable in a penalty of 10*l*, and the suspension, revocation, or forfeiture of his ice-cream licence, who is convicted of any of the following offences which the statute creates: (1) Selling ice cream in unlicensed premises; (2) failure to put up the words "licensed for the sale of ice cream" on the door or outside of the premises so licensed; (3) selling ice cream during the hours between eleven in the evening and eight in the morning on any lawful day. The application of the statute is expressly limited to these purposes, while the conditions in the licence go far beyond the statutory prohibitions. There is no reason why the magistrates should not issue to vendors of ice cream a certificate similar to that granted to the keepers of billiard-rooms.

Cripps, K.C., *Cooper*, K.C. (of the Scotch Bar), and *Beveridge*, for the respondents, argued that the action was incompetent. The appellant does not hold a licence for the sale of ice cream, and may never do so, and as he has not obtained a licence he can have no interest in the form of licence granted. The power conferred to issue licences involves the power to refuse them, and also to attach such reasonable conditions as are not expressly or impliedly repugnant to the Act. The first two conditions attached to the licence are perfectly consistent with the section of the Act, and, as to the third condition, the magistrates considered it advisable that the holders of licences should be informed of the fact that they could at any time suspend or revoke the licence; but, at the same time, they had no intention of capriciously withdrawing licences except for misconduct.

J. Crabb Watt, K.C. was heard in reply.

At the conclusion of the arguments their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: This is an example of most laudable brevity. The point is now reduced to a very short one—namely, whether the civic authorities have power to make these regulations, because in substance they are regulations, although they are contained in the form of the licence, which, they argue, involves the power to make a regulation, whether it is called a regulation or a by-law. It is a legislative power which, in my view, the Legislature has not confided to it. It is idle to say that a great many of these things on which arguments have been addressed to your Lordships would be very desirable for the sake of public order. I confess that for myself I am wholly unable to understand that the question of public order arises in the selling of ice cream. But I pass that by, because I do not know. We have not had an opportunity of considering, nor is there anything in the statute itself, which undoubtedly would have been a proper and legitimate source of information, to show what was the occasion, what was the evil aimed at by the legislation which the Legislature has adopted. It is enough for me to say that I know nothing about it. I do not know what the evil aimed at was. I can, therefore, give no general view of what is the intention and purpose of the statute. I can only look at the statute itself, and construe it by itself, and when I construe the statute by itself I find that there is upon the statute itself a plain prohibition in respect of certain things, and the magistrates are of course not only empowered but bound to give effect to the legislation which has been passed. But when it is argued that, because they have been given the power to restrict within certain hours the sale of ice cream, therefore they have implied power to do all that might be desirable or expedient with reference to the times and circumstances under which ice cream may be sold, it seems to me the argument entirely fails. That which is sought to be done, whether directly by by-law or indirectly by the language of the licence which is issued, is something which can only be done by the Legislature. It is a restraint of common right, and all His Majesty's subjects have a right to sell in their shops, and to sell what they please, subject to legislative restriction. And if there is no legislative restriction which is appropriate to the particular thing in dispute, it seems to me that it would be a very serious inroad upon the liberty of the subject if it could be supposed that the mere single restriction which the Legislature has imposed could be enlarged and applied to other things and other circumstances than that which the Legislature has contemplated. The result is, it appears to me, that the form of this licence is entirely irregular, and when it is said that any court can construe it so as not to infringe the liberty of the subject, and that they could only withdraw the licence under certain circumstances—in the first place, I think it an untenable proposition. You have no right to allow that to stand which on its face would involve an undue restriction of the liberty of the subject, because any court afterwards would construe it so that it should not do so, because it would be *ultra vires*. On the face of it, I think that would be wrong in itself, but it would be much more wrong to allow

the subject to be called upon to bring such a question from court to court, and ultimately to your Lordships' House, because they would not interfere with the language which the civic authorities had used, which, upon the face of it, involved an infringement of the liberty of the subject. Now, I confess for my own part that I have entertained no doubt from the commencement of this matter that this was *ultra vires* on the part of the civic authorities, and the only doubt which I have entertained has been whether this was the appropriate form of remedy. I am told, however—indeed, one of the learned judges himself points out—that if the fact is as was contended before him that the form of the licence (involving, as I say, a prohibition) was *ultra vires*, this is an appropriate form of remedy. Under these circumstances I can have no difficulty at all in asking your Lordships to allow this appeal, and condemn the respondents in costs.

Lord DAVEY.—My Lords: I certainly am not disposed to entertain the objection to the competency of this action, because I find that it has been before both an experienced Lord Ordinary and the Inner House, and I do not see, in any of the judgments delivered by those learned judges, who, of course, must be assumed to know their own procedure, any objection to the competency of the action. Indeed, Lord Moncreiff says: "If pursuer had been able to show that the magistrates had exceeded their powers in this licence, he no doubt would have succeeded." I turn, therefore, to the substance of the arguments of the learned counsel. In the year 1900 the town council and magistrates of Edinburgh thought fit to apply to the Legislature, and the Legislature granted and passed an Act for the regulation of billiard-rooms and the sale of ice cream. I must assume that there are circumstances connected with the trade of selling ice cream in the city of Edinburgh which justified the intervention of the Legislature, and made it right to impose special provisions on the sale of ice cream which are not applicable to the sale of other commodities. But every restriction, and every regulation, such as I find in the Act of 1900, and repeated in the Provisional Order of 1901, is, of course, *pro tanto* a restraint upon the ordinary right of every British subject. It is, in fact, a restraint on trade, and I am of opinion that although the section of the Act and of the Provisional Order in which I find such provisions ought to be construed fairly, and ought to be construed so as to reasonably effect the object which the Legislature must be presumed to have had in view, you ought not by implication to extend the restriction and restraint of that particular trade further than the Legislature has sanctioned, and still less ought you to give such a construction to the clauses of that description as would impose a restraint, not only on the exercise of the particular trade which is in question, but also on the exercise of other trades which are not in question. Bearing that in mind, I confess that I should have said, though not in the same sense in which the Lord Justice-Clerk used the words, "this is a very simple case," and so far I agree with him; but I regret that I cannot concur in the conclusions to which he has come, for I am of opinion that every one of the so-called conditions goes beyond anything in the way of restricting trade which is sanctioned by the Legislature. I need not read to your Lordships, or refer to at length, the section of the Provisional Order which is in question. Clause 57 in the Provisional Order repeats with some verbal differences clause 80 of the Corporation Act of 1900; but I will merely point out to your Lordships that it provides for a licence being granted for the premises in which ice cream may be sold, and prohibits any unlicensed person from selling ice cream except upon premises so licensed. But the prohibition merely is to selling ice cream upon those premises, and it then imposes a penalty for that offence, and also for not writing or putting up upon his premises the words "licensed for the sale of ice cream," and it provides that the licence shall run from the 15th May to the 15th May following, "unless the same shall be sooner forfeited, revoked, or suspended." And then it prohibits selling ice cream except during the hours from eight o'clock in the morning and eleven o'clock at night on any lawful day. Now, the first condition which I think is open to objection is that it prohibits not only the sale of ice cream, but also prohibits the licensee from keeping open the said premises. Now, I am of opinion that is wholly unwarranted by the Act. There is nothing whatever which prevents him keeping his premises open during such hours when he may otherwise lawfully do so. The prohibition is against selling ice cream; but there is no prohibition against him in keeping his premises open for other purposes. For example, I suppose it is quite possible that the sale of ice cream may be combined with other branches of trade, and the effect of this proviso is to extend the prohibition, as regards hours and days upon which ice cream may be sold, to the sale of other commodities which may be lawfully sold on other days and at other times. It is said that this is in the nature of a condition for giving effect to the provisions of the statute. But I am of opinion that you cannot, under the guise of giving better effect to the provisions of the statute, extend the statute to the prohibition of trades which are not included in the statute. And, although I quite feel the effect of the argument used by Lord Trayner on this part of the case, the answer really is that which has been given by the Lord Chancellor, that it might have been a very reasonable condition for the Legislature to have prescribed, but the Legislature has not done so. Then the words in the statute are "on any lawful days," which I admit are ambiguous. The town council have construed that to mean "on Sunday or any other day set apart for public worship by lawful authority." Now, I must confess that with regard to those latter words—Sunday, no doubt, is probably included—"on any other day set apart for public worship by lawful authority," I do not know what is meant by lawful authority. If it means that the Government, acting under the powers of an Act of Parliament, or any other authority acting under the powers of an Act of Parliament, prohibits the sale of ice cream upon such a day, the prohibition must have effect, but if it does not do so I cannot, I confess, agree that because a day is fixed for public worship other than Sunday by some authority it extends the restriction to such a day. And that derives still more force when it is considered that the prohibition is against not only selling ice cream, but keeping open his premises for other purposes. The same observation applies to the condition

in the licence No. 2. On No. 3 the magistrates, or any of them, may at any time suspend or revoke this licence. I confess that I have not heard from the learned counsel—and I took the liberty of pressing him upon that point—of any power in the magistrates to revoke or to suspend this licence. It is said that the words which I read, "unless the same shall be sooner forfeited, revoked, or suspended," give the power. That construction of the Act of Parliament seems to me entirely contrary to principle. The utmost which you can say is that the words seem to assume that the corporation either have already, or may at some future time acquire, a power to forfeit, revoke, or suspend the licence. That it does not give the power seems to me plain from a consideration of the words, because the words, your Lordships will observe, are "forfeited, revoked, or suspended." Now, "forfeited" has a clear and definite meaning when we are speaking of licences of this description. It means that if the licensee does certain acts his licence will be forfeited. That is the plain meaning of it. Well, you will look in vain in the statute, or in this Provisional Order, for anything which defines the conditions upon which the licence is to become forfeited. It is plain to my mind that it does not contain any power either to revoke or to suspend the licence. I therefore agree with the motion of the Lord Chancellor.

Lord ROBERTSON.—My Lords: I am entirely of the same opinion. The first question is whether the proposed form of licence does or does not accurately state the restrictions imposed by the statute on dealers in ice cream. It seems to me that it does not, and that it purports to impose on the dealers more restrictions than does the statute. I can find no warrant in the statute for forcing the dealer to close his premises at the hours during which he is forbidden to sell ice cream, and I know of no principle upon which the magistrates can be held entitled to eke out what they may consider a weak prohibition by imposing an additional one. The licence would compel a man who had a general baking or confectionery business to shut his shop at the specified hours merely because one, and it might be an unimportant, item of his business was ice cream. If the Legislature should in the future come to estimate the importance of ice cream higher than it seems to do at present it may adopt the stringent measures proposed, but in the meantime the respondents must be content to keep pace with the Legislature. I further think that the respondents in the third condition arrogate to the magistrates a power not conferred upon them. As regards "lawful days," I think Sundays are not in the sense of the Act lawful days on the principle stated in this House in the case of *Phillips* v. *James* (2 S. & McL. 465). As regards the other days described in the proposed licence, I do not feel called upon to discuss dubious questions about public fasts which have little or no practical importance, and shall only remark that it is quite out of place for a licensing body to put into the licence their gloss on the statute on such points, whether it be more or less probably correct. On the present point the respondents, I think, no doubt with the best intentions, have gone out of their way to court discussion. The next question is as to the form of action. Now, the substance of the matter is that the magistrates have publicly threatened to impose and enforce upon a lawful trade restrictions which are illegal. This being so, it would be unfortunate if it were necessary that a lawful trade should be interrupted and harassed by actual prosecution. It seems to me that the action of declarator, which is peculiar to the Scottish system, exactly meets the case. It is quite a mistake to assume that a trader requires to postulate what he has not got—namely, a licence—in order to find himself entitled to sue. His title is his trade, which the respondents avow that they intend to interfere with by refusing to give the trader a licence except upon terms more onerous than the law allows. In my opinion the appellant has a perfectly good title to have those restrictions declared illegal.

Judgment appealed from reversed. Cause remitted to the Court of Session. Respondents to pay to the appellant his costs in this House and in the courts below.

Solicitors for the appellant, *Traill, Howell,* and *Page,* for *Donaldson* and *Nisbet,* Edinburgh.

Solicitors for the respondents, *A.* and *W. Beveridge,* for *Thomas Hunter,* Town Clerk, Edinburgh.

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, June 23, 1904.

(Before VAUGHAN WILLIAMS, ROMER, and COZENS-HARDY, L.JJ.)

Re ALLEN AND DRISCOLL'S CONTRACT. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Vendor and purchaser—Paving expenses—Work done by local authority—Charge on frontagers' premises—Date from which charge takes effect—Outgoings—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 150, 257.

The expenses incurred by a local authority for paving and other works executed by them under sect. 150 *of the Public Health Act* 1875 *first become "a charge on the premises in respect of which they were incurred" within the meaning of sect.* 257 *from the date of the completion of the works.*

Decision of Byrne, J. (21 *Mag. Cas.* 535; 90 *L. T. Rep.* 637; (1904) 1 *Ch.* 493) *affirmed.*

Tubbs *v.* Wynne (1897) 1 *Q. B.* 74) *distinguished.*

Per Romer L.J.: The case of Re Highett and Bird's Contract (87 *L. T. Rep.* 697; (1903) 1 *Ch.* 287) *was decided on the assumption that the vendor was in the same position as if he had expressly agreed to make a good title.*

THE question to be decided in this case was the date at which expenses incurred by a local authority under sect. 150 of the Public Health Act 1875 for paving and other works become under sect. 257 "a charge on the premises in respect of which they were incurred."

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

By an order made in the action of *Allen* v. *Driscoll*, dated the 22nd July 1903, the defendants were ordered to pay to the plaintiffs on or before the 29th Sept. the sum of 4440*l.* in settlement of the purchase money and interest due in respect of eleven leasehold houses in Rusthall-avenue, Acton, the plaintiffs by their counsel undertaking to make a good title to the said leasehold houses and to assign the same to the defendants, the defendants by their counsel undertaking to accept the leasehold houses so assigned in their present condition; and the plaintiffs were to receive the rents and pay the outgoings in respect thereof up to the 29th Sept. 1903.

In Feb. 1903 the Acton Urban District Council served the vendors with notices under sect. 150 of the Public Health Act 1875 to pave and make up the roadway in front of the eleven houses.

Default having been made in complying with these notices, on the 13th July 1903 the council entered into an agreement with a contractor for the execution of the works specified in the notices.

The work was only partly completed on the 29th Sept. 1903, and a question arose between the vendors and purchasers as to which of them ought to pay the expenses of the work.

A summons under the Vendor and Purchaser Act 1874 was taken out by the purchasers to have the question determined, and Byrne, J. held that under sect. 257 the expenses did not become a charge on the property until the date of the completion of the works, and therefore the purchasers must pay the expenses, and the purchasers appealed.

W. H. Cozens-Hardy for the appellants.—By sect. 257 of the Public Health Act 1875 these expenses became a charge on the property either when the contract was entered into, that was the 7th July 1903, when the expenses were "incurred" by the council and they became liable to pay them, or, at any rate, as to each completed piece of the work as soon as it was completed:

Tottenham Local Board of Health v. *Rowell*, 35 L. T. Rep. 887; 15 Ch. Div. 378, 392;
West Ham Corporation v. *Grant*, 60 L. T. Rep. 17; 40 Ch. Div. 335;
Re Bettesworth and Richer, 58 L. T. Rep. 796; 37 Ch. Div. 535.

The case of *Stock* v. *Meakin* (82 L. T. Rep. 248; (1900) 1 Ch. 683) was a decision under the Private Street Works Act 1892, in which the language is different. A charge arose immediately any money was paid under the contract:

Re Highett and Bird's Contract, 87 L. T. Rep. 697; (1903) 1 Ch. 287.

Besides, the vendors have not complied with the order of the 22nd July 1903, for they have not shown a good title to the property, as at the date fixed for completion there was an inchoate liability which might become a charge:

Re Highett and Bird's Contract (*ubi sup.*).

Besides, this inchoate liability was an "outgoing," which, under the order of the 22nd July 1903, the vendors were liable to pay:

Tubbs v. *Wynne*, (1897) 1 Q. B. 74.

[COZENS-HARDY, L.J. referred to *Re Boor* (60 L. T. Rep. 412; 40 Ch. Div. 572).]

Norton, K.C. and *Ashton Cross*, for the vendors, were not called on.

VAUGHAN WILLIAMS, L.J.—The question in this case is at what date did the expenses incurred by the local authority under sect. 150 of the Public Health Act 1875, in the execution of paving and other works, first become a charge on the premises in respect of which they were incurred within the meaning of sect. 257? There are other points of the case, but I will deal with those later. Byrne, J. held that this expense first became a charge from the date of the completion of the works, and it is contended that upon the cases that decision is wrong. Now the date which was fixed for completion in this contract of sale was the 29th Sept. 1903, and in Feb. of the same year a notice under sect. 50 of the Public Health Act 1875, to pave and make up the roadway in front of the houses was served upon the vendors by the Acton Urban District Council, and default having been made in complying with this notice, the council, on the 7th July 1903, entered into an agreement with a contractor for the execution of the works specified in the notice. The whole of the works specified in the notice were not completed by the 29th Sept. —that is, were not completed by the date fixed for the completion of the purchase. That date is important also, because it was the date up to which the plaintiffs, the vendors of the property, were to receive the rents and to pay the outgoings. Now it is common ground here that the works comprised in the notice had not been completed at the time when the time for completion of the contract had arrived. If the rule is that the charge under sect. 257 of the Act of 1875 does not arise until the completion of those works, then, apart from any question which was raised as to the meaning of the word "outgoings" in the order of the 22nd July 1903, it is plain that the vendors are not liable to bear these expenses, but the purchaser must bear them. I do not propose to go at length into the cases upon this point. It is sufficient to say that I agree with the judgment of Byrne, J., not only that it was laid down in *Stock* v. *Meakin* (*ubi sup.*) that the date when the charge arises is the date of the completion of the works, but I agree with him further, that there are a series of cases, beginning with *Tottenham Board of Health* v. *Rowell* (*ubi sup.*), and ending with *Surtees* v. *Woodhouse* (88 L. T. Rep. 407; (1903) 1 K. B. 396), in which the same thing is laid down. Mr. Cozens-Hardy has said, and I think to a certain extent he was right, that the exact point as to the date at which the charge becomes effective did not expressly arise in any one of these cases. But it seems to me that in each of these cases, and certainly in *Stock* v. *Meakin*, it was essential to that which the court had to determine to ascertain this date. In *Stock* v. *Meakin* the suggestion was that the charge did not arise until the issue of what was called in the particular Act of Parliament in question the "final apportionment" of the expenses among the owners. It was held that that was not so, and that the charge arose at an earlier period. What was that earlier period? It was as stated in the Court of Appeal, that the charge arose upon the completion of the works. We are bound by that decision, and I think the decision was quite right. Mr. Cozens-Hardy has suggested to us that when such a notice to pave has been given, and that notice has not been complied with, and the local authority in the exercise of their statutory powers have entered

into a contract for the execution of those works (which they are, under the statute, entitled to do in case the owner of the property upon whom the notice has been served does not avail himself of the opportunity given to him to do those works himself), the charge arises from the moment that contract is entered into by the local authority with the contractor for the execution of the works. But I think there is great difficulty in the way of such a construction. If for any reason the contractor could not perform this contract, and someone else was employed to do it (it may be at much larger expense), it would be impossible I think to work out the provisions of the Act of 1875 as to the creation of a charge if it arose at the date the local authority entered into the contract, or if the charge arose as each portion of the work was done; in other words, as each brick was delivered on the ground or used to make a wall. It seems to me quite impossible that the legislature could have intended such a state of things. The only practical way of working out the provisions of the Act is to say that the charge arises on the completion of the works. Two other points were raised. It was said that here the vendors have under this contract undertaken to convey free from incumbrances and to make a good title; and that they could not do so unless they had cleared off this incumbrance, and it is said that there was an inchoate incumbrance by reason of the notice not having been complied with. I do not agree. I think that the object of the notice is to give the owner an opportunity to do the work himself, and if he does not do it in a limited time, then that the local authority are empowered to do it. I think that there is no incumbrance until the completion of the works. Then, as a last point, it is said that these expenses were an "outgoing" which the vendors were bound to pay, because there was an inchoate liability from the moment of the service of the notice to do these paving works. In my opinion, there was no liability inchoate or otherwise until the local authority had completed the works. I wish to add a word with reference to *Tubbs* v. *Wynne* (*ubi sup.*) and *Re Boor* (*ubi sup.*), which were cited as authorities for the proposition that, after the service of the notice by the local authority, there was such an inchoate liability as would throw on the vendors the obligation of discharging the property from the expenses of the works as being an "outgoing." Those cases appear to me to show plainly the distinction between a case in which an order has been made by a magistrate to do certain works and default is made in doing them and a case like the present, in which there has been only a default in complying with a notice served on an owner giving him an opportunity of doing certain works himself. In the former case it may well be said that the expenses of the works became a liability from the date of the magistrate's order, and therefore an "outgoing" which a vendor would be bound to discharge if the order was made before the date fixed for the completion of a contract for sale. Therefore I am of opinion that Byrne, J. was quite right, and that this appeal must be dismissed with costs.

ROMER, L.J.—I agree with all that my Lord has said, and what was said by Byrne, J. in the court below, and they have dealt so fully with every part of this case that I do not wish to add anything to what they have said. But in the course of the argument, *Re Highett and Bird's Contract* (*ubi sup.*) was referred to, and as I was a party to the decision of that case in the Court of Appeal, I wish to say a few words about it. The vendor's counsel in that case did not call our attention to the precise terms of the contract of sale, and certainly did not call the attention of the court to the fact that in that contract itself there was no express agreement by the vendor to show a good title, and so far as the court was concerned (I can say certainly for myself) the arguments proceeded on the assumption that the vendor was in the same position as if he had expressly agreed to make a good title. The case was decided on that footing, and must be taken only as an authority in cases where there is such an express contract, and is not to be taken as an authority in a case where there is an absence of an express contract by the vendor to make a good title.

COZENS-HARDY, L.J.—I agree. It seems to me that *Stock* v. *Meakin* (*ubi sup.*) does really decide this point, for, although it is true that that case arose under the Private Street Works Act of 1892, the judgment proceeded upon the basis that a charge created under that Act was similar to a charge under the Act of 1875. The Court of Appeal, in giving judgment there, said that it became necessary to consider from what date the charge took effect, and the decision was that the charge became effective only as from the date of the completion of the works. I think the principle is this, that under sect. 150 of the Public Health Act an option is given to the owner or occupier, either do the work yourself or the local authority will do it. There is nothing wrong in the owner or occupier not doing the work. If he does not do it, the local authority may do it; and when the work is completed a charge on the property for the expenses for the first time arises. *Tubbs* v. *Wynne* (*ubi sup.*) is distinguishable from the present case, for in that case there was a breach of a positive order by a magistrate that certain works should be done on the premises. There was nothing of the kind in the present case, and it is impossible to suggest that these expenses were "outgoings" which the vendors were bound to pay under the order of the 22nd July 1903.

Solicitors. for the appellants, *T. Blanco White*; for the respondents, *Taylor, Willcocks*, and *Lemon*.

Wednesday, Aug. 10, 1904.

(Before VAUGHAN WILLIAMS, ROMER, and COZENS-HARDY, L.JJ.)

CORPORATION OF OLDHAM *v.* BANK OF ENGLAND. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Elementary education—School boards—Abolition—Property of school boards—"Shall be transferred"—"Appointed day"—Vesting—National Debt Act 1870 (33 *&* 34 *Vict. c.* 71), *ss.* 22, 24—*National Debt (Stockholders' Relief) Act* 1892 (55 *&* 56 *Vict. c.* 39), *s.* 4—*Elementary Education Act* 1870 (33 *&* 34 *Vict. c.* 75), *s.* 30—*Education Act* 1902 (2 *Edw.* 7, *c.* 42). *ss.* 1, 5, 25 (1), *sched.* 2, *clause* 1.

The word "abolished" as used in sect. 5 *of the Educa-*

(*a*) Reported by H. C. GARSIA and E. A. SCRATCHLEY, Esqrs., Barristers-at-Law.

tion Act 1902 *involves the dissolution of a school board for all purposes, so that from the happening of the "appointed day," referred to in clause* 1 *of sched.* 2 *of that Act, it shall cease to have a legal existence, and be incapable of doing anything; and the words "shall be transferred" in the same clause mean "shall vest," the intention being that the moment the "appointed day" has arrived all the property of a school board, including stock with which the Bank of England has to deal, shall* ipso facto *by the operation of the statute vest in the new authority without any additional transfer.*

Decision of Farwell, J. reversed.

THE plaintiffs, as the council for the county borough of Oldham, were, by virtue of sect. 1 of the Education Act 1902, the local education authority for the district of that borough.

The Act of 1902, so far as related to that district, came into operation on the 1st Jan. 1904, which was the day in that behalf appointed by the Board of Education.

On the day when the Act came into effect there stood in the books of the defendants, in the name of the Oldham School Board, a sum of 780*l.* Two-and-a-Half per Cent. Consols, representing moneys set aside by the school board to meet liabilities in respect of loans raised for the erection of elementary schools within their district, which district had now by virtue of the Act become the district of the plaintiffs acting as the local education authority.

On the day appointed for the Act to come into force, as the plaintiffs contended, the school board was dissolved by virtue of the provisions of sect. 5 of the Act; and by virtue of the same provisions the plaintiffs succeeded to and had since exercised the powers formerly vested in the school board.

The plaintiffs claimed that, under the provisions of sect. 25 (1) and sched. 2, clause 1, of the Act, they were *ipso facto* entitled to the Consols and the dividends due or to become due in respect thereof, and to all the rights of registered stockholders in respect thereof; and they brought an action against the defendants claiming a declaration accordingly, and an order on the defendants to pay to the plaintiffs the dividends now due or to accrue due in respect of the Consols, and to register the plaintiffs in the books of the defendants as entitled to such Consols.

The defendants pleaded that under the provisions of the National Debt Act 1870 the person or corporation in whose name stock was standing in their books, or the attorney thereunto lawfully authorised by writing under the hand and seal of such person or corporation, was alone entitled to transfer such stock, and any such transfer must be signed by the stockholder or his attorney in the books kept by the defendants.

The defendants alleged that the circumstances of the present case appeared to them to make it expedient to require evidence of the title of the plaintiffs to receive the dividends, but none had been tendered sufficient in the judgment of the defendants or in fact to establish the right of the plaintiffs. Further, the defendants did not admit that the school board in question had been dissolved.

Sect. 5 of the Act of 1902 provides that:

> The local education authority shall, throughout their area, have the powers and duties of a school board and school attendance committee under the Elementary Education Acts 1870 to 1900, and any other Acts, including local Acts, and shall also be responsible for and have the control of all secular instruction in public elementary schools not provided by them; and school boards and school attendance committees shall be abolished.

Sect. 25 provides that (*inter alia*) the provisions set out in sched. 2 relating to the transfer of property, officers, and adjustment shall have effect for the purpose of carrying the provisions of the Act into effect; and clause 1 of sched. 2 provides as follows:

> The property, powers, rights, and liabilities (including any property, powers, rights, and liabilities vested, conferred, or arising under any local Act or any trust deed) of any school board or school attendance committee existing at the appointed day shall be transferred to the council exercising the powers of the school board.

By the provisions or the same Act the bank, before allowing the receipt of any dividend on any stock, may, if the circumstances of the case appear to them to make it expedient, require evidence of such nature as the bank require of the title of a person claiming a right to receive the dividend.

On the 4th Aug. 1904 the action came on for trial before Farwell, J.

Sir *R. B. Finlay* (A.-G.) and *R. J. Parker* for the plaintiffs.—Our contention is that as soon as the Education Act 1902 came into force with regard to the district, the school board there was absolutely abolished under sect. 5 of the Act of 1902 and that the property which had belonged to the shool board became automatically transferred to the local education authority. Sect. 25 enacts that the provisions set out in the 1st and 2nd schedules to the Act, relating (*inter alia*) to the transfer of property, shall have effect. Now, by clause 1 of the 2nd schedule "the property, powers, rights, and liabilities" of any school board "shall be transferred to the council exercising the powers of the school board." These words "shall be transferred" are, we submit, equivalent to shall vest. It is to be remembered that the Act was only to come into force in any particular district at a future date to be appointed as prescribed in the Act and not immediately upon the passing of the Act. This explains why the words are "shall be transferred" instead of "are transferred." If the words had been "are transferred" it could not have been contended that property did not pass automatically under the Act; but we submit that once the reason for the use of the future tense is explained, there is no real distinction between the two expressions. It cannot be doubted that the school board was entirely abolished on the day appointed for the Act to come into force. For the Legislature has deemed it necessary to specially provide by incorporating sect. 85 of the Local Government Act 1894 with this Act, that such officials as are liable to account shall be continued in their offices until audit has been completed. Again, clause 1 of the 2nd schedule enacted that not only property but also all powers, rights, and liabilities should be transferred to the new education authority. Sect 24 of the Education Act 1902 defines these words by reference to the Local Government Act 1888, sect. 100; "Powers," for example, includes rights, jurisdiction, capacities, privileges, and immu-

nities, and there is an equally sweeping definition of liabilities. Many of these things can hardly be thought of as forming the subject of conveyance, and on that ground too we submit that the Act must be deemed to have automatically transferred the property, together with the powers and liabilities of the school board, to the new local education authority. In the case of *Hyde Corporation* v. *Bank of England* (46 L. T. Rep. 910; 21 Ch. Div. 176), which arose under the Public Health Act 1875, the court held that there was a statutory transfer. There the words of the Act were "shall pass to or be exercisable by and vested in." Here we have got "shall be transferred"; but we submit that the result is the same. They also referred to

Morton v. *Bank of England*, 21 Mag. Cas. 479; 90 L. T. Rep. 375; (1904) 1 Ch. 664.

Latham, K.C. and *Upjohn*, K.C. (with them *Howard Wright*) for the defendants.—Our submission upon the question of construction is that the words "shall be transferred" must mean that some conveyance or transfer shall be executed. In provision 4 in the same schedule of the Act these are the words, "by virtue of this Act," showing that where the Legislature intended something to come into operation by virtue of the Act it used suitable words. But in clause 1, with which we are here concerned, the words "by virtue of the Act" are not inserted, while the phrase "shall be transferred" is the exact technical expression for a transfer of stocks. It has been suggested that there is nobody in existence to execute a transfer, but we submit that this is at least doubtful on the wording of sect. 5. All that is there said is that the school board shall be abolished. "Dissolved" is the apt word for terminating the existence of a corporation, which a school board undoubtedly is, but here it is not employed. We submit that the section is only intended to put an end to the school board's control over education, and not to its existence for all purposes. If this is so, it could still transfer property. Again, as far as the bank is concerned, there is a way out of the difficulty. Under sect. 4 (1) of the National Debt (Stockholders' Relief) Act 1892: "Where by virtue of any provision in an Act of Parliament the right to stock is vested in any person he shall by virtue of the same provision be deemed to be entitled to make a valid transfer of the stock. . . ." We submit that as the new education authority is entitled under the Education Act 1902 to the stock, it can under this last provision effect a transfer to itself.

Sir *R. B. Finlay* (A.-G.) replied.

FARWELL, J.—I think probably I should be doing a better service to the parties if I gave my judgment at once so as to give them a chance of going to the Court of Appeal, but I think it is rather hard on me to have to attempt to unravel the Act in question on the spur of the moment. My own opinion is, that on the true construction of the 2nd schedule of the Act, some future action is pointed to before property vests legally in the new body. I cannot bring myself to doubt that, when the Act of Parliament says that the property, powers, and liabilities of a school board shall at a future day be transferred to the council then exercising the powers of the school board, it uses those words in the ordinary signification of the English language, and points to a future transfer by some appropriate deed or other instrument. With all respect to the Attorney-General, I fail to see the difficulty of transferring liabilities. The whole of the 1st clause of this schedule might have been taken from one of those common forms used when a company sells the whole of its assets and liabilities to a new or reconstructed company. I do not see any difficulty, and the phrase seems to me to be perfectly familiar. Further, I find that when the Legislature has intended something to take effect "by virtue of this Act," it has inserted words to that effect—thus clause 4 says: "Any liability of an urban district council, incurred under the Technical Instruction Acts 1889 and 1891, and charged on any fund or rate, shall by virtue of this Act, become charged on the fund . . ." Further, in this 2nd schedule a distinction is made between "by virtue of this Act" and "under this Act." For I observe that clause 6 commences "where the liabilities of a school board, transferred to the local education authority under this Act comprised a liability, &c." Now, if the Attorney-General's contention is right the Legislature would there have said "by virtue of this Act," as it did in clause 4 immediately before, but a distinction is carefully made. I agree with the argument that I have heard, that it is certainly desirable to construe the Act of Parliament *quo res magis valeat*, and although what I have stated is in my view a reasonably clear *primâ facie* meaning of the words "shall be transferred" in the schedule, still, if I found that the Act was totally unworkable upon such a construction, it might very well be that I should feel bound to find some secondary or different meaning in order to give effect to the Act. It is not immaterial to observe that although there are inconveniences which the Attorney-General has pointed out in having a number of different transfers; still, if I were to adopt the construction for which he has contended, there are not only inconveniences, but vast liabilities cast upon the Bank of England, and for aught I know upon other public bodies and companies who will have to act under this Act, and it is to be remembered that there is no indemnity clause in the Act. I think that that is a most material consideration. As I have been invited to express an opinion upon the construction of the Act I will do so, although it is perhaps not really necessary, for I have come to the conclusion that the Bank of England could with safety accept a transfer by the new education authority to itself under the 4th section of the National Debt (Stockholders' Relief) Act 1892. In order to give effect to the Education Act 1902 I have practically to choose between two difficulties of construction, both of which appear to me to be very considerable. The first is the one I have already mentioned, as to whether I could possibly insert in the 1st clause of the 2nd schedule the words "by virtue of this Act," or something to that effect. The other is whether I can so read the Act of Parliament coupled with the schedule as to hold that the school boards are not absolutely dissolved, with the result that they will remain for the purpose of holding the property which was vested in them so long as is necessary in order to give effect to the transfer.

Now, my own view is that the theory of the draftsman was that, as a future day would be appointed for the Act to come into operation, it would be possible for the school board to transfer any property before going out of existence. If so, this particular *impasse* was probably not foreseen. Can I find words in the Act which will enable me to avoid the *impasse*? I think I can, by reason of the curious phrase which the Legislature has used in sect. 5 of the Act: "School boards and school attendance committees shall be abolished." Standing alone without the 2nd schedule, those words appear to me to be singularly inappropriate for the dissolution of corporations, which school boards are, especially when school boards are coupled with the school attendance committees, which are not corporations. The Legislature was here dealing with the active duties to be performed by the school authorities. It was putting an end to the system of education under the direction of school boards and school attendance committees, and was appointing another mode of carrying on education. And the properties and liabilities of these bodies were to be transferred with their duties. I should be able to give effect to this if I held that the words "shall be abolished" did not in fact put an end to the school boards, but left them so long as it was necessary that they should continue to exist for the purpose of giving effect to and carrying out the full intention of the Act. And I think I can so hold, seeing that the words "shall be abolished" are singularly inappropriate for the dissolution of a corporation, and that they are words that I never before saw used for that purpose. The only difficulty is created to my mind by the 10th clause of the 2nd schedule, which provides, "no election of members of a school board shall be held after the passing of this Act, and the term of office of members of any school board holding office at the passing of this Act or appointed to fill casual vacancies after that date shall continue to the appointed day. . . ." There are, however, no negative words there. Those words show that the duties of the school board educationally are continued until the appointed day; but I do not think that it necessarily follows there that there is by virtue of this provision an automatic dissolution of the corporation when that day arrives. Inasmuch as the effect of so deciding would be to reduce matters to an absolute deadlock, I think I am justified in holding, as I do hold, that the school boards are not dissolved so long as property remains vested in them. The result is that, in my opinion, property has not been divested out of the school boards by this Act, and, further, that they continue to exist after the Act comes into force, and are able to transfer their property to the new education authorities. In the particular case before me, where the Bank of England's special Acts apply, there is, as I have said, another solution; as the right, the equitable right, that is to say, to the Consols is vested in the new education authority, it is entitled under sect. 4 of the National Debt (Stockholders' Relief) Act 1892 to execute a transfer of that stock into its own name so as to give itself the legal title as well as the equitable right to that stock.

From that decision the plaintiffs now appealed.

Sir *R. B. Finlay* (A.-G.) and *R. J. Parker* for the appellants.

Latham, K.C., *Upjohn*, K.C. (with them *Howard Wright*) for the respondents.

The arguments adduced in the court below were substantially repeated, and the authorities there cited were again referred to.

VAUGHAN WILLIAMS, L.J.—We have had a long discussion as to the question which is before us in this appeal—that is to say, as to the meaning of certain sections of the Education Act 1902, and many arguments have been presented, the answer to which may have more or less bearing upon the determination of the particular question raised. The particular question that we have to decide in this case is whether the terms of clause 1 of the 2nd schedule of the Education Act of 1902 are such that "property, powers, rights, and liabilities . . . of any school board or school attendance committee existing at the appointed day" are transferred by virtue of or under the Act of Parliament "to the council exercising the powers of the school board," or whether some additional instrument is necessary before such transfer can be effected. The suggestion is that whatever may be the case with regard to other property, at all events in respect of stock with which the Bank of England has to deal—and with respect to which generally speaking upon a transfer there is an entry of the transfer in the transfer books of the Bank of England, and has been so for a very long time—there can be no vesting of the property independently of the execution of some instrument. Now, part of the arguments that were addressed to us was based upon the words "shall be transferred" in clause 1 of sched. 2, and I will say something about that immediately. But I will observe in the meantime that really in the arguments which have been addressed to us by Mr. Latham, and also by Mr. Upjohn, on behalf of the defendants, they did not ultimately rely upon the effect of the words being "shall be transferred" instead of being "shall vest" or similar words. The final argument addressed to us on behalf of the defendants was an argument which would have applied equally whether the words were "shall be transferred" or "shall vest." I will deal first, and very shortly, with the question of the meaning of the words "shall be transferred." There is no doubt that sometimes one does find in Acts of Parliament somewhat cognate to the present Act of Parliament the words used "shall vest" as distinguished from the words "shall be transferred." If one turns to the Local Government Act 1894 and looks at sect. 5, subsect. 2 (*c*), one finds these words used: "The legal interest in all property vested either in the overseers, or in the churchwardens and overseers of a rural parish . . . shall, if there is a parish council, vest in that council. . . ." It is quite true to say that the words used, clause 1 of sched. 2 of the Act of 1902, are not "shall vest," but "shall be transferred." If one considers the matter, however, there is very good reason for using the future words there, and yet a reason which is quite consistent with holding that the property on the happening of the "appointed day" was to vest, and vest independently of any future or additional instrument. It must be remembered that the Act of Parliament when it passed was contemplating the happening of a future event—the occurrence of

a future day—that is the "appointed day"; and it seems to me that that was quite a sufficient reason for the draftsman employing the words in the future tense that he has done here. They were employed in that form in order to make them fit and suitable for what the Legislature contemplated—a future event—the occurrence of a future day—the "appointed day." Now, just let us see what the provisions generally are of the Act of Parliament. The 5th section of the Act of 1902 provides that: "The local education authority shall, throughout their area, have the powers and duties of a school board and school attendance committee under the Elementary Education Acts 1870 to 1900, and any other Acts, including local Acts, and shall also be responsible for and have the control of all secular instruction in public elementary schools not provided by them; and school boards and public attendance committees shall be abolished." I cannot conceive myself but that the word "abolished" there involves dissolution. It means that the school boards and school attendance committees shall be abolished. Really it is not denied that the effect of that section is that from the happening of the "appointed day" the school boards and the school attendance committees would be incapable of doing anything. The corporation of a school board would in fact, by virtue of that sect. 5, be dissolved in the sense that it would cease to have a legal existence—could not sue—could not be sued—and could not hold property, and could not transfer property. Therefore one finds this state of things: If one accedes to the argument that has been addressed to us on behalf of the Bank of England—namely, that some additional instrument of transfer or conveyance is essential to the passing of the property, notwithstanding the occurrence of the "appointed day," this much is perfectly certain, that that instrument could not be executed by the school board. But then it is said that with reference to the Bank of England, and its relation to certain stocks, there is an Act—viz., the National Debt (Stockholders' Relief) Act 1892—and reference is made to sect. 4 of that Act. It is said that the result of that section is that although a transfer could not be executed by the defunct corporation, the school board, yet a transfer of such stocks might be executed by the new educational body as being a body in whom the right to the stock is vested by Act of Parliament. Now, I will say something more as to this section presently. But I wish at once to point out that it is obvious that that Act of Parliament, if it gets over at all the difficulty arising from the cessation of existence of the school board, can only do so in respect of a very limited subject-matter. It is not suggested that it does so as to all property; it is not suggested that it does so even as to all stocks. It was mentioned in argument by counsel on behalf of the Bank of England that there were certain Colonial Government Stocks, for instance, which would not be governed by that section; and the result of that is that it is quite plain there is this difficulty about the transfer of property if you give to the word "abolished" in sect 5 that which, it seems to me, is its plain and obvious meaning. Also we have got the words here "shall be transferred" applied not only to "property" but to "powers, rights, and liabilities." With reference to "property" it is quite true that with regard to some sorts of property you require a deed, and it may be in some cases a written transfer. But it is not true, as to liabilities, that any transfer is, according to the general law, either necessary or proper. Indeed, such a transfer would not, according to law, transfer the property at all. So that the outcome of all this is that those who put forward the argument which has been put forward on behalf of the Bank of England cannot really make it good unless in one section of one Act of Parliament they ask us to give a different meaning to the words "shall be transferred" in the case of some of the subject-matters dealt with by the section from what one would be bound to do in the case of others. It really, to my mind, could not be maintained for one moment that, with regard to liabilities, or with regard to certain species of property, any transfer, or additional instrument of transfer, was necessary for vesting. Now, I think that it is really unnecessary for me to go at greater length through the numerous matters that one finds in the Education Act 1902 which go, first, to show that "abolished" is used in the 5th section in its natural sense, and, secondly, that the words "shall be transferred" are used to the intent that the moment that the "appointed day" arrives all property of the school board, *ipso facto*, by virtue of and under the Act of Parliament, shall vest in the new education body without the aid of any additional instrument of any sort or kind. I said that I would add a word more as to sect. 4 of the National Debt (Stockholders' Relief) Act 1892. I do not know that it is necessary for me to do so, because, in the view that I take of this case, the question as to the effect of that section is no longer really of any importance. Its only importance arose because Farwell, J. in his judgment relied upon it as showing that in the case of certain stocks, transfers of which are entered in the Bank of England transfer book, you could get over the difficulty of there being no possibility of a transfer by the defunct school board by saying: "Still it might be right that the Bank of England should, in accordance with their practice, insist upon having a transfer, and that at all events, in the case of some stocks—that is to say, the stocks to which the National Debt Act 1870 applied—you could get a transfer by a transfer being executed by the new educational body, as being a body in whom, by virtue of an Act of Parliament, the right to stock was vested." As to them it was said, "He shall, by virtue of the same provision, be deemed to make a valid transfer of the stock, and to receive and give valid receipts for any accrued, or accruing, dividends." Then it was said that the Act of Parliament gave an equitable right to the new educational body, and that they might, without any transfer being executed, even by them to themselves, give a valid receipt for any accrued, or accruing, dividends of stocks, and might also execute afterwards, or before, as they thought fit, a transfer to themselves. As I have not to decide what the construction of that section is, I do not wish to say more than that this is my opinion, as at present advised, and it is not an absolute decision. I think that these words "vested in any person" in sect. 4 mean legally vested. That is my view of that section. Now, having disposed of those matters, I wish to say a word or two upon the argument that was

addressed to us, that even assuming that the effect of the Act of Parliament is to immediately vest the property of the school board in the new educational body, yet there is a necessity for an additional deed. It is said in the first instance that it is essential to the long and venerable practice of the Bank of England that there shall be some such document. I do not think that that can affect the construction of an Act of Parliament. Then it was suggested that there was something in the nature of a transfer of stock which really prevented it from its very nature from being transferred without some instrument of transfer. All I can say in answer to that is that in so far as that is true—and in a sense it is quite true—it is equally true of a number of other things. It is equally true of every *chose in action* that if there was not a transfer by the Act of Parliament, there might be a necessity for some deed or written transfer in order to accomplish the passing of the particular piece of property. I think that that disposes of the argument put forward—namely, that, notwithstanding that the words "shall be transferred" must be construed as "shall vest" on the "appointed day," we ought not to hold that this stock so vests that the Bank of England ought to act upon its statutory effect without the production of any written instrument. I think that they ought. It was said by Mr. Upjohn that in consequence of some previous legislation in which undoubtedly the property, including the property in the stock, did vest without a transfer, an Act was passed in 1895—viz., the Local Government (Stock Transfer) Act 1895. He said that the passing of that Act recognised the proposition that the Bank of England ought not to act upon a statutory vesting without the production of some instrument of transfer. I do not agree with that. The Act of Parliament does not seem to me to have done anything of the sort. The Act of Parliament recognises and is passed upon the basis that the effect of the statute is that without more the property vests in the person denoted by the statute as being the person in whom the property shall vest. But although that is true, and it does vest, the Bank of England, until the passing of the Local Government (Stock Transfer) Act 1895, took it for granted in the case of the statutory vesting of property in the particular case, to recognise for all purposes the statutory vesting of the property. They had, of course, to assure themselves of the identity of the person. They had to assure themselves that the person who came and claimed to be the statutory appointee or donee of the stock was in fact the person that he pretended to be. In the statute of 1895 they got that by a certificate of the clerk to the county council. All one can say is that at present no equivalent Act of Parliament has been passed. If it is desirable from a business point of view that such an Act of Parliament should be passed, I do not suppose that the Legislature, when once satisfied of that from the Bank of England's representations, would make any difficulty in passing an Act. I know nothing about how far it is desirable and how far it is not. If it is desirable, then I have no doubt it will be done. But, as things stand, in my view, it is perfectly plain under this statute that the stock does vest by virtue of the words in the 1st clause of the 2nd schedule of the Act of 1902; and, as far as the Bank of England are concerned, they have an absolute indemnity by the very words of the Act of Parliament, and are not to be in any danger or difficulty at all. I do not suppose that the Bank of England were thinking principally of any danger to themselves, but that really what they were thinking of was that it would be a matter of public convenience that the same formalities should be gone through in respect of all transfers of stock, and that it did not matter whether the transfer was a transfer by the terms of an Act of Parliament, or under an Act of Parliament, or a transfer in any other way *inter partes*, or anything else. I dare say that they think that it would be much more convenient that all transfers should pass through the transfer-book. If that is so, they will have to get an enactment to that effect, but I offer no opinion about that. I think, therefore, that this appeal ought to be allowed with costs.

ROMER, L.J.—The 1st clause of the 2nd schedule to the Act of 1902, on which the question we have to decide turns, is certainly not happily framed. But on the construction of it, and having regard to the provisions of the Act as a whole, I come to the conclusion that this appeal should be allowed. I cannot take the same view of the construction of that clause as was taken in the court below. For brevity I will refer to the old educational authority—that is to say, the school board or school attendance committee, which was abolished by sect. 5 of the Act of 1902 on the "appointed day"—as "the old board," and I will refer to the new educational authority as "the council." Now one thing to my mind is clear about this Act, and that is that on what is defined as the "appointed day" the old board under the very words of sect. 5 of the Act was abolished. And I cannot find, throughout this Act, any indication that when the Act says it is to be abolished it does not mean what it says. I cannot think for myself of any word stronger in the English language—whether it is the word usually used for this purpose or not does not seem to me to matter—and I cannot find any word in the English language which more thoroughly expresses the non-continuance for any purposes of the old board than the phrase used by the Act of Parliament that on the "appointed day" it shall be considered as "abolished." As I have said, there is nothing in the Act from beginning to end to suggest that after the abolition it is, in the eyes of the law, for any purposes whatever to be regarded as existing. Indeed, sect. 5 is borne out by the provision in clause 10 of sched. 2 of the Act, for that carefully provides that existing members of the old board shall continue to the "appointed day." The reason for that is obvious. On the abolition of the old board its members would also of course have ceased to occupy the position of members of anybody whatever. On the "appointed day," therefore, it is clear to my mind that under this Act for all purposes the old board ceased to exist, and the new body—the council—only comes into existence as a new educational authority, with its rights and duties, rights to take property again, on the "appointed day." That being the position of affairs, let me consider for a moment the wording of clause 1 of the 2nd schedule. It says that "the property, powers, rights, and liabilities" of the old board "existing at the

appointed day shall be transferred to the council." The transfer contemplated, whatever that may be, is a transfer to take place at the "appointed day." It could not take place before the "appointed day" by reason of the council not being in a position to take any transfer before that day. It could not take place after that because, as I have pointed out, after the "appointed day" the old board is abolished. And it is noticeable that the property which has to be transferred is the property existing at the "appointed day"—not the property before, or the property after, but the property at that precise moment. The word "transferred," as mentioned in the clause, is a general expression, covering not only property, but powers, rights, and liabilities. It could not mean that in respect of powers, rights, and liabilities, anything in the nature of an instrument in writing should be executed. Nor can I really conceive that under this clause with regard to property any distinction is to be drawn between one kind of property and another kind of property—namely, the kind of property which only passes at law by an instrument in writing. What the clause to my mind contemplates is an immediate passing from the old body—the old board—to the council of all property, powers, rights, and liabilities. To my mind, by the Act of Parliament no writing or deed or any further act, was contemplated. I think that the transfer referred to in the clause was intended to mean a transfer effected by the Act of Parliament effected instantaneously on the "appointed day," not before, and not after. And to my mind the effect of the clause is clearly, on the construction of the Act as a whole, that without more than the operation of the Act of Parliament all property, powers, rights, and liabilities passed by virtue of the Act to the new body—that is to say, vested in the legal sense in that body. And I think that that view is borne out by other considerations. If you look at another part of the Act you will find that the word "transfer" is used with reference to the officers employed by the old board. Clause 16 of sched. 2 says that the officers of any authority whose property, rights, and liabilities are transferred under this Act to any council shall be transferred to and become the officers of the council. There is the same word "transferred" used with regard to officers as there is with regard to debts, powers, liabilities, and property. And I find again that sects. 85 to 88 of the Local Government Act 1894 are incorporated as it were in the Act of 1902 in this way. By sched. 2, clause 8, it is provided that the sections which I have mentioned of the Act of 1894 shall apply with respect to "any transfer mentioned in this schedule"—that is to say, with regard to the word "transfer" that was mentioned in the first clause of the schedule. And reading those sections as applying with respect to the transfer mentioned in clause 1 of sched. 2 what do I see? In sect. 86, sub-sect. 1, of the Local Government Act 1894, for example, I see that it is provided that "Nothing in this Act shall prejudicially affect any securities granted before the passing of this Act on the credit of any rate or property transferred to a council or parish meeting by this Act," and in sub-sect. 2 of sect. 8 of the Act of 1894 it is provided that: "It shall be the duty of every authority whose powers, duties, and liabilities are transferred by this Act to liquidate, so far as practicable before the appointed day, all current debts and liabilities incurred by such authority." And in sect. 88, sub-sect. 1, there is this: "If at the time when any powers, duties, liabilities, debts, or property are by this Act transferred to a council or parish meeting any action or proceeding, or any cause of action or proceeding, is pending or existing by or against any authority in relation thereto, the same shall not be in any wise prejudicially affected by the passing of this Act, but may be continued, prosecuted, and enforced by or against the council or parish meeting as successors of the said authority in like manner as if this Act had not been passed." Those sections strongly bear out, incorporated as they are to the extent and manner I have indicated, the view which I think is forced upon this court as to the true construction of clause 1 of the 2nd schedule of the Act of 1902. I might also refer, without going through them in detail, to the other provisions in that Act for ensuring the continuance without a moment's break of the rights, duties, and general position of the old educational authority to the new which appear in the Act. To my mind it would be inconsistent with the general scope of that continuity if we did not give to clause 1 of the 2nd schedule that construction that I have indicated. I can only say that it is a pleasure also to think that our decision will very much enure for the benefit so far as I can see of everybody concerned under the statute, and will afford the greatest protection to those who have to act upon it. It will certainly be, so far as I can see, the very best indemnity to the Bank of England, for example, among others, which they can possibly have. It puts them in a far better position than they would be in under the interpretation adopted in the court below. I think for these reasons that the appeal should be allowed.

COZENS-HARDY, L.J.—I agree; and I have very little to add. Any other view than that which has been adopted by my Lord and Romer, L.J. would, as it seems to me, make this Act of Parliament absolutely unworkable. The word "abolished" in sect. 5 as applied to school boards is no doubt not a very happy word, and, in this collocation, is probably a novel word. But it seems to me that as applied to a corporation it must mean "dissolved." It must mean, as applied to the school board, that on the "appointed day" it ceases to exist. There is no provision in the Act of Parliament for the continuance of the school board; there is no possibility of any further election of members of the school board. There is nobody who could, on the part of the school board, do any of those Acts which it was the duty of the school board to discharge before the "appointed day." The words in the 1st clause of the 2nd schedule which have been so much discussed, "shall be transferred," seem to me to mean "shall vest" without more on the "appointed day." One interpretation must be given to all kinds of property, and to everything which is covered by clause 1 of sched. 2. It cannot reasonably be suggested that it is to have a different meaning when applied to real property from that which it has when applied to stock. To take the case which I ventured to put to counsel during the course of the argument of schools' freehold property vested in the school

boards. I failed to obtain any suggestion of how any further deed of transfer or conveyance could be obtained after the "appointed day" to the new educational authority. And I certainly am not prepared to so construe the clause as to make an exception in favour of the Bank of England because they happen to have under the National Debt (Stockholders' Relief) Act 1892 a section which may or may not enable the difficulty to be got over with reference to the particular stock with which that Act deals. In my view the conclusion at which we have arrived is very strongly borne out by sect. 88 of the Local Government Act 1894, which is made applicable to the Act of 1902, and that is a section applying not merely to powers, duties, liabilities, and debts, but it speaks of "property by this Act transferred." That makes it more easy to read the 1st clause of the 2nd schedule of the Act of 1902 in the way in which I have suggested, that "shall be transferred" means "shall vest," without more, on the "appointed day." *Appeal allowed.*

Solicitor for the appellants, *Solicitor to the Treasury.*

Solicitors for the respondents, *Freshfields.*

Wednesday, Aug. 10, 1904.

(Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.)

TOWER JUSTICES *v.* CHAMBERS AND OTHERS. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Licensing—Beerhouse licensed before 1869*—Conviction of licence-holder for selling spirits without a licence—Forfeiture of licence—Application by owners to special sessions for grant of a licence—Refusal by justices—Grounds of refusal—Alehouse Act* 1828 (9 *Geo.* 4, *c.* 61), *s.* 14*—Beerhouse Act* 1840 (3 *& 4 Vict. c.* 61), *s.* 7*—Wine and Beerhouse Act* 1869 (32 *& 33 Vict. c.* 27), *s.* 19*—Wine and Beerhouse Act* 1870 (33 *& 34 Vict. c.* 29), *s.* 7*—Licensing Act* 1874 (37 *& 38 Vict. c.* 49), *s.* 15.

The licensee of a beerhouse which had been licensed for the sale of beer by retail on the 1st May 1869 *and continuously since that date up to July* 1903*, was convicted for the first time in July* 1903 *of having sold spirits without having a spirit licence. The beerhouse was thereupon closed for the sale of beer, and was not again opened for such sale until the following October.*

In September in the same year the owners of the beerhouse applied at the special licensing sessions for the grant of a licence for the sale of beer by retail in respect of the house to their nominee, who was the then real resident holder and occupier of the premises. This application was made under sect. 15 *of the Licensing Act* 1874.

The justices refused the application upon grounds other than one of the four grounds specified in sect. 8 *of the Wine and Beerhouse Act* 1869.

Upon appeal, the quarter sessions and the Divisional Court held that the justices had no jurisdiction to refuse the application, except upon one of the four grounds specified in sect. 8 *of the Wine and Beerhouse Act* 1869.

Held, by the Court of Appeal, reversing the decision of the Divisional Court (21 *Mag. Cas.* 433; 90 *L. T. Rep.* 228)*, that an application under sect.* 15 *of the Licensing Act* 1874 *cannot be successful unless the applicant shows that the licence has been continuously renewed since the 1st May* 1869*, and is in force at the date of the application.*

Held also, that upon the conviction of the licensee in July 1903 *the licence in respect of the beerhouse ceased to exist.*

Held, therefore, that the jurisdiction of the justices at special sessions to refuse the application of the owners was not limited to one or more of the four grounds specified in sect. 8 *of the Wine and Beerhouse Act* 1869.

Freer *v.* Murray (71 *L. T. Rep.* 444; (1894) *A. C.* 576) *followed.*

Ex parte Flinn and Sons (No. 2) (81 *L. T. Rep.* 221; (1899) 2 *Q. B.* 607) *disapproved.*

APPEAL by the licensing justices of the Tower division from a decision of the Divisional Court (Lord Alverstone, C.J., Wills and Kennedy, JJ.) upon a case stated for the opinion of the court by the Court of Quarter Sessions for the County of London.

The Coach and Horses beerhouse, situated at No. 86, Backchurch-lane, in the parish of St. George-in-the-East, in the Tower division, was licensed for the sale of beer and wine to be consumed on or off the premises prior to the 1st May 1869, and the licence had been renewed from time to time, the last renewal thereof having been made to one Joseph Arch, the then tenant, at the general annual licensing meeting of the division on the 13th Feb. 1903.

In July 1903 proceedings were instituted by the excise authorities against Joseph Arch under the Beerhouse Act 1834 (4 & 5 Will. 4, c. 85), s. 20, to recover penalties under the Excise Licences Act 1825 (6 Geo. 4, c. 81); and on the 30th July 1903 he was for the first time convicted of the offence of selling spirits without a licence.

The beerhouse was thereupon closed for the sale of beer and wine, and was not again opened for such sale until after the hearing of the appeal on the 16th Oct. 1903.

On the 18th Sept. 1903 an application was made to a metropolitan police magistrate, sitting at the Thames police-court, on behalf of the respondents, Messrs. Chambers, Sichell, and Coombes, who were the owners of the beerhouse, pursuant to sect. 15 of the Licensing Act 1874, for authority to one Coburn to carry on the same business upon the same premises until the next special sessions for licensing purposes. The application was, at the suggestion of the magistrate, treated as withdrawn.

On the 25th Sept. 1903 (being the next special sessions of the Tower division for licensing purposes) a further application was made on behalf of the owners to the special sessions for the grant of a licence for the sale of beer and wine by retail in respect of such premises to the respondent Coburn pursuant to sect. 15 of the Licensing Act 1874. Coburn was then the real resident holder and occupier of the beerhouse.

The grant of such licence was refused at the special sessions upon grounds other than one or more of the four grounds specified in sect. 8 of the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27). There was no evidence before the Licensing

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

justices which would bring the case within any of those four grounds.

Against this refusal the respondents, the owners and Coburn, duly appealed to the Court of Quarter Sessions, when it was contended on behalf of the appellants, the licensing justices, that they had jurisdiction to refuse the grant of the licence to Coburn upon grounds other than one or more of the four grounds specified in sect. 8 of the Act of 1869; and on behalf of the respondents it was contended that the jurisdiction of the licensing justices to refuse the grant was limited to one or more of the four grounds.

The Court of Quarter Sessions found for the respondents and allowed the appeal.

The question for the opinion of the court was whether, upon the facts above stated, the licensing justices had jurisdiction to refuse the grant to Coburn upon any ground other than one or more of the four grounds specified in sect. 8 of the Wine and Beerhouse Act 1869.

The Divisional Court (Lord Alverstone, C.J., Wills and Kennedy, JJ.) affirmed the decision of the Court of Quarter Sessions upon the authority of the decision of the Divisional Court in *Ex parte Flinn and Sons* (*No.* 2) (81 L. T. Rep. 221; (1899) 2 Q. B. 607).

The justices appealed.

The Alehouse Act 1828 (9 Geo. 4, c. 61) provides as follows:

Sect. 14. If any person duly licensed under this Act shall (before the expiration of such licence) die, or shall be by sickness or other infirmity rendered incapable of keeping an inn . . . it shall be lawful for the justices assembled as aforesaid at a special sessions holden under the authority of this Act . . . to grant . . . to the assigns of such person becoming incapable of keeping an inn . . . a licence to sell excisable liquors by retail to be drunk or consumed in such house or the premises thereunto belonging . . . provided always, that every such licence shall continue in force only from the day on which it shall be granted until [the next general annual licensing meeting]. . . .

The Beerhouse Act 1840 (3 & 4 Vict. c. 61) provides as follows:

Sect. 7. Every person who shall hereafter be lawfully convicted of felony or of selling spirits without a licence shall for ever thereafter be disqualified from selling beer and cyder by retail, and no licence to sell beer and cyder by retail under the said recited Acts or this Act shall be granted to any person who shall be so convicted as aforesaid; and if any person shall, after having been so convicted as aforesaid, take out or have any licence to sell beer or cyder by retail under the said recited Acts or this Act, the same shall be void to all intents and purposes. . . .

The Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27) provides as follows:

Sect. 8. All the provisions of the said Act of 9 Geo. 4, c. 61, as to the terms upon which, and the manner in which, and the persons by whom, grants of licences are to be made by the justices at the said general annual licensing meeting and as to appeal from any act of any justice shall, so far as may be, have effect with regard to grants of certificates under this Act, subject to this qualification, that no application for a certificate under this Act in respect of a licence to sell by retail beer, cider, or wine, not to be consumed on the premises, shall be refused except upon one or more of the following grounds—viz. [here follow four specific grounds].

Sect. 19. Where on the 1st May 1869 a licence under any of the recited Acts is in force with respect to any house or shop for the sale by retail therein of beer, cider, or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premises in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine not to be consumed upon the premises, may be refused, in accordance with this Act.

The Wine and Beerhouse Act Amendment Act 1870 (33 & 34 Vict. c. 29) provides as follows:

Sect. 7. The nineteenth section of the principal Act shall extend to licences granted by way of renewal from time to time of licences in force on the 1st day of May 1869, whether such licences continue to be held by the same person or have been or may be transferred to any other person or persons.

The Licensing Act 1874 (37 & 38 Vict. c. 49) provides as follows:

Sect. 15. Where any licensed person is convicted for the first time of any one of the following offences,— . . . (3) selling spirits without a spirit licence; . . . and in consequence either becomes personally disqualified or has his licence forfeited, there may be made by or on behalf of the owner of the premises an application to a court of summary jurisdiction for authority to carry on the same business on the same premises until the next special sessions for licensing purposes, and a further application to such next special sessions for the grant of a licence in respect of such premises, and for this purpose the provisions contained in [the Alehouse Act 1828] with respect to the grant of a temporary authority and to the grant of licences at special sessions, shall apply as if the person convicted had been rendered incapable of keeping an inn, and the person applying for such grant was his assignee.

Low, K.C. (*Leycester* with him) for the justices.—The justices' jurisdiction to refuse the application made by the owners of the house in question was not limited to one of the four grounds specified in sect. 8 of the Wine and Beerhouse Act 1869. The effect of sect. 7 of the Beerhouse Act 1840 was that on the conviction of Arch the licence held by him ceased to exist:

Reg v. *Vine*, 31 L. T. Rep. 842; L. Rep. 10 Q. B. 195.

As the licence was not in force at the time of the application by the owners to the special sessions, the justices were not limited in their jurisdiction by the provisions of sect. 19 of the Wine and Beerhouse Act 1869. The application was made under sect. 15 of the Licensing Act 1874. That section applies to every kind of licensed house, not merely to beerhouses, and does nothing more than enable an application to be made to special sessions for the grant of a licence. It does not relieve the owners from showing, as required by sect. 19 of the Act of 1869, that the licence still exists. The court below decided this case on the authority of a previous decision of the Divisional Court:

Ex parte Flinn and Sons (*No.* 2), 81 L. T. Rep. 221; (1899) 2 Q. B. 607.

That case was wrongly decided. It was only argued on one side, and an earlier decision of the Divisional Court, which Wills, J. in the present case said was very difficult to reconcile with *Ex parte Flinn and Son* (*No.* 2) was not cited:

Reg. v. *West Riding Justices*, 21 Q. B. Div. 358.

Those two cases are in direct conflict, and I

submit that the earlier of the two is the correct one. The later case is rested on the supposition that a licence can exist in a state of suspended animation, alive as regards the premises, though dead as regards the person licensed. That is an absolute misconception of the law, as has been declared by Lord Herschell:

Freer v. *Murray*, 71 L. T. Rep. 444; (1894) A. C. 576; affirming the decision of the Court of Appeal in *Murray* v. *Freer*, 68 L. T. Rep. 507; (1893) 1 Q. B. 635.

The words of sect. 15 cannot help the owners in this case unless they provide that the licence need not be shown to be still in force at the time of the application; and they do not do so. In *Murray* v. *Freer* (*ubi sup.*), in the Court of Appeal, Lord Esher, M.R., gives the true effect of sect. 15, and says that it does nothing more than enable an application to be made for the grant of a licence. The word "assign" in sect. 14 of the Alehouse Act 1828 means an assign of the premises, as also does the word "assignee" in sect. 15 of the Licensing Act 1874. There is no such thing as an assignee of the licence. He referred also to

Hargreaves v. *Dawson*, 24 L. T. Rep. 428;
Reg. v. *Curson*, 29 L. T. Rep. 32; L. Rep. 8 Q. B. 400.

Foote, K.C. and *Bruce Williamson* for the owners.—*Freer* v. *Murray* (*ubi sup.*) is distinguishable. It was a case where an application for a renewal at a general annual licensing meeting was refused upon one of the four grounds specified in sect. 8 of the Act of 1869. There the licence was dead. The case did not come within sect. 15 of the Licensing Act 1874. That is the section on which we rely, and cases decided before that date are of no importance in the present case. That section enables the owner to make an application as if there had been no forfeiture of the licence, and as if the previous licensee had simply become by sickness incapable of keeping an inn. *Reg.* v. *West Riding Justices* (*ubi sup.*) put no construction on sect. 15, but so far as it goes it is really in favour of the owners in the present case. There the licensee had been convicted of keeping a brothel, which is not one of the four offences mentioned in sect. 15. In such a case the reputation of the house is damaged. There was there an undoubted forfeiture, and there was nothing to cure it. But for sect. 15 there is no remedy where a licence is forfeited. The object of the section is to give a remedy in that case. It enables an application to be made "as if" the person convicted was simply incapable of keeping an inn—that is to say, as if there had been no forfeiture of the licence. The application is to be made upon a hypothetical state of facts instead of upon the fact of forfeiture. It would be a mockery to give the owner the right of making an application for a licence, and yet not to give him effectual relief from the forfeiture on account of which he is making the application. The object of the section is to preserve for the owner what may be called his rights or privileges in cases where the forfeiture is not in any way due to his acts. Therefore it is that only when the premises have got a bad name through the acts which have caused the forfeiture (keeping a brothel or harbouring thieves) that the owner gets no protection. In sect. 15 "assignee" may in a sense mean the assignee of the premises, but it refers really to the licensees' interest in keeping the premises as a beerhouse. But, next, the licence has not in fact been forfeited Arch's conviction was under sect. 7 of the Beer-house Act 1840. The word "forfeiture" does not occur anywhere in that section. The sole effect of a conviction under that section is that the convicted person is for ever after disqualified from holding a licence for the retail sale of beer, cider, and wine. It is a mere personal disqualification. If the Legislature had intended that on the conviction of a licensee the licence itself should cease to exist for all intents and purposes, it would have been perfectly easy to have said so in plain words. This is not such a case of suspended animation as was objected to by Lord Herschell in *Freer* v. *Murray* (*ubi sup.*). There the licence was actually dead. There certainly are cases in which a licence continues to exist, although it cannot be used by anyone, as in the case of the death of a licensee. In such a case at some interval of time after his death his licence may be transferred to a new licensee. If such a licence can be transferred, it must be "in force" during the interval. Even if there has been a breach of continuity, it was to meet such a case that sect. 15 was passed. They cited also

Reg. v. *Lancashire Justices*, 49 L. T. Rep. 244; *nom. Reg.* v. *Liverpool Justices*, 11 Q. B. Div. 638;
Mackrell v. *Brentford Justices*, 83 L. T. Rep. 31; (1900) 2 Q. B. 387.

If any licence was forfeited it was only the excise licence. The justices' certificate still remained in force, and this is enough to satisfy the requirements of the Act.

Low, K.C. replied.—The licence referred to by the Act is plainly the excise licence. The magistrate's licence was not in existence in 1869, when the Act was passed. If a licence had continued to exist, as alleged, in case of death, the provisions of sect. 3 of the Licensing Act 1872 with regard to executors would have been unnecessary.

COLLINS, M.R.—This is an appeal from a decision of the Divisional Court affirming a decision of quarter sessions upon the question whether under the circumstances of the case the owners of a beerhouse were entitled to the grant of a licence under the provisions of sect. 14 of the Alehouse Act 1828 and sect. 15 of the Licensing Act 1874. The beerhouse in question was in existence before 1869, and its licence has been yearly renewed up to 1903. In July 1903 the holder of the licence was convicted of selling spirits without a spirit licence, and, speaking roughly, that put an end to the licence. In the following September the owners of the beerhouse applied to the licensing justices for a grant or transfer of the licence to their nominee, but their application was refused. They then appealed to quarter sessions, and that court held that the licence could only be refused on one or more of the grounds specified in sect. 8 of the Wine and Beerhouse Act 1869. That decision of quarter sessions was affirmed by the Divisional Court upon the authority of *Ex parte Flinn* (*No.* 2) (*ubi sup.*). It seems to me that the learned judges in the Divisional Court were not altogether convinced by the reasoning in that case; but they considered that that case was binding upon them, and therefore merely followed it, and affirmed the decision of quarter sessions. An appeal has now

been brought to this court. The question is whether the owners of this beerhouse are entitled to the licence under sect. 14 of the Alehouse Act 1828 as applied to such a case as this by sect. 15 of the Licensing Act 1874, with all the privileges conferred by sect. 19 of the Wine and Beerhouse Act 1869. That section, as amended by sect. 7 of the Wine and Beerhouse Act 1870, provides as follows: [His Lordship read it.] The grounds there referred to, which are the four grounds specified in sect. 8 of the Act of 1869, do not include the ground upon which, in the case now before us, the licence ceased to exist. The licence in force on the 1st May 1869 under certain recited Acts which is referred to in sect. 19 is unquestionably an excise licence, because up to that date no licence or certificate by magistrates was required for beerhouses, but only an excise licence. Then comes sect. 15 of the Licensing Act 1874, under which the question here arises. [His Lordship read it.] That takes me back to sect. 14 of the Alehouse Act 1828, the marginal note of which is: "Provision for death, change of occupancy, or other contingency." Clause 1 of that section provides that: "If any person duly licensed under this Act . . . be, by sickness or other infirmity, rendered incapable of keeping an inn," it shall be lawful for the justices at a special session to grant to the assigns of such person a licence to sell excisable liquors by retail, to continue in force until the next general annual licensing meeting. It is said on behalf of the justices that, under the circumstances of this case, an owner applying after the licence of his tenant has been put an end to could not claim the benefit of the Act of 1869; that is to say, he could not bring himself within the provisions of sect. 19 of the Act of 1869 as to the only four grounds upon which a certificate may be refused by justices Sect. 19 makes it a condition for an application for that certificate that the licence shall have been in force on the 1st May 1869 and shall have been renewed from time to time up to the time of the application. The owners here say that there has been no break in the continuity of the licence since that date, while, on the other hand, the justices contend that the conviction of Arch, the licensee, put an end to the existence of the licence so as to disable the owners from making an application to the justices under sect. 19. To that contention the owners reply that sect. 15 of the Licensing Act 1874 has the effect not merely of putting them in a position to apply for a grant under the Act of 1828, but of placing them in a special position as though the licensee who has been convicted had been "by sickness or other infirmity rendered incapable of keeping an inn"; so that they are relieved from the necessity of showing that the licence has been continuously in existence since the 1st May 1869. That raises the real point in this case. Now, it has often been held that, apart from sect. 15 of the Licensing Act 1874, unless the applicant for a grant or transfer could show that the licence was in existence at the time of the aplication, he lost his right to the advantages given under sect. 19 of the Act of 1869. His right to apply for a grant or transfer was not lost, but his special privileges under the Act of 1869 were destroyed. In *Murray* v. *Freer* (*ubi sup.*) in the Court of Appeal, Lord Esher, M.R. dealt with this point, and his judgment is an exceedingly important one. The headnote to that case in the Law Reports is this: "The tenant of a beerhouse, which had been continuously licensed for the sale of beer to be consumed on the premises, from a date prior to the 1st May 1869, was convicted of permitting drunkenness on the premises, and in consequence of the conviction the justices, at the general annual licensing meeting in Aug. 1891, refused to renew the licence, which accordingly expired on the 10th Oct. 1891. On the 5th Oct. 1891 the tenant yielded up possession of the house to the respondent, who on the 17th Nov. 1891 applied to the justices at special sessions for a transfer of the licence: Held, that at the date of the application the licence was not "in force" within the meaning of sect. 19 of the Wine and Beerhouse Act 1869, and that consequently the justices' power of refusing the transfer was not limited to the four grounds mentioned in sect. 8 of that Act." Lord Esher, M.R. said: "We have to construe two sections in two Acts of Parliament. The first is sect 14 in the Act 9 Geo. 4. c. 61. It is admitted on all hands that sect. 14 includes the present case up to a certain point—that it gave the respondent a *locus standi* before the justices to apply for a transfer. I entirely agree in that view. But does sect. 14 do any more than that? It apppears to me that, if you read the section over and over again, you cannot say that it does anything more than provide who are to be proper applicants; it makes no provision for what the justices are to do with the application when it is made." If sect. 15 does no more than define the class of applicants and admit into that class a person claiming in respect of a case where the licence has been forfeited it is obvious that he is not emancipated from the conditions which apply to the case of every other applicant. I think that he is simply admitted into the class of applicants, and an applicant cannot succeed in this kind of application unless he can show that his licence is in force, and has been continuously in existence since the 1st May 1869. The decision of the Court of Appeal in *Murray* v. *Freer* (*ubi sup.*) was affirmed by the House of Lords, and Mr. Foote in his argument before us has not disputed that if this application had been made under the Act of 1828 the licence could have been shown to have been determined during the currency of the year. That brings us to sect. 15 of the Licensing Act 1874. Unless special privileges are given by that section under which the applicant is exempted from proving the continuous existence of the licence since the 1st May 1869 it will not help the owners here; and it seems to me that it does nothing more than admit them into the class of persons who have a *locus standi* to make an application. It does not emancipate them from having to prove the continuous existence of the licence, and therefore their contention on this part of the case must fail. Then comes the question as to the authority of the decision in *Ex parte Flinn and Sons* (*No.* 2) (*ubi sup.*), a case which appears to me to be directly in point here. It is not a very satisfactory case because it was only argued on one side. Darling, J. did not really deal with the authorities or reason out the question, and though Phillimore, J. went more into detail I do not think that in the result their decision was in accordance with the principles laid down by the

House of Lords in *Freer* v. *Murray* (*ubi sup.*). Phillimore, J. used these words: "No doubt there is some awkwardness in saying that a licence has been forfeited, and yet that it can be assigned or carried on; but the awkwardness is, I think, only verbal, and when sect. 15 comes to be looked at as a whole, it appears that the licence is to be regarded as only forfeited in respect to the licensee, but as capable of being kept alive in favour of the owner." That view is not in accordance with the view taken by Lord Herschell and by the Court of Appeal in *Freer* v. *Murray* (*ubi sup*), for they held that a licence cannot be in a state of suspended animation in that way. A licence of this kind may be said to be a personal matter; it involves two things, a person who can use it and a place where the business may be carried on under it. If there is no person who can use the licence, it seems to me that there is no licence. Lord Herschell in *Freer* v. *Murray* (*ubi sup.*) has sufficiently dealt with the argument that a licence which has expired may yet be considered to be in a state of suspended animation. It seems to me, therefore, that the grounds of the decision of the Divisional Court in *Ex parte Flinn and Sons* (*No.* 2) (*ubi sup*) are not correct, and upon this point the contention of the owner must fail. The next point taken on their behalf was that the licence which it is necessary for them to show has been in existence continuously since the 1st May 1869 is not the excise licence, which is the only licence that can be said to have come to an end on Arch's conviction, but the certificate granted by the magistrates. Reference was made to the Licensing Act 1872, and it was said that under that Act two convictions are necessary for the forfeiture of a licence, while here there has been only one conviction. But for the reasons which I have already given I think that the licence referred to in the Act is the excise licence, and not the magistrate's certificate, and as the excise licence in this case has not been continuously in force since the 1st May 1869 the conditions imposed by the Act of 1869 have not been fulfilled. Then I come to the argument, based upon sect. 7 of the Beerhouse Act 1840, that the excise licence has not been forfeited. [His Lordship read the section.] It is said that, though that section defeats the capacity of the person who has been convicted to sell beer or cider by retail, yet it leaves the licence itself in existence. It seems to me, upon the natural meaning of the words, that the licence itself is destroyed. The section not only disqualifies the person convicted from ever thereafter selling beer and cider by retail, but says that if such person shall afterwards have any such licence to sell beer and cider by retail the same shall be void to all intents and purposes. That is equivalent to the forfeiture of the licence. Therefore it is impossible to say that this licence has continued in force since the 1st May 1869 up to the time of the owners' application to the justices. I think that the appeal to this court must be allowed.

STIRLING, L.J.—I am of the same opinion, but I will state shortly the grounds on which I rely. The case relates to a beerhouse which on the 1st May 1869 had a licence under the Beerhouse Acts for selling beer by retail. This licence was regularly renewed down to the year 1903, and in that year it was held by a man named Arch who was then in occupation of the beerhouse. On the 30th of July he was convicted of selling spirits without having the proper licence, and undoubtedly he thereupon became disqualified from holding a licence for the sale of beer by retail. In the following September the owners of the house applied to the justices for the grant of a licence to sell beer by retail on the premises to their nominee, one Coburn. That application was made under sect. 15 of the Licensing Act 1874, which was passed in order to enable the owner of premises to apply for the grant of a licence in a case where the person who had been previously licensed has become personally disqualified upon being convicted "for the first time" of selling spirits without a spirit licence. That relieves us from considering sect. 3 of the Licensing Act 1872, which refers to a conviction for the second time. Sect. 15 of the Licensing Act 1874 authorises an application to be made under sect. 14 of the Alehouse Act 1828 and provides that the provisions of that Act with respect to the grant of a temporary authority and to the grant of licences at special sessions shall apply "as if the person convicted had been rendered incapable of keeping an inn and the person applying for such grant was his assignee." At first I was disposed to think that the "assignee" there mentioned meant the "assignee of the licence" in some shape or form, but upon consideration I have come to the conclusion that Mr. Low was right in saying that the word is used with reference to one of the persons mentioned in sect. 14 of the Alehouse Act 1828 as the assigns of the premises. Now, it was contended on behalf of the owners of the premises in the present case that sect. 15 of the Act of 1874 is a remedial enactment and was intended not only to give the owners of the premises a *locus standi* to apply for a grant of a licence but also to give them the benefit of being placed in the same position as if there had been no disqualification upon the conviction of the licensee, so that they might have all the privileges which attach to the case of a licence which has been in force on the 1st May 1869 and has been continuously renewed up to the date of the application. I cannot see in sect. 15 any ground for that contention either in the express words there used or in any inference that should be drawn from the words. The section only gives the owner of the premises a right to make an application, and that application must be subject to the same conditions as other applications. Then I come to the question what effect had the conviction of Arch upon the licence. The answer to that depends upon the meaning of sect. 7 of the Beerhouse Act 1840, which refers to excise licences then in existence, and then provides that the person convicted shall be disqualified for ever thereafter from selling beer and cider by retail, and that any licence which he may afterwards take out or have "shall be void to all intents and purposes." It seems to me that the meaning of that section is that the licence held by the convicted person at the time of his conviction shall be void just as much as any licence which he may afterwards obtain, and the case of *Reg.* v. *Vine* (*ubi sup.*) is a strong authority in favour of that view. That case was decided upon the construction of sect. 14 of the Wine and Beerhouse Act 1870 (33 & 34 Vict. c. 29), which is in almost the same terms as sect. 7 of

the Beerhouse Act 1840. The result is that upon the conviction of Arch the licence that he held became void, and ceased to exist. The owners of the premises now claim the protection given by sect. 19 of the Wine and Beerhouse Act 1869 to persons holding licences which were in force on the 1st May 1869, and have been renewed from time to time. But to be entitled to that protection they must show that the licence has been continuously renewed and is in force at the time of their application. As I have already said, I think that upon the conviction of Arch the licence held by him ceased to exist, and therefore it was not in force at the time of the application of the owners to the justices. That being so, the decision in *Freer* v. *Murray* (*ubi sup.*) applies, and I agree that the owners are not entitled to the benefits of the provisions of sect. 19 of the Act of 1869.

MATHEW, L.J.—I am of the same opinion. It seems to me that the case is governed by the decision of the House of Lords in *Freer* v. *Murray* (*ubi sup.*). In that case the licence had come to an end by the effluxion of time, and an innocent owner was held not to be entitled to the protection of the Act because the licence that had existed had not remained in force up to the date of the application to the justices. In the present case the licence was forfeited by the misconduct of the tenant of the premises. But the result is the same, and as the licence was not in force at the date of the application, the owners cannot claim the protection of the Act.

Appeal allowed.

Solicitor for the appellants, *E. W. Beal.*

Solicitors for the respondents, *Maitlands, Peckham,* and *Co.*

HIGH COURT OF JUSTICE

CHANCERY DIVISION.

July 5 *and* 6, 1904.

(Before FAREWELL, J.)

SHARPINGTON *v.* FULHAM GUARDIANS. (*a*)

Public authority—Guardians—Time for bringing action or proceedings—Liabilities of public authority under contract—Arbitration—Time fixed for payment—Public Authorities Protection Act 1893 (56 *&* 57 *Vict. c.* 61)—*Poor Law* (*Payment of Debts*) *Act* 1859 (22 *&* 23 *Vict. c.* 49), *ss.* 1, 3.

Guardians contracted with S. to convert a house into a suitable residence for their poor children. The contract contained an arbitration clause.

The guardians paid S. the sum agreed, and S. made a further claim against them in respect of damage sustained by him through their default, and the claim was referred to arbitration. The reference took place more than a year after the work was finished and the original sum mentioned in the contract paid.

The guardians at the arbitration took two preliminary legal objections (1) *that the claim made by S. was a claim arising in respect to a public duty of the guardians, and that proceedings to enforce such claim should have been commenced within six months' time under the Public Authorities Protection Act* 1893; (2) *that the claim of S. could not, in view of the time that had elapsed, be legally satisfied under the Poor Law* (*Payment of Debts*) *Acts* 1859, *it being impossible to pay the same within the half-year in which the same became due, or within three months after the expiration of such half-year.*

An action was by agreement brought by S. against the guardians in the Chancery Division to determine these points.

Held, (1) *that the duty of the guardians to S. was of a private and not of a public character, and that the Public Authorities Protection Act* 1893 *had no application;* (2) *that the sum owing to S. in respect of his claim did not become due within the meaning of the Poor Law* (*Payment of Debts*) *Act* 1859 *until the same had been fixed by arbitration.*

THE guardians of the poor of the parish of Fulham, London, entered into a contract with Thomas George Sharpington in respect to the conversion of a house, No. 9, Parson's-green, into a suitable residence for their pauper children.

The contract was contained in three documents —conditions of contract, conditions and specifications of work; a tender by Sharpington dated the 20th Sept. 1899; and an acceptance by guardians dated the 20th Dec. 1899.

The clauses in this contract, so far as the same are here relevant, were as follows:

The contractor shall at his own cost measure with the architect or measuring surveyor at such times and in such manner as the architect shall direct any altered, omitted, additional, or provisional works, and shall add or deduct, as the case may require, to or from the amount of the contract the value of such works, which value shall be ascertained by pricing out the extras and omissions in accordance with the prices contained in an unsealed copy of the bills of quantities which shall be deposited by the contractor with the architect prior to the signing of the contract. These bills must be fully and properly priced out by the contractor, and after examination by the architect or measuring surveyor they shall be sealed up, and only opened for adjustment of the extra or omitted works, or for the purpose explained in clause 3 of these conditions.

Where the prices in the said bills of quantities shall not apply, the architect or measuring surveyor shall estimate the value of the work in such manner as he shall think just and fair, but the contractor shall not claim payment for any extra works unless upon the production of a written order or drawing signed by the architect, and unless weekly vouchers for extra works considered by the architect incapable of measurement be delivered to the architect not later than the Wednesday following the week in which such extra works shall have been executed.

Provided also, that if the contractor or his representative shall from any cause whatever not attend the appointment made by the architect or measuring surveyor for measuring as aforesaid, the architect or measuring surveyor shall be at liberty to proceed alone with such measurements, and the contractor shall be bound by the result thereof.

If it should be decided to omit any of the works described in the contract, or to erect the buildings according to a different plan, or to erect additional buildings, or to change the positions of the sites of any of them, no extra charge shall be made beyond that provided for by the foregoing clause.

The contractor shall complete the works and leave the whole clean and perfect and fit for occupation within five calendar months of the architect's order to com-

(*a*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

mence the works, under a penalty of 2*l.* per diem for each and every day beyond that period during which the works or any part thereof shall remain unfinished. Provided always that if the contractor shall in the opinion of the architect have been prevented by a general strike in the building trade, inclement weather, alterations, or other causes not under the control of the contractor, then the architect shall upon the application of the contractor in writing within one week after each such occasion on which any such prevention or delay has occurred allow (at his discretion) such further time as he shall consider reasonable, but in addition to the above penalty it is to be understood that the clerk of works' salary at three guineas per week is to be deducted for each and every week during which the completion of the works is delayed beyond the stipulated period of five months. The above stipulated penalties may be deducted from any moneys due to the contractor under the contract or recovered by the guardians or his sureties by action at law or otherwise.

Payments in respect of the works contracted for will be made only on the architect's certificates and in the following manner — that is to say, at the rate of 75 per cent. on the architect's estimate of the net amount of work executed and 20 per cent. additional when the whole works shall be certified by the architect to have been completed, but it is to be clearly understood that no certificate whatever given by the architect prior to his final certificate is to be considered as certifying that any part of the work has been properly executed, and the final certificate must only be taken to certify that the work has been executed to the best belief of the architect in a proper manner. The remaining 5 per cent. will be paid on the expiration of twelve calendar months from the date of such completion, provided the architect shall certify that the works contracted for are to the best of his belief in proper repair, and no claims shall have been made against the guardians or the contractor for damages, compensations, or otherwise in relation to the works or the execution thereof. The architect shall not be bound to give certificates (other than the final certificate) for sums of less than £500.

If any dispute, question, difference, or controversy shall arise between the parties to the contract other than questions respecting the quality of the materials or labour, or as to payments to be made as the work progresses, or as to the matters provided for by clauses 3 and 16 (all of which are to be left to the sole discretion of the said architect), then and in every or any such case the matter or difference shall be and is hereby referred to some person to be appointed by the president of the Royal Institute of British Architects for the time being, and it shall be and is hereby agreed that this reference shall be made a rule of Her Majesty's High Court of Justice, and that the arbitration shall be conducted in all respects according to the provisions as to arbitration contained in the Arbitration Act 1889, and shall have all the incidents and consequences of an arbitration under that Act.

Sharpington commenced the works on the 12th Feb. 1900, and completed them on the 12th March 1901. Properly speaking, they should have been finished on the 12th June 1900. The work when completed was also substantially different from the work directed in the contract.

According to Sharpington, the work was delayed and altered owing to the acts and default of the guardians, and owing to such default and delay considerable extra expenses were incurred.

When completed, the works were approved by the architect to the guardians.

According to the contract, Sharpington was entitled to be paid 5751*l.* 15*s.*, and this was paid to him by the guardians in Sept. 1901.

Sharpington subsequently delivered full particulars of his claim in respect of the extra costs incurred by him, the total of which amounted to 1357*l.* 19*s.*

On the 25th Nov. 1902 the matter was referred to arbitration, and in March 1903 the parties came before the arbitrator, when the guardians raised the preliminary objection that no portion of Sharpington's claim could as a matter of law be recovered by him.

It was accordingly agreed between the parties that an action should be brought with a view of determining this point.

Sharpington accordingly issued a writ against the guardians, and claimed that he was entitled to recover from them under the contract such an amount as the arbitrator should award in respect to his claim.

Pars. 7 and 8 of the defence, in which the points argued at the hearing of the action were raised, were as follows:

(7) If any debt, claim, or demand was lawfully incurred by or became due from the defendants to the plaintiff in respect of the plaintiff's said claims (which is denied), the same was incurred or became due on or before the 3rd May 1901, the date of the completion of the said contract, and was not paid within the half-year in which the same was incurred or became due, nor within three months after the expiration of such half-year, the commencement of such half-year being reckoned from the 30th day of March 1901, the time when the last half-year's account was or ought to have been closed according to the order dated the 14th day of January 1867 of the Poor Law Board, and the same cannot now be paid by the defendants under an Act to provide for the payment of debts by boards of guardians &c. (22 & 23 Vict. c. 49).

(8) The plaintiff did not commence proceedings within six months next after the acts, negligence, or default now complained of, nor within six months next after the ceasing thereof, and the defendants submit that the present action will not lie under the Public Authorities Protection Act 1893 (56 & 57 Vict. c. 61).

The points were separately argued, and the point under the Public Authorities Protection Act was first considered.

Upjohn, K.C. and *Beddall* for the plaintiff.—The defendants are not entitled to the protection of the Public Authorities Protection Act. The defendants entered into the contract, no doubt, under their statutory powers, but, so far as relates to the plaintiff, they were acting as private individuals in their private capacity. They referred to

Midland Railway Company v. *Local Board of Withington*, 1883, 11 Q. B. Div. 788;
Davies v. *Swansea Corporation*, 1853, 8 Exch. 808;
Wallace v. *Smith*, 1804, 5 East, 115.

In any case the section cannot apply to proceedings before an arbitrator.

Butcher, K.C. and *A. A. Hudson* for the defendants.—The defendants entered into this contract under their statutory powers, and throughout they were acting in "pursuance of trade or business, which in private hands would be of a private character," and here the Act applies:

The Ydun, 81 L. T. Rep. 10; (1899) P. 236;
Fielden v. *Morley Corporation*, 79 L. T. Rep. 231; (1899) 1 Ch. 1;
Parker v. *London Corporation*, 21 Mag. Cas. 474; 90 L. T. Rep. 415; (1904) 2 K. B. 531;

Chamberlain and Hookham Limited v. *Bradford Corporation*, 1900, 83 L. T. Rep. 518;
Jeremiah Ambler and Sons Limited v. *Bradford Corporation*, 20 Mag. Cas. 647; 87 L. T. Rep. 217; (1902) 2 Ch. 585;
Grand Junction Waterworks Company v. *Hampstead Urban Council*, 1899, 15 Times L. Rep. 412.

Attorney-General v. *Company of Proprietors of Margate Pier and Harbour* (82 L. T. Rep. 448; (1900) 1 Ch. 749) is not an authority against the defendants, as that was the case of a private company.

Upjohn, K.C. in reply.—There is no decision that goes to the point here, as in all the cases that have been referred to there has been a duty to the public. The defendants' argument confuses their duty to the public with their duty to a private individual.

FARWELL, J.—In this case the plaintiff contractor entered into a contract to convert a house into a suitable home for poor children. To provide a home for the poor children was a statutory duty imposed on the defendants. The contractor complained that he had not been paid enough and that there had been a breach of contract, and the matter went to arbitration. The defendants raise two points of law by way of defence, and one of these points I have now to decide. In 1893 an Act was passed known as the Public Authorities Protection Act. Sect. 1 of that Act, which is alone material here, provides that "the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months after the act, neglect, or default complained of; or, in a case of a continuance of the injury or damage, within six months next after the ceasing thereof." It is said that the breach of contract alleged here is an act or default within the meaning of sect. 1. It is curious that no exact decision on the point can be found; but, in my opinion, there is an attempt being made here to carry the Act further than it has been carried before, and further than, in my opinion, it is advisable to carry it. Public authorities in these days are allowed to perform statutory duties which entitle and compel them to enter into contracts for the supply of all sorts of things, and to engage in trades. They may deal with tradesmen to any extent, and, if I decided this case in favour of the defendants, it would result that every contract made under a statutory power would fall within this Act. None of the cases cited seem to me to be very relevant. The first case cited, *Fielden* v. *Morley Corporation*, does not seem to me to touch the case at all. It was an action to restrain a corporation from allowing water to escape from their aqueduct and to flood the plaintiff's land. Mr. Butcher has seized upon a sentence in the judgment of the learned President of the Probate Division in the case of *The Ydun*. The learned President says: "Whether a corporation is constructing a work or using it—whether, for example, it is building an aqueduct, and laying pipes from it, or supplying a consumer from the aqueduct by means of the piping—it appears to me to be equally engaged in executing the duties imposed on it by Act of Parliament, and, though it may be asked why a corporation should receive privileged advantages in litigation, I cannot doubt but that the Act in question has conferred them." But these words are merely descriptive of this class of contracts, and the President's mind was not directed to actions by contractors, nor did he consider that he was deciding anything new, for he had previously said that the point was covered by authority. He says: "I cannot doubt that the corporation of Preston in carrying out under statutory authority its enterprise of the Ribble navigation, a water highway to Preston, acts as a public authority executing a public duty as much as when it makes or maintains the land highways within the ambit of the municipality." The case of *Parker* v. *London County Council* is, I think, to be explained in the same way. The point here is not in any way touched by *Jeremiah Ambler and Sons Limited* v. *Bradford Corporation*, but Romer, L.J. in his judgment does suggest that the Act only applies to an action "whose ground is an act done by the defendants directly in execution or intended execution of their public duty or authority" which would seem to show that it would not apply to a contract which was only incidental to a public duty. This case differs also from *Chamberlain and Hookham Limited* v. *Bradford Corporation*, decided by Kekewich, J. In that case the corporation were sued in respect of an alleged infringement of a patent in respect of the meters used by them for the electric lighting of Bradford under statutory powers. The action failed, and Kekewich, J. gave to the defendants solicitor and client costs on the ground that they had been attacked in respect to the statutory performance of a public duty. Here the public duty which was cast on the guardians was to supply a home for poor children. A breach of this duty would have been an injury to the poor children of the district, and perhaps also to the public, who might be injured by finding the children on the highway. To carry out the public duty the defendants have power to build or to alter a house, and for this purpose they entered into a contract with a contractor to alter a house. It is a breach of this private contract that is complained of by the contractor, and his complaint is as a private individual of a wrong done to himself. It is not an action on behalf of the poor children of the district, or by a member of the public on behalf of such poor children. I cannot find any grounds for saying that this contract comes within the Act. What is complained of is a breach of a private duty of the guardians to a private individual. In my view the point fails.

The second point was next argued.

Upjohn, K.C. and *Beddall* for the plaintiff.—The case for the plaintiff is covered by authority. Until costs are taxed there is no obligation to pay them. Similarly in this case it is impossible to sue until the damages have been fixed by the award. Until the amount was settled the liability of the guardians was inchoate:

Midland Railway Company v. *Edmonton Guardians*, 72 L. T. Rep. 206; (1895) 1 Q. B. 357;
West Ham Guardians v. *Churchwardens, &c., of St. Matthew, Bethnal Green*, 75 L. T. Rep. 286; (1896) A. C. 477;
Manchester, Sheffield, and Lincolnshire Railway Company v. *Doncaster Union*, 75 L. T. Rep. 472; (1897) 1 Q. B. 117.

Butcher, K.C. and *A. A. Hudson* for the defendants.—The defendants' case here is that the plaintiff did not commence his proceedings within the time required by the Act. The plaintiff claimed a fixed sum, and it was open to him to commence arbitration proceedings within the six months, and, as he did not do so, he is now barred:

Baker v. *Billericay Union*, 2 H. & C. 642.

The cases on which the plaintiff relies relate to taxation of costs.

Upjohn, K.C. was not called on.

FARWELL, J.—I have now to consider the defendants' second point. The question is whether the Poor Law (Payment of Debts) Act 1859 is a bar to the plaintiff's claim. The view taken by the defendants' counsel has been upset by the decision of the House of Lords and the Court of Appeal, which have given a judicial interpretation to the Act. It follows from what was there laid down that neither the sending in of the claim nor the reference to arbitration on the part of the plaintiff was a commencement of the proceedings within sect. 4 of the Act. This was determined in *Midland Railway Company* v. *Edmonton Guardians*. There there was an order for the payment of costs, and an application to tax was made within the specified time; but the taxation took place after the time had expired and there were no proceedings to enforce payment until after a further period of three months after the expiration of that half-year. It was held that the application to tax costs was not a commencement of proceedings to enforce payment; that until a sum of money which was susceptible of payment was ascertained, no debt, claim, or demand had become due from or been incurred by the guardians. This decision I consider governs the present case. As to whether the sum has become due under sect. 1 of the Act has, in my opinion, been decided by the judgment of the House of Lords in *West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green*. Lord Herschell there says: "The 1st section, then, was not designed, as Statutes of Limitation are, to prevent stale demands, though it may incidentally bar the remedy of creditors who delay asserting their rights. Both in form and purpose it is an injunction on the guardians to discharge their obligations promptly. It provides that the debt, claim, or demand 'shall be paid' within the time limited. I think it must refer to debts which the guardians could and ought to have paid within the time limited, and not to such as could not properly have been paid within that time, inasmuch as the amount had not been ascertained in the manner provided by law." In my opinion, Lord Herschell's observations apply *a fortiori* here. His Lordship continues: "In my opinion it was not until the certificate of the Clerk of the Parliaments was given that the statutory provision became applicable. I must not be understood as saying that, if the amount of the debt or liability remained unascertained owing to neglect on the part of the guardians, the case might not have a different aspect." It has been said that that judgment turned on the practice of the House of Lords. But in *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Doncaster Union* it was held that a judgment of the Court of Appeal against guardians for payment of costs does not constitute a debt, claim, or demand within the section. Lord Esher says: "It is true to say that outside this Act of Parliament a judgment for costs enables the party in whose favour it is given to say that they are due, and to maintain an action for them. But within the meaning of this Act, when those who are ordered to pay costs are a board of guardians, they are not bound to pay till the costs are taxed; and, that being so, the period from which the time limited is to run is not that at which judgment was given, but that at which they are bound to pay—that is, the time when costs are ascertained by taxation." Rigby, L.J. says: "The question that arises on such a case as the present is, to my mind, not whether an action could be brought to recover untaxed costs, or whether an order for costs has been made, but whether the circumstances are such that the guardians are under an obligation to pay." *Baker* v. *Billericay Guardians* is not relevant. The judgment there turned on the pleadings. The defendants' second point thus also fails.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Booth* and *Smee*.
Solicitor for the defendants, *T. Blanco White*.

KING'S BENCH DIVISION.

July 8 *and* 12, 1904.

(Before Lord ALVERSTONE, C.J., KENNEDY and PHILLIMORE, JJ.)

LONDON COUNTY COUNCIL (apps.) v. DAVIS (resp.). (*a*)

Metropolis—Street—Commencing to form or lay out—Passage to shops—London Building Act 1894 (57 *&* 58 *Vict. c. ccxiii.*), *s.* 7.

A passage-way, thoroughfare, or courtyard leading to shops, even although some part of the user may be restricted to certain times, which is intended and used as a market or bazaar, may be a "street" within the meaning of the London Building Act 1894, *and the person responsible therefore may be convicted under sect. 7 of that Act for commencing to form and lay out a street.*

CASE stated on an information preferred by the appellants against the respondent for unlawfully commencing to form and lay out a street without having first obtained the sanction of the appellants, under sect. 7 of the London Building Act 1894, whereby he became liable to a penalty prescribed by sect. 200 (1) (*a*) of that Act.

Upon the hearing of the information the following facts were either proved or admitted by both parties:—

In or about May 1902 the respondent, who is a builder, was proposing to pull down a row of small houses on the eastern side of Morgan-street, and to build six blocks of dwellings on the site of such houses.

At the back of the yards of the small houses in Morgan-street, there was at one time another row of small houses called London-terrace, which had been almost entirely pulled down about 1896. Beyond London-terrace was a footway leading from Commercial-road to James-street, and

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

beyond this footway were the back walls of the houses and premises in Cannon-street-road. The footway was carried on brick arches, the spaces under such arches serving as cellars for the London-terrace houses. The front walls of the London-terrace houses came up to the footway, which was the only means of access to them. Access was also given by the footway to the rear of some of the houses in Cannon-street-road.

On the 3rd Nov., and before commencing to erect his blocks of dwellings, the respondent duly gave to the district surveyor a building notice.

The respondent proceeded to erect the blocks of dwellings with basements. The basements at the back of the blocks were ultimately completed as shops, twenty-four in number, with entrances from the open space next hereinafter described.

In order to provide the necessary air space at the basement level of the blocks of dwellings, which was about 8ft. 6in. below the level of Morgan-street, it was necessary to excavate the ground, formerly the site of the old houses in London-terrace, and the respondent originally intended to extend the space up to the wall in rear of the Cannon-street-road houses, clearing away the arches over which the footway ran, and so doing away altogether with the footway. He found, however, that the wall at the rear of the Cannon-street-road houses would not stand without the support which it received from the arches. He was also served with a writ at the suit of one Silverman, the occupier of premises in Cannon-street-road, who claimed to be entitled to a right of way from the rear of his premises along the footway. In these circumstances the respondent decided to replace the old arches or cellars under the footway, which were in a dilapidated condition, by the erection described in the following paragraph, which served to carry the footway, and this work was executed by him in and after June 1903. The level of the footway, when replaced, was about 9in. or 10in. above the level of Morgan-street, and there was no evidence that this was not the level at which it originally stood.

The erections are fifty-five in number. Each of them is separated from the adjoining one by a vertical brick wall 9in. thick. A bed of concrete resting on iron girders supported on the tops of the walls forms a covering or roof to the erections, and at the time forms the surface of the footway. Each of them is about 6ft. wide and 4ft. 6in. deep and 9ft. high, and has a door or doors opening on to the space. Most of them have in front small gables projecting slightly above the level of the footway. The erections serve not only to carry the footway, but also as buttresses or supports to the wall at the rear of the Cannon-street-road premises.

The space was paved by the respondent with granolithic cement paving, having a fall of about 4in. from the Cannon-street-road side of the space towards the Morgan-street side. The surface water runs off into gulleys running along the backs of the blocks of dwellings, and thence into a gulley running through the centre of the blocks of dwellings into the main sewer in Morgan-street. It is lighted and cleansed at the respondent's expense.

On the 10th Sept. 1903, when the information was laid, the twenty-four basements on the Morgan-street side of the space, and the fifty-five erections on the Cannon-street-road side of the space, had all, or nearly all of them, been let by the respondent to weekly tenants, chiefly of the Jewish faith, and were being used for the sale or storage of goods. The space was in fact a kind of market or bazaar, and was frequented by a large number of persons.

The means of approach to the space at the time of laying the information were as follows: (*a*) A main entrance from Morgan-street, through the middle of the blocks leading down steps into the said space, and having iron gates at Morgan-street end. (*b*) Each of the blocks is entered by a passage from which there are stairs leading to the upper part, and also stairs leading down into the space, from which alone there is access to the basements. The stairs leading downward give access to the space for the occupiers of each block, but there was nothing to prevent persons passing from Morgan-street down these stairs into the space. Between the laying of the information and the hearing wooden gates were placed by the respondent to all these entrances at the Morgan-street end. (*c*) A flight of steps at the southern end of the space, having a gate at the top, through which access was obtained to the old footway, and thence into James-street, or eastward through the old passage-way of Bowyer's-buildings into Cannon-street-road. After the laying of the information the respondent cut off all means of access to the space at this point by building a wall. (*d*) A flight of steps with a gate at the top, leading up from the space on to the old footway between the erections numbered 31 and 32. Facing the top of the steps there was a door in the wall forming the rear of the premises in Cannon-street-road for which the respondent had acquired by deed a licence to use, thus gaining access into a yard in which there was a place sanctioned by the Jewish authorities for the killing of poultry. From this yard there was a passage leading into Cannon-street-road. (*e*) After passing through a gate at the top of the steps described in the last paragraph, there is a gate on either side across the old footway. Passing through that on the southern side, access is obtained to the old footway, and thence through another gate at a point between the erections numbered 51 and 52, and so into James-street, or through Bowyer's-buildings into Cannon-street-road. After passing through the gate on the north side of the steps, access is obtained to the old footway, but the entrance in Commercial-road has been for some years prior to the date of the information blocked up by some person or persons other than the respondent, and was then still blocked up. The respondent kept the door in the wall and all the gates mentioned in this paragraph under his control, but whether he had any right to place any gates across the old footway it is not material to this case to inquire.

The iron gates at the main entrance in Morgan-street above referred to were closed at night from about 10.30 p.m. or 11 p.m. for Jewish Sabbaths and festivals. No business whatever is permitted on Jewish Sabbaths and festivals. All other means of access to the space were entirely under the control of the respondent. There was, however, at the date of the information nothing to prevent persons passing from Morgan-street through any one of the passages in each of the blocks when the iron gates were so closed.

The blocks of dwellings accommodate some 800 persons, who naturally form the majority of those who frequent the space and deal at the basement shops and the erections there, but other persons are not prevented by the respondent from using the space for the same purpose, and it is to his interest that as many persons as possible should so use it.

The respondent laid out the space in the circumstances and to the extent above described and no further, and he had not made any such application to the Council nor received any such sanction for forming or laying out a street as is required by sect. 7 of the London Building Act 1894.

The appellants contended that the respondent had commenced to form and lay out a street for foot traffic within the meaning of sect 7 of the London Building Act 1894, and sect. 200 (1) (*a*) of the same Act as amended by the London Building Act 1894 (Amendment) Act 1898, and they cited the case of *Armstrong* v. *London County Council* (81 L. T. Rep. 638; (1900) 1 Q. B. 416).

The respondent contended that the space in question was a Jewish market or bazaar, and was not a street within the meaning of the Acts.

The magistrate was of opinion, upon the facts as above stated, that the respondent had formed a market in the space, but that it was not a "street" within the meaning of the Act, and he dismissed the information.

Avory, K.C., *Daldy*, and *Robertson* for the appellants.

Macmorran, K.C. and *Harold Brandon* for the respondents.

Lord Alverstone, C.J.—Upon the point raised in the case by the learned magistrate I really have had no doubt from the time that I understood the facts. The learned magistrate has decided in favour of the respondent's contention that the space in question was a Jewish market or bazaar, and not a street within the meaning of the Act, and he was of opinion, upon the facts as stated, that although the respondent had formed a market in the said space it was not a street within the meaning of the Act, and he therefore dismissed the information. After listening—as I ought to do, and did—to all the learned magistrate's judgment, it is quite plain to me that he has embodied in one sentence the ground of his decision, and that is, that as the place was described to him as existing on or about the 22nd June, it was not a street, but was a market. Whether or not any point could be raised upon the state of things which existed earlier and might have made it a street is a matter which we need not consider now, because it was not raised before the learned magistrate. I think, for the purposes of this case, the answer which Mr. Avory has given us is a good one and a correct one: "It may be that I might even have come earlier, but I contend that what was being done on the 22nd June was at any rate the commencing to form, or lay out, a street within the meaning of the 7th section." I can see now that there might have been some contention raised, although I think it is very likely, on the facts, that it would not prove a well-founded one, that the twenty-four basements might be used as workshops, or shops in connection with some trade which might be carried on by the occupants of the houses. But, looking at the place and seeing the character of the buildings, I do not think there is very much likelihood of these stores being used in connection with the rooms in the places above. As I understand the plan, the passage is utilised in the manner shown, and opens out in six places on this court, and there is a big, broad staircase; there are also ways out, which I need not describe again, whereby at certain points people can get out into Cannon-street-road. At any rate, if it was possible to put a different construction upon the matter, as it was originally designed and contemplated, Mr. Davis was minded to erect the fifty-five shops on the other side, to which no access can be got at all except by going down the passage, and therefore it seems to me that there is no doubt about it. Now, sect. 7 states that before any person commences to form or lay out any street, whether intended to be used for carriage traffic or for foot traffic only, application shall be made; and "street" is deemed by the definition clause to include any highway, footway, square, court, alley, or passage, whether a thoroughfare or not. Mr. Macmorran has contended, or, at any rate, indirectly contended, that, in order to lay out a street within the meaning of sect. 7, the person must be doing something of a character indicated in sect. 8. I do not take that view, and I have expressed this opinion before. Sect. 8 is, in my opinion, a section which has been enacted in order to enable persons to come from the commencement of certain work, and if as a matter of fact those acts are done, and they are acts done in the course of forming or laying out a street, proceedings can be taken although the street is not finally formed, obviously for the reason that it was in the interests of the person himself that he should be told that he was beginning to do work which he would not be allowed to do. That is the construction which we put upon that section when the point arose in another case. Now, as the matter stood in June last, what was the condition of things? Here is a court, or passage, or alley, some 20ft. wide, with fifty-five places of business on one side which have no connection whatever with the houses, physically or structurally, but they are let, some to tenants and some to outsiders, and on the other side twenty-four independent shops. That was the state of things when, at any rate, the London County Council thought that what was shown indicated that the respondent was laying out this place to be so used. I do not want to go all through the facts again, but there were no less then six or seven modes of access through those buildings, designed, and designed only, for the purpose of getting to them, and there is also some means of access from the Cannon-street-road side. Looking at the plan, and looking at the statements in the case, I have no hesitation in coming to the conclusion that the learned magistrate has applied a wrong test. It is not a question of whether the respondent has established a market here or whether he has established a bazaar. The question is whether or not he has laid it out so that people shall be free to come and go and pass in and out and through this place by means of the passage, and also by means of going to these stairs. I think the learned magistrate ought to have come to the conclusion that on

those facts there was a commencing to lay out a street. I desire to say that I cannot on these facts come to any other conclusion without practically disagreeing with the reasons of the decision in *Armstrong* v. *London County Council* (81 L. T. Rep. 638; (1900) 1 Q. B. 416), which expressly deals with the matter, and which seems to me to be the governing case. It does not cease to be a street simply because some part of the user may be at certain times. Under these circumstances it seems to me that, had the learned magistrate really applied his mind to the question of what this really was, a passage-way, or thoroughfare, or courtyard leading to shops, he must have come to the conclusion that within the definition of the section it was a commencing to form and lay out the street. But he has for the moment allowed his mind to consider, not what the respondent was laying out and doing, but what was the purpose in his mind of creating what he is pleased to call a bazaar or a market, which, if it be in a street, does not prevent it being a street. I therefore think that this case must go back before the learned magistrate for a conviction.

Mr. Justice KENNEDY.—I am of the same opinion, and I have nothing to add.

Mr. Justice PHILLIMORE.—I also agree.

Appeal allowed.

Solicitors: *W. A. Blaxland*; *D. A. Romain.*

Tuesday, July 12, 1904.

(Before Lord ALVERSTONE, C.J., KENNEDY and PHILLIMORE, JJ.)

SCOTT (app.) v. PILLINER (resp.). (*a*)

Local government—By-law—Validity—Sale of Racing tips in newspapers—By-law forbidding the frequenting of public streets for the sale of such newspapers—Municipal Corporations Act 1882 (45 & 46 *Vict. c.* 50), *s.* 23.

Under the power given by sect. 23 *of the Municipal Corporations Act* 1882 *to make by-laws for the good rule and government of the county, a county council made the following by-law: "Sale of racing tips. No person shall frequent and use any street or other public place either on behalf of himself or of any other person for the purpose of selling or distributing any paper or written or printed matter devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions."*

Held (by Lord Alverstone, C.J. and Kennedy, J.; Phillimore, J. dissenting), that the by-law was too wide, and was invalid as including within its scope sales of newspapers in the streets which could not be regarded otherwise than as perfectly innocent sales not tending towards street betting.

CASE stated by justices of the peace, sitting as a court of summary jurisdiction, at Handsworth, in the county of Stafford.

An information was preferred by George Pilliner (the respondent), superintendent of police, against John Scott (the appellant), for that on the 19th April 1904, at the parish of Handsworth, he did then and there frequent and use a certain street or public place there situate, called Soho-road, and did then and there sell or distribute a certain paper or written or printed matter—namely, a certain paper called the *Midland Sporting News*, devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions, contrary to by-law No. 13 (*c*), being an amendment of and addition to by-laws for the good rule and government of the administrative county of Stafford other than municipal boroughs, and contrary to the statute in that case made and provided.

After hearing the parties and the evidence adduced by them on the 13th May 1904, the justices convicted the appellant of a breach of the by-law, and fined him 5*l.* and costs.

At the hearing of the information the following witnesses were called and evidence given:

The respondent, Pilliner, on being sworn, stated that he laid the information as superintendent of the Handsworth petty sessional division; that he produced a sealed and certified copy of the amendment of and additions to by-laws for the good rule and government of the administrative county of Stafford other than municipal boroughs, and that Handsworth was in the Staffordshire county and was not a municipal borough, and that the same had been submitted to the Secretary of State and had not been disallowed; and that he was proceeding under by-law 13 (*c*) for a breach of that by-law as to the sale of racing tips.

John Hall, a sergeant of the Staffordshire police force, stated:

The defendant is charged with selling or distributing a paper, written or printed, devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions. I produce a paper called the *Midland Sporting News*, of Tuesday, the 19th April 1904. At 11.20 on the morning of the 19th April I saw the defendant in Soho-road, a street in Handsworth, the main road. He had a number of papers under his arm, and I saw him sell one to a man who was passing. I then went to him and bought the paper I produce from him, for which I paid 1*d.* He said he was selling them for a blind man, to whom he pointed, on the opposite side of the street. The paper contained eight columns, and, with the exception of four small advertisements, it was entirely devoted to sporting news, racing and steeplechasing. The first column was devoted to tips on races and steeplechases, except a portion quoting the betting for the City and Suburban, the Derby, and Manchester betting. The second column was entirely devoted to tips. Column 3, except a small portion, was devoted to tips. Column 4 was devoted to racing, but not tips. Column 5 was devoted to racing news, but not tips. Column 6 was partly devoted to tips, and the remaining portion to racing news. Column 7 contained no tips, but racing news. Column 8 had no tips, some racing news, several advertisements by betting men, and some other advertisements which had nothing to do with racing, and two doctors' advertisements on the top of the paper on each sheet.

In cross-examination the witness further stated:

The defendant, a respectable and well-conducted man, is a general newsvendor, not employed exclusively for these papers. This was the first summons against him. I saw him first at 11.20, and at 12.15 in a different locality. He was frequenting the street, and I saw him many times before and since in that locality. He had

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

only similar papers to the one produced on that day, and similar papers on previous occasions. He was more than half a dozen times in that street and at this particular spot ever since the by-laws came into operation, and previously on many occasions. It was a daily occurrence in the same street, and within 100 yards of this particular spot, and at this spot. He did not make any lengthened stand at one spot, but passed up and down the street, and did so on many occasions before he used the road for selling this particular paper.

By-law 13 (c) provided:

Sale of racing tips.—No person shall frequent and use any street or other public place either on behalf of himself or of any other person for the purpose of selling or distributing any paper or written or printed matter devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions. Every person contravening any of the foregoing provisions shall be liable to a penalty not exceeding 5l.

The appellant called no evidence, but contended: (1) that there was no evidence upon which the justices could properly find as a fact that the appellant had frequented the street for the purpose of selling the paper; (2) that there was no evidence upon which the justices could properly find as a fact that the paper was wholly or mainly devoted to giving information as to the probableresult of races, steeplechases, or other competitions; (3) that the by-law was *ultra vires*; and (4) that the by-law was unreasonable.

The justices found as facts that the appellant had frequented the street for the purpose aforesaid, and that the paper was mainly devoted to giving the probable result of races, and they held that the by-law was good and valid and properly made by the County Council of Stafford, and was neither *ultra vires* nor unreasonable. They accordingly convicted the appellant.

The questions for the opinion of the court were: (1) Was there any evidence upon which the justices could properly find that the appellant frequented the street for the purpose of selling the paper? (2) Was there any evidence upon which they could properly find that the paper was mainly devoted to giving the probable result of races? (3) Was the by-law properly made by the County Council of Stafford, and was the same valid as being reasonable, and generally whether the justices upon the above statement of facts came to a correct decision in point of law, and if not, what should be done in the premises?

Sect. 16 of the Local Government Act 1888 gives a County Council the same power of making by-laws in relation to their county as the council of a borough have of making by-laws in relation to their borough under sect. 23 of the Municipal Corporations Act 1882, with the proviso that such by-laws are not to be of any force or effect within any borough.

Sect. 23 of the Municipal Corporations Act 1882 (45 and 46 Vict. c. 50) provides:

(1) The council may from time to time make such by-laws as to them seem meet for the good rule and government of the borough, and for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the borough, and may thereby appoint such fines, not exceeding in any case 5l., as they deem necessary for the prevention and suppression of offences against the same.

Danckwerts, K.C. (*J. S. Pritchett* with him) for the appellant.—The by-law was made under the powers given by sect. 23 of the Municipal Corporations Act 1882, and the question is as to its validity. It is submitted that the by-law is *ultra vires* and unreasonable. The two questions for the court are, first, whether this paper came within the by-law at all; and, secondly, if so, whether the by-law is one which ought to be supported. By the words of the by-law the paper must be one which is devoted "wholly or mainly" to giving information as to the probable result of races, steeplechases, and competitions. Less than one-third of this paper is devoted to the probable result of steeplechases, and, that being so, it is obvious that this paper does not come within the by-law at all, and the sale of it does not infringe the by-law. Secondly, the by-law itself is bad. A by-law made under sect. 23 must be for one of two purposes, either for the suppression of nuisances, or for the good rule and government of the county. This clearly was not a nuisance, and it cannot be said to infringe anything for good rule and government. The whole by-law is too unreasonable, too wide and too general, and is bad upon that ground:

Macdonald v. *Lochrane*, 51 J. P. 629.

The appellant was properly selling newspapers in the streets, and it is said that he was unlawfully there because his newspaper contained racing news and so infringed against this by-law. That raises this difficulty: Who is to say and decide whether a newspaper is or is not obnoxious to this by-law on that ground? This by-law applies to every street or public place in the county except the boroughs, and if a boy went into a railway carriage or theatre and sold this paper he would be liable—if the by-law is good—to this penalty. There ought to be something more definite than that, and the by-law is simply an attempt to impose a particular view of moral conduct on the whole inhabitants of the rural parts of the county. It has its origin in the mistaken view that every person who buys the paper wants to bet. The by-law is therefore not one either for the suppression of nuisances, or for good rule and government, and is bad:

Thomas v. *Sutters*, 81 L. T. Rep. 469; (1900) 1 Ch. 10.

[Lord ALVERSTONE, C.J.—The principles applicable are clearly laid down by Lord Russell, C.J. in *Kruse* v. *Johnson*, 78 L. T. Rep., at pp. 650-51; (1898) 2 Q. B, at pp. 99-101.] There are several heads there enumerated under which this by-law may fall. It may be *ultra vires* because unreasonable, and also because it is not within the scope of these powers.

Avory, K.C. (*W. Shakespeare* with him) for the respondent.—The real ground on which this by-law was made and on which it was intended to operate was the prevention of betting in the streets. The sale of such papers as these necessarily leads to betting in the streets, and the court ought to look at this by-law as one to prevent betting in the streets; and in *Thomas* v. *Sutters* (*ubi sup.*) a by-law made under the very same section, for the prevention of street betting, was held to be good. A by-law which prohibits the sale of racing tips in the street by a person who is frequenting the street for that purpose is aimed at the very same thing—namely, the prevention

of street betting—and that is the object it has in view. The very gist of the by-law is the frequenting and using the street for this purpose, and therefore it only applies to the person who goes frequently and habitually to the street for that purpose. The business of selling papers with tips is equally within the purview of a by-law to prevent. The by-law is said to be unreasonable because it would punish a person who goes into a railway carriage to sell the paper, but it would not apply in that case, as such a person could not be said to frequent the carriage for that purpose, nor could it apply to the giving of probable results of competitive examinations, as has been contended. [Lord ALVERSTONE, C.J.—Does not this by-law go too far, and is it not too wide? It would really hit a poor lad who gets his living by selling papers in the street, although he has nothing to do with betting.] It is necessary to deal with the person who sells, and if he is a mere lad that can be dealt with by the magistrates, and is a question for them. If it is legitimate to prevent by a by-law betting in the street—and *Thomas* v. *Sutters* (*ubi sup.*) has decided that a by-law for that purpose is good—then it must also be admissible by such a by-law as the present to prohibit that which is ancillary to street betting—namely, the sale of racing tips. All the suggested difficulties are removed by the use of the words "frequenting and using," and so long as the words "frequenting and using" are properly interpreted no hardship can arise. Reliance is placed on the use of these words in the by-law, as well as on the words "devoted wholly or mainly," though the latter is a question of fact entirely for the justices.

Danckwerts, K.C. in reply.

PHILLIMORE, J.—Although the power to make by-laws for good rule and government were formerly possessed only by municipal corporations under the Municipal Corporations Act, that power has now been extended by Parliament to county councils, who are now authorised to make by-laws for the good rule and government of their counties. Therefore, if county councils think that additional by-laws are necessary for the good rule and government of their counties, I am strongly of opinion that this court ought to be very slow in interfering without good cause with such by-laws as the council may frame for that purpose. Dealing with the by-law in the present case, it seems to me that it is a reasonable by-law—at all events that it is not an unreasonable one—and therefore, in my judgment, it ought to be supported.

KENNEDY, J.—I regret to have to come to a different conclusion. The by-law is framed for the purpose of preventing a person frequenting and using any street or other public place for the purpose of selling any paper which is devoted wholly or mainly to giving information as to the probable results of races, and so on. Whether such a by-law as that is *ultra vires* or not has to be determined on legal principles, apart altogether from the question whether such a by-law is desirable. The case finds that the conviction was for frequenting and using a street and there selling and distributing a newspaper devoted wholly or mainly to giving information as to the probable result of races, steeplechases, and other competitions. It cannot be disputed that such information may be given without infringing the law. It is information of a legal kind, and information which to many persons is harmless, and I should be slow to think that it is a reasonable thing to prevent the sale in this way of a paper which contains information in itself legal, and to most persons harmless, merely because such information may induce some persons to make bets. The question is whether this by-law is reasonable, and not whether betting is desirable or undesirable. While entirely agreeing with the view that the greatest possible liberty should be given to these bodies who are authorised to make by-laws, yet I have come to the conclusion that the by-law now in question is not a reasonable by-law, and that it ought not to be supported.

Lord ALVERSTONE, C.J.—I come with reluctance to the conclusion that this by-law cannot be supported. I entirely agree with the principle that the by-laws made by public bodies for the good rule and government of their districts ought not to be interfered with if they can be supported on legal grounds; and I hope I may not be taken as saying that the local authority may not make a proper and valid by-law for the purpose of dealing with the mischief aimed at by this by-law. It is necessary that by-laws should be clear and definite as to the mischief they are aimed at and intended to prevent, and that they should not make unlawful things which are otherwise lawful. One main objection to this by-law is that it includes the case of a sale of a newspaper which is not in aid of street betting. If it were entirely confined to the prevention of street betting it would, no doubt, be a good by-law; but it is too wide, as it brings within its purview a sale by a newspaper vendor which may not tend to street betting. It therefore does bring within its ambit perfectly innocent sales which could not be regarded as sales leading to betting. Moreover, it renders it uncertain what a person may sell on the street or may not sell. But merely on the ground that it includes perfectly innocent sales which have nothing to do with betting, with reluctance I come to the conclusion that this by-law cannot be supported.

Appeal allowed.

Solicitors for the appellant, *Judge* and *Priestley*, for *Philip Baker* and *Co.*, Birmingham.

Solicitor for the respondent, *H. M. Davis*, for *Hand* and *Co.*, Stafford.

July 12 *and* 13, 1904.

(Before Lord ALVERSTONE, C.J., KENNEDY and PHILLIMORE, JJ.)

MORRIS (app.) *v.* BEAL (resp.). (*a*)

Factory Acts—Underground bakehouse—Structural alterations—Expenses of alterations necessary to secure certificate—Covenant by lessee to pay all "outgoings"—Liability of lessee under covenant to bear expenses of alterations—Jurisdiction of magistrate to apportion expenses as between owner and occupier—Factory and Workshop Act 1901 (1 *Edw.* 7, *c.* 22), *s.* 101, *sub-s.* 8.

The lease of premises used as an underground bakehouse contained a covenant by the lessee that he would during the term pay "all existing

(*a*) Reported by W. W. ORR Esq., Barrister-at-Law.

and future rates, assessments, and outgoings of every description, whether Parliamentary, parochial, or otherwise." The district council having refused to grant the certificate required under sect. 101 *of the Factory and Workshop Act* 1901, *that the bakehouse was suitable for the purpose, unless certain structural alterations were made in the premises, and the lessee having made these structural alterations:*

Held, that the expenses of these structural alterations were "outgoings" within the meaning of the lessee's covenant, and that the lessee was bound to bear the same, and that therefore a court of summary jurisdiction had no jurisdiction, under sub-sect. 8 *of sect.* 101 *of the Act, to apportion the expenses between the owner and the occupier.*

CASE stated by the metropolitan police magistrate sitting at the Marylebone Police-court.

At the court of summary jurisdiction sitting at the Marylebone Police-court an information was preferred by Walter Beal (the respondent) under the statute 1 Edw. 7, c. 22 (the Factory and Workshop Act 1901) alleging that the appellant was the owner of the premises No. 168, Cambridge-road, Kilburn, a place let as a bakehouse, for which a certificate required by sect. 101, sub-sect. 8, of the Factory and Workshop Act 1901, could not be obtained unless structural alterations were made, and alleging that the whole expenses of the alterations ought to be borne by the appellant.

This information was heard by the magistrate on the 4th Feb. and the 10th March 1904, when he made an order that the appellant should pay to the respondent 70*l.* in respect of the expenses, and 21*l.* for costs.

Upon the hearing of the information the following facts were proved before the magistrate:

The aforesaid premises, No. 168, Cambridge-road, Kilburn, were demised by one George H. Morris to one George Ashby by an indenture dated the 17th April 1886, for a term of twenty-one years from the 25th Dec. 1885, upon the terms in that indenture contained. The lessee (Ashby) was therein described as a baker, and he was to have the use of the landlord's fixtures upon the premises including those mentioned or specified in the schedule thereto, amongst which were a "brick-built oven and all iron fittings belonging thereto." The rent was 70*l.* per annum, payable on the usual quarter days, and the lease contained a clause that the lessee "will not, without the previous written consent of the lessor, carry on or permit to be carried on upon the said premises any trade or business other than that of a bread and biscuit baker."

The premises were by an indenture dated the 24th March 1899 assigned by George Ashby (the lessee) ot the respondent for the then unexpired residue of the term.

The premises were by an indenture dated the 25th July 1899 demised by the said George H. Morris to the respondent, who was therein described as a baker, for a term of twenty-one years from the 24th June 1899, upon the terms in such indenture contained, together with "the use of the landord's fixtures upon the said premises including those mentioned or specified in the schedule hereunder written." Among the fixtures specified in the schedule were a "brick-built oven and all iron fittings belonging thereto."

By the said indenture the lessee covenanted to pay on the usual quarter days the yearly rent of 70*l.*, "clear of all deductions whatsoever (landlord's property tax on the said rent only excepted)."

The lessee also covenanted that he would "during the said term pay the sewers rate and all existing and future taxes, rates, assessments, and outgoings of every description, whether Parliamentary, parochial, or otherwise, for the time being payable either by the landlord or tenant in respect of the said premises (except landlord's property tax)." He also covenanted that he would "as often as occasion shall require at his own expense and without being thereunto required so to do, well and substantially repair, uphold, paint. pave, scour, cleanse, glaze, maintain, and keep the said premises in repair and all outbuildings upon the said piece of land hereby demised and at the like expense scour, cleanse, and keep in good order and repair all the sinks, privies, and drains belonging to the same (damage happening to the demised premises by fire excepted)"; and that he would "not erect or build or suffer to be erected or built any additional erection or building whatever on the said piece of ground or any part thereof nor make an addition to the said messuage and buildings or any alteration in the elevation of the same either in front or rear"; and also that he would not "without the previous written consent of the lessor carry on or permit to be carried on upon the said premises any trade or business other than that of a bread and biscuit baker and confectioner." There were similar covenants in the lease of 1886.

For upwards of sixteen years next before the date of the information an underground bakehouse existed and was used upon the premises.

The certificate required by sect. 101 of the Factory and Workshop Act 1901 could not be obtained in respect of the bakehouse unless the work included in the undermentioned builder's account was carried out upon the premises. The account was an account of one C. Simmons against the respondent, dated the 1st Jan. 1904, for a sum of 133*l.* 17*s.* 6*d.*

The work included in the account was carried out upon the premises, and the amount of the account was paid by the respondent.

On the part of the appellant it was contended that it must be found that the premises were let as a bakehouse, and that for the purpose of ascertaining whether the premises were so let the magistrate ought only to have regard to the terms of the current lease thereof, being the indenture dated the 25th July 1899, and it was objected on the appellant's behalf that the indentures dated respectively the 17th April 1886 and the 24th March 1899, and the parol testimony of the respondent that for a period of sixteen years next before the date of the information an underground bakehouse existed and was used upon the premises, were not admissible in evidence.

On the part of the respondent it was contended to the contrary.

The magistrate overruled the objection, and received in evidence the two last-mentioned documents and the parol testimony, and found as a fact that the premises were during the whole of that period and still were at the date of the information used as a bakehouse.

On the part of the appellant it was further contended that on the true construction of the indenture dated the 25th July 1899, the premises had not been let as a bakehouse, and that unless so let the magistrate had no jurisdiction to make any order under sect. 101, sub-sect. 8, of the Factory and Workshop Act 1901.

On the part of the appellant it was also contended that by the covenants on the respondent's part contained in the indenture dated the 25th July 1899, he became and was liable to bear all such expenses as were in the information referred to, and that, regard being had to the terms of

the covenants, it was not just and equitable under the circumstances of the case that an order should be made for the payment of any part of such expenses by the appellant, on whose behalf the attention of the magistrate was called to the cases of *Thompson* v. *Lapworth* (17 L. T. Rep. 507; L. Rep. 3 C. P. 149), *Aldridge* v. *Ferne* (17 Q. B. Div. 212), and *Crosse* v. *Raw* (L. Rep. 9 Ex. 209).

On the part of the respondent it was contended, and the magistrate was of opinion, that the covenants did not impose on the respondent the obligation to pay the expenses, and that it was just and equitable to make the order made by him as hereinbefore mentioned.

The question of law for the opinion of the court was whether the magistrate, upon the above statement of facts, came to a correct determination and decision in point of law; if not, what should be done in the premises.

Sect. 101 of the Factory and Workshop Act 1901 (1 Edw. 7, c. 22) deals with the prohibition of underground bakehouses, and provides:

(1) An underground bakehouse shall not be used as a bakehouse unless it was so used at the passing of this Act. (2) Subject to the foregoing provision, after the first day of January one thousand nine hundred and four, an underground bakehouse shall not be used unless certified by the district council to be suitable for that purpose. (3) For the purpose of this section an underground bakehouse shall mean a bakehouse any baking room of which is so situate that the surface of the floor is more than three feet below the surface of the footway of the adjoining street or of the ground adjoining or nearest to the room. The expression "baking room" means any room used for baking or for any process incidental thereto. (4) An underground bakehouse shall not be certified as suitable unless the district council is satisfied that it is suitable as regards construction, light, ventilation, and in all other respects. (5) This section shall have effect as if it were included among the provisions relating to bakehouses which are referred to in section twenty-six of the Public Health (London) Act 1891. (6) If any place is used in contravention of this section, it shall be deemed to be a workshop not kept in conformity with this Act. (7) In the event of the refusal of a certificate by the district council, the occupier of the bakehouse may, within twenty-one days of the refusal, by complaint apply to a court of summary jurisdiction and, if it appears to the satisfaction of the court that the bakehouse is suitable for use as regards construction, light, ventilation, and in all other respects, the court shall thereupon grant a certificate of suitability of the bakehouse, which shall have effect as if granted by the district council. (8) Where any place has been let as a bakehouse, and the certificate required by this section cannot be obtained unless structural alterations are made, and the occupier alleges that the whole or part of the expenses of the alterations ought to be borne by the owner, he may by complaint apply to a court of summary jurisdiction, and that court may make such order concerning the expenses or their apportionment as appears to the court to be just and equitable, under the circumstances of the case, regard being had to the terms of any contract between the parties; or in the alternative the court may, at the request of the occupier, determine the lease.

Barnard Lailey for the appellant.—The magistrate was wrong in holding that the appellant was liable to these expenses under the section, and he had no jurisdiction to impose any part of these expenses on the appellant. In the first place, it is a condition precedent to the right of the magistrate to make any order under sect. 101, sub-sect. 8, that the premises should be let as a bakehouse. The words of the sub-section are express upon that point: "where any place has been let as a bakehouse"; and it is not enough to bring the section into operation, that the premises should have been in fact used as a bakehouse. The lease itself must show that the premises were let to be used as a bakehouse, and for no other purpose, and there is nothing in the present lease to show that the intention of the parties was that the premises should be used as a bakehouse and nothing else. Upon an application made between the same parties to Farwell, J. for an injunction in respect of these very same premises, to restrain the making of certain structural alterations, he expressed the opinion that the premises were not let as a bakehouse. There was therefore no letting of the premises as a bakehouse to bring the case within sect. 101, sub-sect. 8. In the second place, the magistrate's jurisdiction was subject to the contract between the parties. The lease in this case imposed upon the lessee (the respondent) the obligation to discharge all assessments and outgoings. The covenant is in the widest possible terms; it imposes upon the respondent the obligation of paying "all existing and future taxes, rates, assessments, and outgoings of every description . . . for the time being payable either by the landlord or the tenant." The expense incurred by the respondent was an "outgoing" within the meaning of that covenant, which the respondent was therefore under the express terms of the covenant, liable to pay. Upon that point this case is clearly concluded by *Goldstein* v. *Hollingsworth* (21 Mag. Cas. 616; 91 L. T. Rep. 85; (1904) 2 K. B. 578) and *Foulger* v. *Arding* (86 L. T. Rep. 488; (1902) 1 K. B. 700.) In *Goldstein* v. *Hollingsworth* (*ubi sup.*) where the lessee of an underground bakehouse had covenanted to pay "all existing and future . . . assessments, impositions, and outgoings of every description," it was held that the expenses of structural alterations ordered to be carried out under the sub-section, were "impositions" or "outgoings" within the meaning of the covenant, and that the lessee was bound to pay the same under his covenant. There is absolutely no distinction between that case and the present. So, in *Foulger* v. *Arding* (*ubi sup.*), the Court of Appeal held that an expense necessarily incurred by the lessor in abating a nuisance on the premises came within the words "impositions charged or imposed upon or in respect of the said premises on the landlord, tenant, or occupier of the same." With reference to the case of *Monk* v. *Arnold* (86 L. T. Rep. 580; (1902) 1 K. B. 761) it arose under a different Act—namely, sect. 7, sub-sect. 2, of the Factory and Workshop Act 1891, which did not contain any words similar to the words in the present sub-section, "regard being had to the terms of any contract between the parties"; and moreover, it was decided before the decision by the Court of Appeal in *Foulger* v. *Arding* (*ubi sup.*). Therefore these two answers may be given to the decision in *Monk* v. *Arnold* (*ubi sup.*)—namely, that the words of the section upon which it was decided did not contain the words in the present sub-section, that regard should be had to the terms of any contract between the parties, and further, that since it was decided the Court of Appeal have held similar expenses to be "outgoings." In the third place, that the magistrate

has no power in such a case to make the order, is emphasised by the fact that the magistrate has power to determine the lease, "or, in the alternative, the court may, at the request of the occupier determine the lease." Here he was not asked to determine the lease, but the existence of that power negatives the power to make an order for payment of these expenses. Upon these grounds the magistrate had no jurisdiction to make the order.

Danckwerts, K.C. (*A. Hutton* with him) for the respondent.—The premises were let as a bakehouse within the meaning of the sub-section. They were let to the respondent, who was therein described as a baker, and they were let together with the use of the landlord's fixtures upon the premises, including those mentioned in the schedule. Then turning to the schedule, amongst the fixtures therein specified we find "a brick-built oven and all iron fittings belonging thereto." Then the lease goes on to say that the lessee covenants that he would not without the consent of the lessor carry on upon the premises any trade or business "other than that of a bread and biscuit baker." That is, he is not to use the premises otherwise than as a baker. There is, therefore, no question that the place was let as an underground bakehouse, and that the parties contemplated that it should be so used. He also covenanted that he would not erect or build any additional building or make any alteration in the elevation of the same. What was complained of was some alteration in connection with the elevation, and the lessee had covenanted not to make any alteration in that respect. To bring the case within the section it is not necessary that the premises should be let in express terms for a bakehouse; it is sufficient if it clearly appears that it was the intention of the parties that the premises should be used as a bakehouse. Then, as to the second point, the expenses of these alterations were not "outgoings" within the meaning of the covenant in the lease. The word "outgoings" was dealt with by Farwell, J. in *Valpy* v. *St. Leonard's Wharf Company* (1 L. G. Rep. 305), and (at p. 309) he cites with approval the passage from the judgment of Collins, M.R. in *Foulger* v. *Arding* (*ubi sup.*), where he says: "The word 'outgoings' in its widest sense might cover more than the parties to such a covenant could possibly have contemplated. But it was not suggested that, because it might cover a wider area, it could not be construed as covering an obligation which the parties might reasonably be supposed to have contemplated." Applying that here, it could not be supposed that the parties to this lease made in the year 1899 could ever have contemplated that the Legislature would in 1901 impose this burden on the premises, and, therefore, such a condition of things could not reasonably be supposed to have been within the contemplation of the parties when they entered into this lease. It is important in this case that the lease was made in 1899, before this provision as to structural alterations in the present Act, and after the provision in sect. 27 of the Factory and Workshop Act 1895, which contained no clause as to structural alterations, such as is in the present Act. Sect. 101 draws a distinction between alterations which are structural and those which are non-structural, and it is only in respect of structural alterations that the magistrate has power to apportion expenses; and it is submitted that under sub-sect. 8 the magistrate has a right, if he thinks it just and equitable, to disregard the covenant and apportion the expenses. The case of *Goldstein* v. *Hollingsworth* (*ubi sup.*) does not conflict with this view, inasmuch as the lease in the case was granted in 1903, and therefore after this Act of 1901 had passed, so that it well might have been in the contemplation of the parties that this burden would have been imposed on the premises. In that case the magistrate decided that he could not disregard the covenant, and the only point was whether the expenses came within the covenant. *Monk* v. *Arnold* (*ubi sup.*) is in the respondent's favour. It was decided upon a section which did not contain the words "regard being had to the terms of any contract between the parties"; and Lord Alverstone, C.J. there said: "He" (that is, the County Court judge) "is bound, I think, to take into consideration the contract between the parties, but, unless its terms are such as to make it unjust and inequitable that he should divide the amount between them, I think he has jurisdiction to do so"; and Darling and Channell, JJ. agreed with that view. The court there held that, notwithstanding the covenant, there was jurisdiction to divide the expenses, and the judge did in fact apportion them. So that *Monk* v. *Arnold* (*ubi sup.*) is absolutely clear in favour of the respondent. [Lord ALVERSTONE, C.J.—We all think that the real point you have to meet is to distinguish this case from *Goldstein* v. *Hollingsworth* (*ubi sup.*). The covenant did not impose upon the respondent the duty of paying these outgoings; and even if the covenant did cover these expenses, sub-sect. 8 expressly overrides it, and gives the magistrate power to do what is just and equitable. The case is not covered by *Goldstein* v. *Hollingsworth* (*ubi sup.*); it rather falls under *Monk* v. *Arnold* (*ubi sup.*). Upon the principles laid down by Farwell, J. the parties could not have intended that the structural alterations, necessary to enable the premises to be carried on as a bakehouse, should have to be borne by the tenant.

Lailey in reply.

Lord ALVERSTONE, C.J.—The real point in this case is whether it can be distinguished from the case of *Goldstein* v. *Hollingsworth* (*ubi sup.*), that is to say, whether there is a substantial distinction between the two cases. It may be that grounds may be suggested for reviewing that decision; but, at all events, we are bound by it. If the present case should go further, I should wish to refer to my judgment in *Goldstein* v. *Hollingsworth* (*ubi sup.*), so as to prevent any mistake as to the grounds of my judgment in that case. It is perfectly true, as has been pointed out during the argument, that the lease in that case was granted after the passing of the Factory and Workshop Act 1901, and after the decision in *Foulger* v. *Arding* (*ubi sup.*), but it was not upon that ground that I held that the lessee's covenant in that case to pay all "impositions and outgoings," included the expenses which were then in question. I construed that covenant as including expenses of this kind, because of the construction which the Court of Appeal put upon a similar covenant in *Foulger* v. *Arding* (*ubi sup.*), and without any reference to the date when the

lease was granted. The question, therefore, is whether our decision in *Goldstein* v. *Hollingsworth* (*ubi sup.*) covers this case. In this case there was the lease granted in 1899 for a term of twenty-one years, and I agree with the contention of counsel for the respondent that the premises were let as a bakehouse, and under conditions by which the tenant was bound to keep them up as such, and they are therefore *primâ facie* premises to which the provisions of sub-sect. 8 of sect. 101 of the Act apply. Therefore I think that on that point the magistrate was quite right, and the judgment of Farwell, J., which has been referred to, even if we were bound by it, has little to do with that part of the case. In *Goldstein* v. *Hollingsworth* (*ubi sup.*) the magistrate held that the expenses came within the words "impositions and outgoings," and upon that ground he held that he had no jurisdiction to apportion the expenses. We decided that the magistrate was right in so construing the covenant, and we accordingly affirmed his decision. That brings us back to the question: Is there a sufficient ground for distinguishing this case from *Goldstein's* case (*ubi sup.*). In the case now before us the magistrate says that he was of opinion "that the covenants did not impose on the respondent the obligation to pay the expenses, and that it was just and equitable to make the order" for the apportionment. I can only understand that to mean that the magistrate was of opinion that the covenant in this case did not put the burden of these expenses upon the tenant. Counsel for the respondent has pressed us to say that the magistrate's language must be taken as meaning that, even if the covenant applied to and included these expenses, it was not in the magistrate's opinion just or equitable to enforce that covenant with regard to these particular expenses. That does not seem to me to be a fair construction of his meaning; but, even if it were, it would not help the respondent, because I think the magistrate would have no jurisdiction so to hold. I therefore think that the principle of *Goldstein's* case (*ubi sup.*) applies and is binding upon this court. Kennedy, J. there says that where there is a covenant by the tenant to pay all outgoings, the question whether it is just or equitable to make an apportionment on the landlord does not arise; and Wills, J. says the same thing. Speaking for myself, I think a strong argument in favour of this view is to be found in the fact that the Act was amended and the provision at the end of the sub-section added, that the court may at the request of the occupier determine the lease. I think, therefore, we are bound by these two cases to say that in this case the magistrate was not authorised by this section to disregard the covenants in the lease so long as the lease existed. In my opinion, therefore, the magistrate was wrong in apportioning the expenses under the sub-section, and I think that the appeal must be allowed.

KENNEDY, J.—I am of the same opinion. Upon the question whether these premises were "let as a bakehouse" within the meaning of the sub-section, I do not express an opinion, as it is unnecessary to decide that point. But, speaking for myself, it seems to me that for the premises to be "let as a bakehouse" within sub-sect. 8 the premises must be let as a bakehouse in such a way as to prevent the tenant from using the premises in any other way than as a bakehouse. If the premises were let upon the terms that the tenant not only may use them as a bakehouse, but must so use them, then, if the district council required the making of structural alterations as a condition of granting their certificate, the tenant would be compelled either to carry out the structural alterations at his own expense, or abandon the use of the premises altogether. It was, as I think, to remedy that possible hardship to the tenant that sub-sect. 8 was introduced. Then, with regard to the other question, I think the case is covered by *Goldstein* v. *Hollingsworth* (*ubi sup.*). One must give the words of the covenant their plain and ordinary meaning, and the magistrate has here found a term which I can only read in one way—namely, that "outgoings" did not include these expenses. He says that he was of opinion "that the covenants did not impose on the respondent the obligation to pay the expenses, and that it was just and equitable to make the order made by him." It has been suggested that one ought to read those words as showing that the magistrate thought that these expenses may have been outgoings, but that it was just and equitable to apportion them. I cannot so read them. From what the magistrate has said, it is clear that the ground on which he made this order was that in his opinion the tenant's covenant to pay all outgoings did not include expenses of these structural alterations, and in that I think he was wrong.

PHILLIMORE, J.—I am of the same opinion. I have a difficulty in seeing and expressing any distinction between this case and *Goldstein* v. *Hollingsworth* (*ubi sup.*). I will put my judgment in the following propositions: First, I refrain from expressing any doubt as to the correctness of the decision in *Goldstein* v. *Hollingsworth* (*ubi sup.*); it is, at all events, binding on this court. Secondly, it is, in my opinion, very undesirable to allow the construction of such a covenant as this to vary with minute variations in the language used. This covenant has been fruitful of litigation, and it seems to me that the best way to deal with it is to put a broad construction upon it, and to adhere to it. Thirdly, I concur with my brother Kennedy in reserving the question whether these premises were "let as a bakehouse." Lastly, before the magistrate can put in force the provisions of this sub-section as to equitable apportionment, he must find as a fact not only that the premises have been used as a bakehouse—as he has done here—but also that they have been let as a bakehouse, and he should state that finding in the case, which he has not done here.

Appeal allowed.

Solicitor for the appellant, *G. B. Crook.*
Solicitors for the respondent, *Young* and *Sons.*

Wednesday, July 13, 1904.

(Before Phillimore, J.)

Mayor, &c., of Norwich *v.* Norwich Electric Tramways Company. (*a*)

Tramway—Construction of Act—Maintain and keep in good condition "junction" of company's paving and corporation's surface.

By the Norwich Electric Tramways Act 1897 *the defendant company were to maintain and keep in good condition "the junction of the paving laid and maintained by the company with the surface laid and maintained by the corporation."*

Held, that the word "junction" could not only mean the mere point or place where the two surfaces met, but that the defendant company had to maintain the even contour of the road at the junction of the two surfaces.

Action.

The plaintiffs sought to recover 53*l.* 13*s.* 10*d.* repairs to roadways, and claimed a declaration as to their rights under the Norwich Electric Tramways Act 1897, s. 57, sub-s. 5.

The material part of sect. 57 was as follows:

If the company fail to maintain and keep in good condition to the satisfaction of the corporation . . . (5) the junction of the paving laid and maintained by the company with the surface laid and maintained by the corporation, the corporation may, if they think fit, themselves, at any time after seven days' notice to the company, do the work necessary for the repair and maintenance of the road, and the expense reasonably incurred by the corporation in so doing shall be repaid to them by the company with the addition of 5 per centum of such expense.

The facts of the case, as stated in the learned judge's judgment, which gave rise to the action were as follows:—

The defendant company's tramways in some cases are laid in granite setts, or in wood edged with a line of granite setts, the roadway on either sides being of macadam. The life of a granite sett is about twenty years, but macadam under ordinary traffic will not last more than four years. The evidence given at the trial showed that the effect of the above was to produce, as the macadam wore away, a sort of descent or step from the setts on to the macadam. Then the line of setts tended to form a guiding ridge along which the wheels of vehicles ran, forming a trough which accumulated water, softening the macadam road, and further increasing the depth of the trough to 2in. to 2½in. It was also proved in evidence that this defect in the roadway could be made good, if taken in time, by the picking up of the old macadam, and putting in of new metal over a space of about 3in. in breadth from the setts.

The corporation contended that it was to meet this expense and trouble and to throw it upon the company that sub-sect. 5 of sect. 57 of the Norwich Electric Tramways Act 1897 was passed.

Macmorran, K.C. and *E. E. Wild* for the plaintiffs.

F. Low, K.C. and *Henlé* for the defendants.

Phillimore, J.—In this action the plaintiff corporation seeks to recover from the tramways company a sum of 53*l.* 13*s.* 10*d.* and interest; and both parties seek a declaration as to their respective rights under sect. 57, sub-sect. 5, of the Norwich Electric Tramways Act 1897 (60 & 61 Vict. c. 254). By the Tramways Act 1870 (33 & 34 Vict c. 78), s. 28, a tramway company has to maintain and keep in good condition and repair to the satisfaction of the road authority: (1) So much of the road as lies between the rails of the tramway; (2) if there are two tramways belonging to the same tramway company within 4ft. of each other, the portion of the road between these two tramways; (3) so much of the road as extends on either side 18in. beyond the rails of the tramway. By the same section, if the tramway company fails to comply, the road authorities may, after seven days' notice, open and break up the road and do the necessary works at the expense of the tramway company. The Norwich Act by sect. 2 incorporates Part 2 of the General Tramways Act, except when expressly varied. Sect. 28 is in Part 2. The Norwich Act has, however, certain special provisions which probably were the results of a Parliamentary bargain between the City of Norwich and the Norwich Electric Tramways Company. Sect. 53 provides that whenever the road authority, which is for this case the corporation, alters the level of any road on which a tramway is laid, the company shall at the same time alter its rails so that the uppermost surface shall be on a level with the altered surface of the road, and shall make corresponding alterations to level with regard to the portion of road between the rails and to the 18in. space. Sect. 56 imposes a penalty of 5*l.* a day in case the rails of the tramways or the substructure are or is out of repair so as to be a danger or annoyance to ordinary traffic, and further provides that where a street is so narrow that there is less space than 3ft. between the footpath and the nearest tramway rail the company shall pave and maintain the street right across. This imposition of penalty and this obligation in the case of narrow streets is an addition to the law under the general Act. Sect. 57 has provisions which are very like those contained in sect. 28 of the general Act, and must, I suppose, be taken to be in substitution for those contained in sect. 28. I quote them: "If the company fail to maintain and keep in good condition to the satisfaction of the corporation: (1) So much of any road whereon any tramway belonging to them is laid as lies between the lines of the tramway; (2) the portion of the roadway between the tramways where two lines of tramway are laid by the company in any road; (3) so much of the roadway as extends 18in. beyond the rails of and on each side of any such tramway; (4) the whole width of the roadway where any tramway shall have been constructed in any street so that a less space than 3ft. shall intervene between the outside of the footpath on either side of such street and the nearest rail of such tramway; (5) the junction of the paving laid and maintained by the company with the surface laid and maintained by the corporation; the corporation may if they think fit themselves at any time, after seven days' notice to the company, do the work necessary for the repair and maintenance of the road, and the expense reasonably incurred by the corporation in so doing shall be repaid to them by the company with the addition of 5 per cent. of such expense." On this

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

section I notice, first, that the corporation is not merely to be paid their expense, but to have interest on the outlay; secondly, that this section applies to the whole surface of narrow streets, thus providing machinery for enforcing the special obligation provided by sect. 56; thirdly, that, incidentally as it were and without the interposition of any direct order upon the tramway company to repair the space between two tramways more than 4ft. apart, the corporation is by this section enabled to enforce such a repair. These observations are of assistance in the construction of the one sub-section now in dispute, which enables the corporation to do the work and charge the company, if the latter fails in the opinion of the corporation "to maintain and keep in good condition the junction of the paving laid and maintained by the company with the surface laid and maintained by the corporation." The state of things to which I am asked to apply this sub-section is as follows: The tramways in some cases are laid in streets paved with wood, and as to these streets no question arises. In other cases the road is made with macadam, the tram rails being laid either in granite setts or in wood edged with a line of granite setts. The life of a granite sett is about twenty years, but macadam in roads where there is an ordinary amount of town traffic will not last more than four years, so that at the point where granite meets macadam the latter is wearing down five times as fast as the former. The effect of this, according to the evidence, is to produce as the macadam gets older a sort of descent or step from the setts on to the macadam. Then the line of setts tends to form a "guiding ridge" along which the wheels of vehicles will run, forming a trough which tends to deepen and which accumulates water, making the macadam rotten or soft and further increasing the depth. This depth, according to the diagrams, models, and photographs submitted to me, was, before the corporation took the work in hand, from ½in. to 2in., and in the worst cases 2½in. The existence of this trough and its depth were not seriously disputed by the company; but it was said on behalf of the company that this trough was not found except in cases where the general surface of the macadam was bad and the whole macadam needed repair. This contention gave rise to the only dispute of fact in the case. As to it I think the company may have been in some cases right at any rate to this extent that the trough would not have been so deep had the macadam been in better repair, but I am satisfied that in the greater number of cases where there was a guiding ridge and an objectionable trough the rest of the macadam was in sufficiently good repair. The particular sum in dispute, which represents the cost of the work which the corporation has done to fill up these troughs, being small, and the great object being the ascertainment of the principle, I have not thought it necessary to look closely into the items. No doubt, if it should be ultimately decided that there is any liability on the company in respect of these troughs, those who represent the company will in proper cases meet a seven days' notice to repair by a counter contention that the corporation should put the whole macadam in good order. I say ultimately because the annual sum involved by the decision of this case is considerable, and the matter will probably go to appeal. What has to be considered is what is to be done when macadam has still some years of life, but it is worn down appreciably below the surface of the setts. The city engineer says that this may occur in places every three months, and could, if taken in time, be made good by the picking up of the old macadam and the putting in of the new metal over a space of about 3in. breadth from the setts. If not taken in time it may require action over as much, I think, as 14in. breadth. The corporation says that it was to meet this known expense and trouble, and to throw it upon the shoulders of the company, that sub-sect. 5 was agreed to and passed. The company says that it would be absurd to expect it to trespass upon or interfere with that part of the road which is maintained by the corporation. The sub-section is certainly difficult to construe. What is meant by the word "junction"? The company says "junction" means the point or place where the two surfaces meet, and gives as an example of maintaining the junction that, if there were a crack in the earth's surface separating the setts from the macadam, the company would have to bridge it over. The corporation replies that much more than this is meant, and that you cannot maintain a point or place in good condition, and that the junction must be something material. I have a further difficulty, that what is to be maintained is not the junction of two surfaces, but the junction of a paving which is a solid with a surface. Again, what surface can be described as laid and maintained by the corporation? No doubt the corporation has in the first instance laid the surface of the road before the tramway came there. When the tramway company breaks up it must make good for the corporation, under sect. 27 of the Tramways Act, and the surface so made good may be said to be the surface laid by the corporation. No doubt also if the corporation changes the level of the road, as contemplated by sect. 56 of the Norwich Act, when it relays the macadam in the course of repair, it "lays a surface." But what surface does it "maintain?" The tramway company, as I understand, contends that these words import a condition, and that the sub-section, taking it at its worst for the company, means that if the corporation maintain the surface of the macadam to the level at which it was laid, then, and then only, can it require the tramway company to keep the two surfaces even at the same height at the junction. But this contention would almost rob the sub-section of practical effect. It would only leave cases where the whole structure of the tramway had sunk or risen, or possibly, in the case of a wooden structure, had shrunk, or where there was a fissure, as I have already said, in the earth. Except this last, rather a fanciful case, these cases would be all cases of bad repair, and would be covered by the other sub-section. The only other case to which it might apply was suggested by Mr. Banister, the engineer and manager of the tramway company. He thought that the macadam might sink, and that it might be proper then to round off the edges of the setts, so as to preserve a nearly uniform contour. But this suggestion, which should not be pressed against his company, gives up the point. It only alters the mode in which the tramway company should perform that duty which the corporation insists upon. In fact I

suppose it would be more expensive for the tramway company to plane away the edges of these setts than it would be for it to fill up the trough with macadam. I must if possible give a meaning to this sub-section, and upon the whole, taking into account the fact that there had been much experience of tramways before 1897, when this Act was passed, and that it was known that macadam wore away more quickly than setts and was thus liable to create a guiding ridge, I think it was the intention to throw upon the tramway company, as a condition of the privilege which it was seeking, the duty to maintain an even contour of the road by a proper junction of the two surfaces. In order that this duty may arise, the macadam must be in such a state that it can be said to have a surface and not several, or to put it in other language, the corporation must maintain the surface which it has laid, though it may maintain it at a lower level. I therefore give judgment for the plaintiffs for 53*l.* 13*s.* 10*d.* and 5 per cent. With regard to the proposed declaration, I asked that each party should suggest in writing the form which it should take, and these forms have since been sent to me. That proposed on behalf of the corporation is as follows: "A declaration that the obligation of the company under sect. 57 (5) of the Norwich Electric Tramways Act 1897 to maintain and keep in good condition the junction therein mentioned extends to cases where, by reason of the presence of tramways in a road, the traffic in such road has caused the surface laid and maintained by the corporation to become worn down below the level of the paving laid and maintained by the company, and involves the maintenance by the company of a uniform level of such surface and paving, whether that is to be effected by the raising of the surface immediately adjoining such paving or the lowering of the paving itself." The defendants pray for a declaration "That the true meaning of the word 'junction' as set forth in sect. 57 (5) of the Norwich Electric Tramways Act 1897 is the line of contact formed by the abutment of a vertical plane (that is to say, the outer surface of the paving laid and maintained by the company) upon a horizontal plane (that is to say, the surface laid and maintained by the corporation), and that the right of the plaintiffs to do and charge for work under the said sub-section does not arise until and unless the level of the paving laid and maintained by the company at its points of junction with the surfaces laid and maintained by the corporation varies from the level at which such paving was originally laid." This last paragraph aptly expresses the intention of the company, which I have rejected. As to the form proposed by the corporation, I observe that it somewhat narrows their claim, for it proposes that the duty shall only arise where by reason of the presence of the tramway the traffic has caused the surface of the roadway to become worn down below the level of the tramway structure. In other words, the duty will not arise as soon as the step is formed, but only when the guiding ridge has made a trough. To as much as this they are fully entitled in my opinion. But I do not agree that the obligation of the company involves the maintenance by the company of "a uniform level." Nor was this asked for. It would mean lowering of the whole tramway structure or the raising of all the macadam at once. What was desired was an unbroken contour, a smoothing or bevelling off for perhaps three inches, perhaps more, so that there should be no sharp descent. Upon the whole I think the words "uniform and unbroken contour" should be substituted for the words "uniform level," and with this alteration I accept the form proposed by the corporation and I declare accordingly. The plaintiffs should have the costs of the action.

Judgment for the plaintiffs.

Solicitors: *Sharpe, Parker,* and *Co.*, for *Miller,* Norwich; *Crowders, Vizard,* and *Oldham,* for *Mills* and *Reeve,* Norwich.

Wednesday, July 13, 1904.

(Before Lord ALVERSTONE, C.J., KENNEDY, and PHILLIMORE, JJ.)

FITCH *v.* BERMONDSEY GUARDIANS. (*a*)

Lunacy — Asylum — Expenses of maintenance of lunatics—Pauper lunatics settled in parish outside county or borough to which the asylum belongs—Limit of charge for maintenance—Lunacy Act 1890 (53 *&* 54 *Vict. c.* 5), *s.* 283, *subss.* 1, 3.

Sub-sect. 1 *of sect.* 283 *of the Lunacy Act* 1890 *requires every visiting committee to fix "a weekly sum, not exceeding* 14*s., for the expenses of maintenance and other expenses of each pauper lunatic in the asylum," and sub-sect.* 3 *gives them power to fix "a greater weekly sum not exceeding* 14*s." in respect of pauper lunatics "other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs."*

Held, that the committee have no power under sub-sect. 3 *to fix a greater weekly sum than* 14*s. for the expenses of maintenance of out-county pauper lunatics in the asylum; but that the sub-section merely gives them power to make a differential charge between out lunatics and home lunatics, and, while charging less than the* 14*s. in respect of home lunatics, to charge a greater sum, up to the limit of* 14*s., in respect of out lunatics.*

APPEAL from the City of London Court.

The action was brought by the visiting committee of the City of London Lunatic Asylum, in the name of their clerk, Mr. Charles Fitch, to recover a sum of 11*l.* 5*s.* from the guardians of the poor of the parish of Bermondsey, for the lodging and maintenance in the asylum from the 30th Dec. 1903 to the 30th March 1904 of a pauper lunatic whose legal settlement was in the parish of Bermondsey.

By a resolution of the 1st Aug. 1901, under sect. 283, sub-sect. 1 of the Lunacy Act 1890, the visiting committee of the asylum fixed the weekly sum or charge for the expenses of maintenance and other expenses of each pauper lunatic in the asylum chargeable to the union of the city of London at 12*s.* 3*d.*, increasing the rate from 11*s.* 1*d.*, at which it then stood.

By a resolution of the 4th Feb. 1904, under sub-sect. 3 of sect. 283, the committee increased the weekly charge for the maintenance and expenses in the asylum of pauper lunatics chargeable to unions outside the City from 14*s.* to 21*s.*, and

(*a*) Reported by W. W. CAR, Esq., Barrister-at-Law

notice of that resolution was thereupon given to the defendants.

The sum now sued for represented forty-five days' lodging and maintenance of the lunatic at 2*s.* per day (that is, at the rate of 14*s.* a week) from the 1st Jan. 1904 to the 15th Feb., and forty-five days at 3*s.* per day (that is, at the rate of 21*s.* a week) from the 15th Feb. to the 30th March.

The defendants paid into court the sum of 9*l.*, being 2*s.* a day or 14*s.* a week for the whole period of ninety days, and the action proceeded in respect of the balance. The County Court judge gave judgment for the defendants, with leave to the plaintiff to appeal.

The plaintiff appealed.

The Lunacy Act 1890 (53 & 54 Vict. c. 5) provides:

Sect. 283 (1). Every visiting committee shall fix a weekly sum, not exceeding fourteen shillings, for the expenses of maintenance and other expenses of each pauper lunatic in the asylum, and of such amount that the total of such weekly sums shall be sufficient to defray such expenses and also the salaries of the officers and attendants of the asylum, and such weekly sum may from time to time be altered. (2) If fourteen shillings a week is found insufficient for the purposes aforesaid, the local authority to whom the asylum belongs may by order direct such addition to be made to the weekly sum as to the local authority seems necessary, and every such order shall be signed by the clerk of the local authority, and forthwith published in a local newspaper. (3). A committee may fix a greater weekly sum, not exceeding fourteen shillings, to be charged in respect of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs. (4). Any excess created by the payment of such greater weekly sum may, if the visiting committee think fit, be paid over to a building and repair fund, to be applied by the committee to the altering, repairing, or improving the asylum, and the committee shall annually submit to the local authority a detailed statement of the manner in which such fund has been expended.

The corresponding section in the Lunatic Asylums Act 1853 (16 & 17 Vict. c. 97)—repealed by the Act of 1890—was sect. 54, which provided as follows:

Every committee of visitors shall fix a weekly sum to be charged for the lodging, maintenance, medicine, clothing, and care of each pauper lunatic confined in such asylum, of such amount that the same may be sufficient to defray the whole expense of the lodging, maintenance, care, medicine, and clothing, and other expenses requisite for each pauper lunatic, and that the total amount of such weekly sums, after defraying such expenses, may also be sufficient to pay the salaries of the officers and attendants, and such committee may from time to time alter the amount of such weekly sum as occasion may require; provided always, that any such committee may, if they think fit, fix a greater weekly sum to be charged as aforesaid in respect of pauper lunatics other than those sent to such asylum from or settled in some parish or place situate in any county or borough to which such asylum belongs; provided also, that such sum shall in no case exceed the rate of fourteen shillings per week; but if the aforesaid rate of fourteen shillings be found insufficient for the purposes aforesaid, it shall be lawful for the major part of the justices of the county or borough, or of each county or borough to which such asylum may belong, present at any general or quarter sessions for such county, or at a special meeting of the justices of such borough, or each such county or borough respectively, to make such addition to such rate as to them respectively shall seem fit and necessary, and to make an order or orders accordingly, which order or orders shall be signed by the clerk of the peace for the county, or clerk to the justices for the borough, and forthwith published in some newspaper commonly circulated within such county or borough.

Danckwerts, K.C. (*A. Neilson* with him) for the plaintiff.—The sole question is whether, upon the construction of sect. 283 of the Lunacy Act 1890, a county which owns a lunatic asylum can charge more than 14*s.* a week in respect of out pauper lunatics; that is, for pauper lunatics brought in from other counties. The scheme of the section is that pauper lunatics are maintained in the asylum, and if they have a settlement in a union in the county where the asylum is, then a certain amount can be claimed from that union; but if the pauper is settled in an out union, then the question is what sum can be charged. The Lunacy Act of 1890 is a consolidation Act, and it is therefore of advantage to look at the previous Act, which is the Lunatic Asylums Act of 1853 (16 & 17 Vict. c. 97). Sect. 54 of that Act deals with the point, and under that section the visiting committee may fix a weekly sum to which there is no limit for lunatics within the county, and then they can also fix "a greater weekly sum" for lunatics that come in from outside the county, provided that "such sum"—that is, such greater sum—"shall in no case exceed 14*s.*" The corresponding provision in the Act of 1890 is sect. 283, which has introduced this alteration, that the weekly sum that can be charged to any county paupers is limited to 14*s.* under sub-sect. 1, and that applies to both classes of paupers. Then if that sum is found to be insufficient, sub-sect. 2 gives, not to the visiting committee, but to the local authority to which the committee belongs, power to order a larger sum than 14*s.*; so that in certain circumstances for in-county patients more than 14*s.* can be charged, provided the local authority so order. Then comes sub-sect. 3, and under that it is contended for the defendants that in no case can more than 14*s.* be charged for an out-patient. That cannot be the construction of the sub-section. It allows a difference between the two charges of 14*s.*, so that, supposing they are charging 12*s.* a week for in-patients, then they would be entitled to charge up to 26*s.* for out-patients. That certainly was the case under the Act of 1853, where the 14*s.* was the limit of the greater weekly sum, and not the limit of both sums combined. Sub-sect. 3 of sect. 283 says that the committee may fix "a greater weekly sum, not exceeding 14*s.*," in respect of out-patients; that means that the excess of the amount fixed for the out-patients over the amount fixed for the home patients shall not exceed 14*s.* The greater weekly sum there means an additional weekly sum not exceeding 14*s.*, and it cannot mean that the total sum is not to exceed 14*s.* Sect. 54 of the Act of 1853 included "lodging," as well as the maintenance of the lunatic in the asylum; sub-sect. 1 of sect. 283 of the Act of 1890 omits the "lodging," that is to say, it does not provide for the lodging of the lunatic, which means the expenses of the buildings and the maintenance of the same, as the sub-section merely provides that maximum of 14*s.* "for the expenses of maintenance and other expenses"; and the 14*s.* in sub-sect. 2 is "for the purposes aforesaid," which are "maintenance and other expenses." The expenses of the lodging of the

lunatic, that is, of the buildings and their maintenance, are dealt with in other ways: (sects. 238, 239, 241, 254, 266, 273). Under those sections, which come under Part 9, dealing with county and borough asylums and the obligation to provide asylums, the whole of the accommodation of the buildings is to be provided by the local authority. Then Part 10, beginning with sect. 283, deals with a different subject-matter, the expenses of pauper lunatics in the asylum, once the asylum has been provided, the providing of the asylum corresponding to the "lodging" in the Act of 1853. Under sub-sects. 1 and 2 of sect. 283 there is no means of making the out-lunatics contribute anything to the building fund, that is, for lodging; that is done by sub-sects. 3 and 4, and any excess created by the payment of the greater weekly sum under sub-sect. 3 may under sect. 4 be paid over to "a building and repair fund." By reading "the greater weekly sum, not exceeding 14*s*." in sub-sect. 3 in respect of out-patients, as meaning an additional weekly sum not exceeding 14*s*., the whole section becomes consistent; if read otherwise great inconsistencies would follow.

R. Cunningham Glen, for the defendants, was not called upon.

Lord ALVERSTONE, C.J.—The point raised by the appellant's counsel is certainly one of great ingenuity, but the section in question here—sect. 283—seems to me not to admit of the construction which counsel has put upon it. I was very much impressed with the suggestion that this Lunacy Act of 1890 was a consolidation Act, which I think it is, and that the old Act of 1853 allowed extra payment. I think that if it had been possible to put the construction contended for upon the words in question, we ought to have striven to do so, but looking at the words in sect. 54 of the Act of 1853, where the words are "a weekly sum to be charged for the lodging, maintenance, medicine, clothing, and care of each pauper lunatic confined in such asylum," and "a greater weekly sum" in respect of out-lunatics, and, looking at the words "a greater weekly sum" in sub-sect. 3 of sect. 283 of the present Act, I am quite satisfied that in the earlier Act the "greater weekly sum" was not an additional sum, but was the total sum to be charged. That, however, is not conclusive, because, as counsel has pointed out, even if he could not rely upon sect. 54 of the earlier Act, the language of sect. 283 of the Act of 1890 may have altered the law. In sect. 283, in my opinion, the language is too strong to admit of the appellant's contention. The first sub-section says: "Every visiting committee shall fix a weekly sum, not exceeding fourteen shillings, for the expenses of maintenance and other expenses of each pauper lunatic in the asylum." Counsel has argued that the present Act has dropped out the word "lodging" because there are expressions and sections in the Act showing that the provision of houses or asylums is to be dealt with and defrayed and met in a different way. That may possibly afford some ground for thinking that that is the reason why the words have been changed. I do not myself think that that was the intention. I think the intention was to introduce the words "maintenance and other expenses" as a compendious mode of describing the words used in the earlier Act, "lodging, maintenance, care, medicine and clothing, and other expenses." We have then to deal with sub-sect. 2. That sub-section says: "If fourteen shillings a week is found insufficient for the purposes aforesaid, the local authority to whom the asylum belongs may by order" increase it, and under that clause the amount might be increased to whatever figure the local authority think right. Then, coming to sub-sect. 3, my view of that sub-section is this: It gives a power to the committee, not to increase the 14*s*., but in some cases to fix a greater weekly sum not exceeding 14*s*. Does that refer to the expenses of maintenance and other expenses of the pauper lunatics, or does it refer to an additional charge to be made in respect of lunatics from the out counties, because they are going into the asylum of another county. It would have been perfectly competent for the Legislature to have said that the committee might charge in respect of lunatics from other places not exceeding any sum they thought right to provide; but it seems to me that the language "a committee may fix a greater weekly sum," refers to the same weekly sum as is referred to in sub-sect. 1, and that it would not be in accordance with the proper construction of the language to treat that as being an additional weekly sum, and if it speaks to the total sum then the maximum ought to be 26*s*. and not 14*s*. I think sub-sect. 3 was intended to meet the case which is dealt with in the earlier sub-section—namely, that although the commitee do not charge up to the maximum in the case of their own lunatics, they may charge more for the out lunatics than for their own lunatics in respect of maintenance and other expenses, but so as not to go above 14*s*. In my view, the language of the section is too strong to admit of the argument which counsel has pressed upon us. Then with regard to the argument upon the words in sub-sect. 4 that any excess created by the payment of such greater weekly sum may be devoted, if the committee think fit, to special funds, I do not think that the words advance the appellant's argument one way or the other. If the committee do not wish to charge more for the out lunatic than for the home lunatic, within the limit of 14*s*., then there will be no such excess; if they do think right to make a differential rate and there is such an excess, then the sub-section gives them the power to apply it for a special purpose. That does not seem to me to enable us to put a different construction on the words of sub-sect. 3 than I have indicated. I have come to the conclusion that sub-sect. 3 was only intended to enable the committee to differentiate in respect of the out lunatic as compared with the home lunatic within the maximum of 14*s*., and was not intended as an entirely new clause enabling the committee to make a quite new and separate and different charge in respect of the out lunatic, based upon the idea or having regard to the fact that he was coming into their county from another county. I therefore come to the conclusion that, apart from the order which may be made under sub-sect. 2, no higher charge than 14*s*. can be made. The appeal therefore must be dismissed.

KENNEDY, J.—I am of the same opinion. I do not say, especially after the careful argument we have had, that the matter is free from diffi-

culty, but in my opinion, if the section is read in its simple and natural meaning, there is no great difficulty about it. The first sub-section provides that the committee are to fix a weekly sum, not exceeding 14s., for the expenses of maintenance and other expenses of each pauper lunatic in the asylum; and it provides that that sum when fixed is not fixed unalterably; it is a weekly sum which may from time to time be altered. The maximum being in that clause 14s., it was considered that there might be a case in which the 14s., the maximum, would be shown to be insufficient in spite, I presume, of proper economy; and thereupon the local authority to whom the asylum belongs may, under sub-sect. 2, increase the 14s. a week if that sum be found insufficient for the purposes described in the first sub-section, namely, "the expenses of maintenance and other expenses of each pauper lunatic in the asylum." Then comes sub-sect. 3, which to my mind obviously must refer to the greater weekly sum, meaning the sum which is still to be fixed, as the very first two words of that sub-section describe it, by the committee. The committee could only go to 14s., but supposing that they have to deal with pauper lunatics who are not pauper lunatics who come from or are "settled in a parish or place within the county or borough to which the asylum belongs," even if they have fixed, say, 12s. generally, they may, if they please, charge a sum not exceeding the total 14s.; in other words, they may differentiate between the case of the home pauper lunatic whose charge they naturally have owing to locality, and the case of pauper lunatics who come to them from a place outside their own area. Then it might be said, assuming for the moment that the committee have this differential treatment, what are they going to do if they do not want the difference or excess? Must the difference be applied to purposes of everyday life, or may they apply the money to purposes which are building and repair? In order to meet that point we have sub-sect. 4, which says that "any excess created by the payment of such greater weekly sum may"—not must—"if the visiting committee think fit, be paid over to a building and repair fund, to be applied by the committee to the altering, repairing, or improving the asylum." Possibly it might be said that although this differential charge, being found unnecessary for the mere purpose of maintenance, was a charge which ought not to be made, yet the fourth sub-section justified the application of that difference to something which made it reasonable and necessary to have that difference, namely, for the purpose of altering and improving the asylum, which it is not unreasonable to suppose should be to some extent provided for by the extra payment made in respect of paupers coming within the union from places outside. I think the whole four sub-sections of sect. 283 are one, and must be read as such.

PHILLIMORE, J.—I am of the same opinion. This Act of 1890 is a consolidation Act, and sections have been collected in it from various other Acts. Sub-sec. 4 reproduces sect. 6 of the Lunacy Acts Amendment Act 1862 (25 & 26 Vict. c. 111). The scheme of this section seems to me to be this: the Legislature has assumed that pauper lunatics can as a rule be maintained—using the word "maintained" quite generally—for something not exceeding 14s. a week, and it says to the managers of an asylum that if by economy and good management, or from the fact that provisions or servants are cheaper in their district, they can maintain their lunatics for 12s. a week, they may charge the out union for out lunatics up to 14s. a week, and may, if they like, pay the difference between the 12s. and the 14s. into a fund for repairing and improving their building, but that if for any reason whatever they cannot keep their expenditure down under 14s. then they shall not make a greater charge upon the out patients than they do upon the in patients. Then comes in sub-sect. 2, which says that in an extreme case where the 14s. will not be sufficient, the local authority may raise the standard for both out and in patients to any sum which they find necessary, and when such is the case it is not considered right—14s. being the maximum—that the foreign unions should pay more for the out patients than the actual charge made for the in patients. For these reasons I think that the appeal should be dismissed.

Appeal dismissed.

Solicitor for the plaintiff, *City Solicitor.*

Solicitors for the defendants, *Arkcoll, Cockell,* and *Chadwick.*

July 8 *and* 15, 1904.

(Before Lord ALVERSTONE, C.J., KENNEDY and PHILLIMORE, JJ.)

SYKES (app.) *v.* BARRACLOUGH (resp.). (*a*)

Mine—Checkweigher—Removal of—Interference with workmen—Coal Mines Regulation Act 1887 (50 *&* 51 *Vict. c.* 58), *s.* 13.

Acts of interference with any of the workmen at a mine for which a court of summary jurisdiction may order the removal of a checkweigher by virtue of sect. 13 *of the Coal Mines Regulation Act* 1887 *need not be done at the mine, and need not be done by virtue of or in connection with the office of checkweigher.*

CASE stated on a complaint preferred by the respondent, the certified manager of a colliery, against the appellant, for that he, being a checkweigher on behalf of persons employed at a coal mine, did unlawfully on certain days impede and interrupt the working of the mine, and did unlawfully interfere with certain workmen employed at the mine, and did unlawfully interfere with the management of the mine; and the justices being satisfied that the respondent had shown *primâ facie* ground for the removal of the appellant caused a summons to be served on the appellant to show cause against his removal as such checkweigher.

The following facts were found by the justices:—

The appellant, in addition to being the checkweigher of the mine, was also president of the local branch of the miners' association, and on the 19th Nov. 1903 he presided over a meeting of the men which had been called to consider the question of working on play days. Play days were days on which the pits were not working for pulling coal, and the only work done on those days was work necessary for the safety of the pit roads, workings, roofs, and ventilation. There was no coal getting. On a play day, therefore, the appellant had no business at the pit. Four

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

men had been previously stopped by the respondent for refusing to work on a play day for the opening of some blocked ventilation, and this meeting had been called to consider the matter. The appellant told the four men whose checks had been stopped not to go and see the respondent, but to be at a pit-gate meeting not later than half-past four, and he (the appellant) would see there were others to stop the men from going to work, and they would then have a meeting at half-past five. There was accordingly a pit meeting the next morning. The appellant spoke, and said the men were not to go into the pit, and he asked for a motion to stop play-day working either by fair or foul means, and he said he would stop play-day working one way or another. A pit-gate meeting is a meeting at the entrance to the colliery yard as the men are going to work. The appellant told the men also that they were not to work on play days in future. Several men called as witnesses went on the 20th Nov. 1903 to work, but did not go to work, as they were told not to do so. The appellant also told the men at this meeting to go back and come in their holiday clothes next morning and watch those who went to work. On the 21st Nov. 1903, which was a play day, and a day on which the appellant had no business at the pit, men had been interfered with by him and had gone to the colliery intending to work, but had been turned back.

On behalf of the appellant it was contended that sect. 13 of the Act specially referred to what a checkweighman might do in the discharge of his functions. "Or otherwise misconducts himself" was omitted from the amended statute by the substitution of "Or has at the mine to the detriment of the owner . . . done anything." That the intention was obvious—viz., to reduce the wide-spreading net which was previously thrown round the checkweighman. He might not take advantage of his position to inflict injury upon his employers, but the statute did not interfere with his freedom of action when not discharging his ordinary functions unless he did unlawful acts. If in his capacity as president of the branch, and not while acting as checkweigher, the appellant simply advised the men not to go down, there was no offence. Were it otherwise it would be impossible for the checkweighman to be associated with the men in their interests, especially seeing that he was the only independent man of them. Intimidation would warrant the man's removal, but advice would not.

On the part of the respondent it was contended that a checkweighman was in no sense in the service of the colliery company. They had no voice in the appointment, and so long as he kept to the Act they had no power to remove him. This made it all the more necessary that such a person should be careful not to exceed his duties, and the sole question was whether the checkweighman had exceeded his duties in such a manner as to justify the bench in ordering his removal. The offence constituted by sect. 13 of the Act need not necessarily take place on the mine premises, but might be committed at any time and at any place. [The attention of the justices was called to *Prentice* v. *Hall* (37 L. T. Rep. 605).]

By sub-sect. 3 of sect. 13 of 50 & 51 Vict. c. 58, it is provided that a checkweigher shall not be authorised in any way to impede or interrupt the working of the mine, or to interfere with the weighing or with any of the workmen, or with the management of the mine, but shall be authorised only to take such account or determine the deductions as provided by the Act. Sub-sect. 4 provides that if the owner, agent, or manager of the mine desires the removal of a checkweigher on the ground that the checkweigher has impeded or interrupted the working of the mine, or interfered with the weighing or any of the workmen, or with the management of the mine, or has, at the mine, to the detriment of the owner, agent, or manager done anything beyond taking such account, determining such deductions, or giving such information as aforesaid, he may complain to a court of summary jurisdiction, who, if of opinion that the owner, agent, or manager shows sufficient *primâ facie* ground for the removal of the checkweigher, shall call on the checkweigher to show cause against his removal.

The justices found that the appellant did on the 19th, 20th, and 21st Nov. 1903 unlawfully interfere with certain of the workmen employed at the colliery, and ordered him to be removed as checkweigher.

Atherley Jones, K.C. and *J. O. Andrews* for the appellant.—By sect. 13 (4) and (5) of the Coal Mines Regulation Act 1887, if the removal of a checkweigher is desired on the ground that he has impeded or interrupted the working of the mine or interfered with the weighing or with any of the workmen or with the management of the mine, he can be removed by the justices, but here the facts which are found in the case in no way justify the order of removal made against the appellant, for there is no interference with the workmen within sect. 13 (4) of the Act of 1887. All the acts which he has done were done as president of his local miners' association, and not in any way as checkweigher. They were not done while he was performing his duties, and they were not done at the mine. The words "or has otherwise misconducted himself," which appear in sect. 18 of the Coal Mines Regulation Act 1872, are not found in the Act of 1887, and they were omitted because of the case of *Prentice* v. *Hall* (37 L. T. Rep. 605).

W. Bairstow for the respondent.—The facts found by the justices clearly show that the appellant has interfered with the workmen, and they were justified in making the order for the appellant's removal. It does not matter whether or not the act was done in his capacity of checkweigher or whether it was actually done at the mine itself, for sect. 13 (4) of the Act of 1887 merely says, "interfere with any of the workmen." What occurred at the pit gate certainly was "at the mine," and there was plenty of evidence to support the justices' finding.

Atherley Jones, K.C. in reply.

Lord ALVERSTONE, C.J.—I think this appeal must be dismissed. I have read and agree with the judgments of Kennedy and Phillimore, JJ., and for the reasons therein expressed.

KENNEDY, J. read the following written judgment:—Whilst I concur in the conclusion at which my Lord and my brother Phillimore have arrived, I wish to state shortly the reasons of my own judgment, as the matter to be decided is

one of general importance. The magistrates have found as a fact that on three out of five dates charged in the respondent's complaint, the appellant, then being a checkweigher, did unlawfully interfere with certain of the workmen employed at the Ackton Hall Colliery, and on this ground, under the provisions of the Coal Mines Regulation Act 1887, s. 13, sub-ss. 4 and 5, they have made a summary order for the removal of the appellant from his position as checkweigher "Interference with workmen" is under these sections a specified legal ground of removal, and we can reverse that decision only if there was not in point of law any evidence to justify the magistrates' finding of fact. The findings in substance are as follows: Now I cannot say that what is here recorded as having taken place, according to the magistrates' view, on 20th and 21st Nov., at all events cannot, as a matter of law, be held to constitute "an interference with any of the workmen" within the fair and proper meaning of the statute. It is urged that it ought not to be so regarded substantially on two grounds. First, that the interference with workmen which is intended to be forbidden by the section must be interference of the checkweigher *virtute officii*, or, at all events, in apparent or professed exercise of the check-weigher's powers or authority as a checkweigher, whereas, it is contended, the appellant in the present case was not engaged in, or claiming to be performing, duties as a checkweigher, but was acting as president to the local mining association. Now I desire, for my part, to say that I should by no means be prepared to justify an order of magistrates removing a checkweigher from his place merely because, either as an official of a miners' association, or as a private individual, the checkweigher took some part in the legitimate work of a miners' association, and was present, or spoke, or presided at meetings called together to consider and resolve upon matters affecting the miners' interests or action. It is true that such action may be intended to influence, and may influence, the conduct of workmen at the mine, but I should not be prepared to hold, nor must I be understood to hold here, that action of that kind is necessarily interference within the meaning of the section. I do not believe that this was the purpose of the enactment in question. But I am equally convinced that the mere fact that a checkweigher charged with the unlawful interference is also an official of the local miners' association, and that the acts charged were done by him when purporting to act as such official, and not when claiming to use authority or perform duties as a checkweigher, does not necessarily constitute an answer to such charge. As to what conduct is interference which under the statute constitutes a ground for removal, it seems to me, must turn on the particular circumstances and facts of each case. Interference is not a word of art, or capable of precise definition, but there is nothing in the section which limits the unlawful interference to acts which the checkweigher does or purports to do in connection with or by virtue of his duties in that office. With regard to the locality of the acts and to the further contention of the appellant that the section does, if it is properly construed, limit the objectionable interference to interference within the gates, or, to use the phrase which appears in the later part of the section, to interference "at the mine." I do not agree with this view as a matter of construction. The very fact that in regard to conduct of the checkweigher which is to the detriment of the owner, agent, or manager, the section does expressly limit the area of the mine, and in the same section does not in terms put any such limitation to interference with workmen, appears to me to make very strongly against the propriety of implying it in the later case, nor is it in my view a reasonable construction, looking at the subject-matter of the enactment. A safeguard against an abuse of the influence and power over the workmen which a checkweigher's office gives him appears to me to be quite as reasonably necessary in regard to interference with workmen at or outside as within the pit gates. Reference was made in the course of the argument to the case of *Prentice* v. *Hall* (37 L. T. Rep. 605). I think that the effect of the judgments in that case, as well as the change of wording of the Act of 1887 from the wording of the Coal Mines Regulation Act 1872, under which that case was decided, is opposed to the contention of the appellant in the present case on both the points which I have dealt. The act of the checkweigher which in that case was held to justify an order to remove him was the intimidation of the workman. It is true the intimidation of the workman was in one of the branches of the colliery; but there is no suggestion in that case as reported that the judgment would have been different if it had been from outside the pit gate, or that the act of intimidation was, or purported to be, in any way connected with the performance of the checkweigher's duties or under colour of his authority as a checkweigher. It is true that both the judges of the Divisional Court lay stress on the words "otherwise misconducted himself," which are not to be found in the Act of 1887. But the change of language is rather against the appellant's contention here, for in the Act of 1887, whilst these words are omitted, the words "interfere . . . with any of the workmen" are introduced, and the just inference as to the intent of the Legislature appears to me to be that whilst other "misconduct" of a checkweigher other than that which is specified in the section is not to afford ground for his removal, misconduct which consists in interference with a workman is still to be treated as proper ground for removal. For these reasons I cannot say the facts found do not constitute "interference" within the statute.

PHILLIMORE, J. read the following written judgment:—This is an appeal from an order made by justices of the peace for the West Riding of Yorkshire. A complaint was on the 16th Jan. last preferred against the respondent for that he on the 13th, 14th, 19th, 20th, and 21st Nov. 1903, being checkweigher at the Ackton Hall Colliery, unlawfully interfered with certain of the workmen employed in the mine and unlawfully interfered with the management of the mine. The object of this complaint was to procure the removal of the appellant. On the 20th Feb. the justices, being satisfied that the appellant did so interfere, made an order for his removal, with costs, but stated the case which forms the subject of this appeal. They did not find adversely to the appellant with regard to the charges on the 13th and 14th Nov.; but with regard to three later days they found that the appellant did

unlawfully interfere with certain of the workmen employed at the Ackton Hall Colliery. They gave their findings in detail, and my brother Kennedy has summarised them. The question upon which the opinion of the court was desired was whether there was any evidence to support these findings. The provisions of the Act as to the removal of a checkweigher are as follows, sect. 13, sub-sect. 3: "A checkweigher shall not be authorised in any way to impede or interrupt the working of the mine, or to interfere with the weighing or with any of the workmen, or with the management of the mine." Sub-sect. 4: "If the owner, agent, or manager desires the removal of the checkweigher on the ground that the checkweigher has impeded or interrupted the working of the mine, or interfered with the weighing or with any of the workmen, or with the management of the mine, and has at the mine, to the detriment of the owner, agent, or manager, done anything beyond taking such account determining such deduction or giving such information as aforesaid, he may complain to a court of summary jurisdiction, who, if of opinion that the owner, agent, or manager shows sufficient *primâ facie* grounds for the removal of the checkweigher shall call on the checkweigher to show cause against his removal." It was contended on behalf of the appellant that these provisions relate solely to interference or misconduct by the checkweigher in his capacity of checkweigher, or at any rate only to something done at the mine. It was pointed out that the words "or otherwise misconducted himself," in the older Act, had been repealed, and in lieu the words "or has at the mine, to the detriment of the owner, &c, done anything beyond taking such account, &c.," had been enacted. But these are not the only words of addition in the new Act. In the older Act (35 & 36 Vict. c. 76, s. 18), the grounds for removal were if a checkweigher has "impeded or interrupted the working of the mine, or interfered with the weighing, or has otherwise misconducted himself." In the present Act we have the words "or has otherwise misconducted himself" taken out; but we have three new grounds inserted—interference with any of the workmen, interference with the management of the mine, and doing anything at the time to the detriment of the owner. It was contended on behalf of the respondent that it might easily happen that a person in the position of a checkweigher could use his influence and knowledge to interfere with the workmen in a manner injurious to the mine and its management. and that it was not necessary in law that he should do the acts complained of at the mine; that it was a question of fact for the justices whether he had interfered with the workmen. The justices set out the evidence on both sides as parts of the case. From this I gather that the act complained of on the 19th Nov. was an inflammatory speech and advice or direction given to four miners at a meeting held at the Featherstone Hotel; that the acts complained of on the 20th and 21st were inflammatory speeches and threats at meetings held at the pit gate. If it be necessary to constitute a cause of removal that the action of which a complaint is made should be done as contended at the mine, I do not think that what happened on the 19th could be said to be done at the mine; but I think that the justices might find that the actions of the appellant on the 20th and 21st were acts of interference with the workmen. A pit-gate meeting was upon the evidence a meeting held on the road outside the entrance to the mine yard at a point which every workman must pass, and where any workman upon whom influence or intimidation might be brought to bear could be stopped. I think that acts done at such a meeting were acts done at the mine, and though not done by the appellant in his capacity as checkweigher, were acts of serious interference. It was suggested that the order could not be supported unless the justices were right in their findings as to all three days; but this was not a conviction of misdemeanour to which the rule in *O'Connell* v. *Reg.* (11 C. & F. 155) would apply. It is a proceeding on behalf of the manager of the mine to get rid of an official appointed by the men who has misused his official position and his statutory privileges to the detriment of the mine. An order for removal upon a proper case would be *ex debito justitiæ* whether the objectionable conduct was upon two or three days. It becomes therefore unnecessary to decide whether or not a checkweigher may be removed from his office by reason of acts of interference not done at the mine. I am, however, of opinion that there is no such local limitation. Sect. 13, sub-sect. 3 enumerates the acts which a checkweigher has no authority to do. Sub-sect. 4 says that if he does any of these acts he may be removed from his office, and also that he may be removed upon additional grounds—namely, doing at the mine acts to the detriment of the mine-owner, agent, or manager. These are words of extension, not of limitation. It was, therefore, open to the justices to find that the action of the appellant on the 19th Nov., though it did not take place at the mine, and though it was not as a checkweigher but as president of the association that he spoke, was an unlawful interference with certain of the workmen employed at the mine. The appeal will be dismissed with costs.

Appeal dismissed.

Solicitors: *Charles Russell* and *Co.* for *C. E. S. Lowden*, Pontefract; *Moxon* and *Barker*, Pontefract.

Aug. 1 *and* 2, 1904.

(Before BIGHAM, J.)

MAYOR, &c., OF HAMPSTEAD *v.* MIDLAND RAILWAY COMPANY. (*a*)

Metropolis—New street—Expenses of paving—"Owner"—Land abutting on street—Restriction imposed by statute on user of land—Restriction in favour of an individual—Exemption from paving expenses—Metropolis Management Acts 1855 (18 *&* 19 *Vict. c.* 120, *ss.* 105, 250) *and* 1862 (25 *&* 26 *Vict. c.* 102, *s.* 77).

In a private Act conferring additional powers upon a railway company there was inserted for the protection of the person named therein who was the owner of land adjoining the railway, a section providing that the company should acquire all the land of the owner up to a certain road, and should leave a strip of that land 20ft. wide along the whole length of the road, and plant and maintain the same with shrubs and trees, and fence off the land from the

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

road with an iron fence, and the company duly acquired the land, left the strip 20ft. wide, and planted and fenced the same as provided by the section.

The local authority having resolved, under the Metropolis Management Acts, to pave the road as a "new street," and having claimed part of the apportioned expenses from the company as being the "owners" of the strip of land "bounding or abutting" on the new street:

Held, that, as the section was for the protection of an individual, and the incapacity of the strip of land to yield a rack rent was created, not for a public purpose, but for the benefit of an individual, the land was not thereby made extra commercium, *and therefore the company were "owners" of the land within the meaning of sect.* 250 *of the Metropolis Management Act* 1855, *and were liable under sect.* 77 *of the Metropolis Management Amendment Act* 1862 *to contribute to the expenses of paving the new street.*

Special case stated by agreement of the parties under Order XXXIV., for the opinion of the court upon a question of law arising in an action.

The dispute between the parties was as to the liability of the defendants to the plaintiffs to contribute to the estimated expenses of paving a certain portion of a "new street" known as Westbere-road, in the metropolitan borough of Hampstead.

The plaintiffs were by virtue of the Metropolis Management Act 1855, and the Acts amending the same, and the London Government Act 1899, the local authority for the metropolitan borough of Hampstead, and the body charged with the duty of paving new streets in the borough.

By sect. 105 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120) it is provided as follows:

In case the owners of the houses forming the greater part of any new street laid out or made or hereafter to be laid out or made which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate be desirous of having the same paved as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same either throughout the whole breadth of the carriage-way and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair, and the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board), and in case such estimated expenses exceed the actual expenses of such paving then the difference between such estimated expenses and such actual expenses shall be repaid by the said vestry or board to the owners of the houses by whom the said sum of money has been paid, and in case the said estimated expenses be less than the actual expenses of such paving then the owners of the said houses shall on demand pay to the said vestry or board such further sum of money as together with the sum already paid amounts to such actual expenses.

By sect. 77 of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102) it is provided as follows:

Where any vestry or district board shall under the powers given by the one hundred and fifth section of the first recited Act have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property should they deem it just and expedient so to do, and any such costs or expenses, including the costs of paving at the points of intersection of streets and all other incidental costs and charges, shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced or during its progress or after its completion; and it shall be lawful for the vestry or district board at their discretion to accept payment of the amount apportioned or charged in respect of each house or premises by instalments spread over a period not exceeding twenty years, and any such amount shall be recoverable from the present or any future owner of the premises either by action at law or in a summary manner before a justice of the peace at the option of the vestry or board.

By sect. 250 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120) it is provided as follows:

The word "owner" shall . . . mean the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent.

By the Midland Railway Act 1900 (63 & 64 Vict. c. cxliii.) certain additional powers were conferred upon the defendants, the Midland Railway Company, in the Act referred to as "the company," and particularly by sect. 18 of the Act it was provided as follows:

The following provisions shall unless otherwise agreed apply and have effect for the protection of Percy Horace Gordon Powell-Cotton and his trustees (in this section called "the owners"): (1) The company shall not use any part of the sidings to be placed upon the land to be acquired from the owners and coloured red upon the plan signed by John Allen McDonald on behalf of the company and by Percival Fox Tuckett on behalf of the owners for any purpose except for the standing of empty passenger trains. (2) The company shall acquire all the land of the owners up to Westbere-road and shall leave a strip of land twenty feet wide along the whole length of such Westbere-road and shall at their own expense plant and maintain the same with shrubs and trees to the reasonable satisfaction of the owners, and shall at the like expense and to the like satisfaction fence off the said lands from the Westbere-road by an open unclimbable iron fence seven feet high, such planting and fencing to be carried out within one year from the company obtaining possession of such lands and to be maintained by the company.

In accordance with the provisions of sub-sect. 2 of the above section of the Act the defendants duly acquired the land therein referred to, and left a strip of land 20ft. wide along and contiguous to the whole length of the west side of Westbere-road aforesaid, and had planted and dealt with the same in manner in the section provided. They had also fenced off the lands from the Westbere-road by an open unclimbable iron fence 7ft. high in pursuance of the section, and planted a quick-set hedge immediately inside the fence along its whole length. On the other side of the strip the land slopes down to the edge of

their railway, a cutting having been made for the purpose of constructing the same.

A plan of the road and of the strip of land and of the bank or slope and railway lines was annexed to and formed part of this case.

On the 4th June 1903 the plaintiffs, pursuant to the provisions of the Metropolis Management Acts 1855 and 1862, duly passed a resolution in the following terms:

That, inasmuch as the remaining private portion of the new street in this borough called and known as Westbere-road is not paved to the satisfaction of this council, this council deem it necessary and expedient that the same should be paved in manner following [then followed the specified way in which the footways, kerb, channels, and roadway should be made up and paved], and that the estimated expenses, amounting to 2364*l.* 12*s.*, of providing and laying such pavement be and the same are hereby apportioned to and charged upon the respective owners of the houses and lands forming, or bounding, or abutting on the said portion of the said new street in manner following and be demanded and recovered accordingly.

The apportioned amount of the above sum of 2364*l.* 12*s.*, being the estimated cost as determined by the surveyor for the time being to the council of paving the road and footways in accordance with the above resolution of the council, chargeable according to the determination of the council upon the owners of the land in Westbere-road was 1200*l.* 12*s.*

By a notice dated the 25th Sept. 1903 and signed by the town clerk to the plaintiffs, which was served on the defendants on the same day, the sum of 1200*l.* 12*s.* was duly demanded of the defendants.

The plaintiffs contended that the defendants were "the owners" of the land "bounding or abutting" on the new street known as Westbere-road aforesaid within the meaning of the Metropolis Management Act, and were liable to contribute to the expenses or estimated expenses of paving the same the above sum of 1200*l.* 12*s.*

The defendants contended (*a*) that the land was not land bounding or abutting on the street within the meaning of sect. 77 of the Metropolis Management Amendment Act 1862; (*b*) that the land was subject in perpetuity to the burden of public and private rights which deprived it of all beneficial value to the defendants, and was not such land as was intended by the section; and (*c*) that the defendants were not owners of the land within the meaning of the enactments mentioned in the case, and that they were therefore not liable to contribute to the paving expenses.

The questions submitted for the opinion of the court were: (1) Whether on the true construction of the Metropolis Management Acts 1855 and 1862, and having regard to the above provisions of the Midland Railway Act 1900, the defendants were liable to pay to the plaintiffs the amount claimed in this action in respect of the estimated expenses of paving the new street known as Westbere-road; and (2) by whom the costs of this action and special case ought to be paid.

Macmorran, K.C. (*Courthope-Munroe* with him) for the plaintiffs.—The plaintiffs are entitled to recover the apportioned share of these expenses. The defendants' contention is that because the defendants are prevented from getting any rack rent or any other beneficial occupation of this strip of land by reason of the provision in sect. 18 of the Midland Railway Act 1900, therefore they are exempt from contributing to the paving expenses as not being "owners" within the meaning of sect. 250 of the Act of 1855. It is submitted that, notwithstanding that provision in sect. 18, the defendants are "owners" within the meaning of the Metropolis Management Act 1855, and that they are liable for the paving expenses. The authorities on the question are collected and considered in the case of *London County Council* v. *Wandsworth Corporation* (21 Mag. Cas. 191; 88 L. T. Rep. 783; (1903) 1 K. B. 797), and those authorities establish the principle that where land is dedicated to public purposes or so restricted by statute that it is placed *extra commercium* and prevented from being let at a rack rent, then the person in whom it happens to be vested is not the "owner" within sect. 250 of the Metropolis Management Act 1855, but where the incapacity or restriction is created merely for the benefit of an individual, as in the present case, then the land is not *extra commercium*, and the person in whom it is vested is not thereby prevented from being owner. In *Wright* v. *Ingle* (54 L. T. Rep. 511; 16 Q. B. Div. 379) it was held that the trustees of a Wesleyan chapel were "owners" of the chapel, upon the ground that by the consent of the parties the trusts might at any moment be put an end to and the building restored to its capacity of being let at a rack rent. The same principle was followed in *Hornsey District Council* v. *Smith* (76 L. T. Rep. 431; (1897) 1 Ch. 843), and in *Hackney Corporation* v. *Lee Conservancy Board* (21 Mag. Cas. 575; 91 L. T. Rep. 13; (1904) 2 K. B. 541). By their special Act the railway company were taking land under their statutory powers, and they were taking it for the purposes of their undertaking, and the statute, in sect. 18, contains this exception in favour of a certain owner. The restriction as to user by the defendants was one contained in a private Act, and it merely amounted to a statutory sanction of a private bargain between two parties. The section was inserted merely for the protection of an individual and conferred no rights whatever on the public, and the arrangement could be put an end to at any time by the parties themselves. A section of this kind passed for the benefit of a particular person can be waived by that person:

Goldsmid v. *Great Eastern Railway Company*, 49 L. T. Rep. 717; 25 Ch. Div. 511.

It is really in the nature of a Parliamentary contract, and Pollock, C.B. puts it thus in *Savin* v. *Hoylake Railway Company* (13 L. T. Rep. 374, at p. 376; L. Rep. 1 Ex. 9, at p. 11): "A private Act of Parliament is in the nature of an agreement between the parties; why may not an agreement be made in derogation of it?" In *Rothes (Countess of)* v. *Kirkcaldy and Dysart Waterworks Commissioners* (7 App. Cas., at p. 707), Lord Watson says: "But such statutory provisions as those of sect. 43, occurring in a local and personal Act, must be regarded as a contract between the parties, whether made by their mutual agreement, or forced upon them by the Legislature." The defendants therefore are not taken out of the category of "owners" by this provision in sect. 18 of their special Act.

Lush, K.C. (*William Wills* with him) for the defendants.—The defendants were not "owners"

within the meaning of the section, and were not liable for the paving expenses. The intention was to throw the liability of contributing to the expenses of paving a new street on the owners of the property which received the benefit—that is, on the owners of houses or land on which houses might be built: (per Lord Coleridge, C.J. in *Plumstead Board of Works* v. *British Land Company*, 32 L. T. Rep. 94, at p. 95; L. Rep. 10 Q. B. 203, at p. 207). Sect. 18 of the private Act imposes restrictions on the defendants as to the mode of user of this strip of land. They can make no beneficial use of it, and they have no beneficial occupation of it. It is of no beneficial value to them, and, although the restriction may possibly be removed at some future time, the question must be determined by their present position with regard to it. There is no case in which it has been held that where Parliament has imposed upon a person an obligation by statute, that can be treated as mere matter of bargain. If we apply the law as to rating, then it could not be said that this strip of land would have any value for rating purposes, or that it would be rateable to the poor under the statute of Elizabeth. We are to look at this land *rebus sic stantibus*, and, if the land as it now stands is not capable of beneficial occupation, then we are not to take into account what it might be if these restrictions imposed by Parliament were removed: (per Lord Watson in *Great Eastern Railway Company* v. *Hackney District Board of Works*, 49 L. T. Rep., at pp. 511-12; 8 App. Cas., at pp. 694-5). This property has really been placed *extra commercium*, and is subject in perpetuity to this statutory burden which deprives the defendants of any beneficial use of the land, and therefore they are not the "owners" for this purpose. With regard to the case of *Wright* v. *Ingle* (*ubi sup.*), it appears from that case that a consecrated church is exempt by reason of its consecration, but the building there in question was an unconsecrated chapel, and was not exempt on that ground. But this court is not bound by that case, because in that case there was no statute in question which imposed any burden on the land, whereas in the present case the burden is imposed by statute. The parties cannot by any contract repeal the Act of Parliament which imposes the burden; and, *rebus sic stantibus*, the statute strikes this strip of land with sterility. The present case is quite uncovered by any of the authorities referred to, and the court is not bound by any of those authorities. It is therefore submitted that this land is sterile land, and the defendants ought not to be called on to pay these expenses.

Macmorran, K.C. in reply. *Cur. adv. vult.*

Aug. 2.—BIGHAM, J. read the following judgment:—I have had an opportunity of examining the cases that were cited before me, and I think the result of those cases is that where land is incapable of yielding a rack rent by reason of its being subjected to some public user, the owner is not liable. For instance, where the land has been dedicated as a highway, or where a church has been built upon it which has been consecrated according to English law for public worship, or where the land has been appropriated by Act of Parliament to some public purpose; but where the incapacity is created in favour of an individual or of a particular class of persons, then the owner does not escape liability. For instance, where the owner has covenanted not to use the land for any purpose of profit, or where he has voluntarily devoted it to a purpose which is inconsistent with the receiving of rent, as in the case of a Wesleyan chapel. The reason for this distinction seems to be that in the one case nothing short of an Act of Parliament can restore to the land its capacity to yield a rent, whereas in the other case the capacity to yield a rent can be restored by the mere act of the parties, who for the time being have destroyed it. Then within which category does the present case fall? In my opinion it falls within the second category. It is true that the restriction which prevents the railway company from turning the land to a profitable use is embodied in an Act of Parliament, but that Act creates no public right. It does no more than give a legislative sanction to an agreement between Mr. Powell-Cotton and his trustees on the one hand, and the railway company on the other. Such an agreement can be put an end to by the parties to it at any moment apparently without the intervention of the Legislature: (see *Goldsmid* v. *Great Eastern Railway Company*, 49 L. T. Rep. 717; 25 Ch. Div. 511). The arguments adduced by counsel for the defendants in this case were put forward in that case by Mr. Hemming, and are to be found at p. 533 (25 Ch. Div.), and were dismissed by the court as insufficient. That argument, therefore, does not afford any answer to the claim of the local authorities to be paid the amount sued for. There must be judgment for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitor for the plaintiffs, *Arthur P. Johnson.*
Solicitors for the defendants, *Beale* and *Co.*

Saturday, Aug. 6, 1904.

(Before DARLING, J.)

KENT COUNTY COUNCIL *v.* MAYOR OF FOLKESTONE. (*a*)

Limitation of actions—Damage to highway—Action against public body—Period of limitation—Public Authorities Protection Act 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1 (*a*)—*Locomotives Act* 1898 (61 *&* 62 *Vict. c.* 29), *s.* 12 (1) (*b*).

By sect. 1 *of the Public Authorities Protection Act* 1893 *an action "shall not lie or be instituted unless it is commenced within six months" from the matter complained of.*

By sect. 12 (1) (*b*) *of the Locomotives Act* 1898 *proceedings for the recovery of expenses of extraordinary traffic "shall be commenced within twelve months of the time at which the damage has been done."*

Held, that where it is sought to charge a public authority with the expenses of extraordinary traffic, the period of limitation was six months.

ACTION.

The plaintiffs' claim was as highway authorities for expenses incurred by them by reason of damage caused by extraordinary traffic on their highways by or in consequence of the orders of the defendants.

The damage was done more than six months, but less than twelve months, before the action was

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

brought, and the defendants contended that the claim was barred by sect. 1 of the Public Authorities Protection Act 1893.

Dickens, K.C. and *Theobald Mathew* for the plaintiffs.

Hume Williams, K.C. and *Hansell* for the defendants.

DARLING, J.—In this case I think that the plaintiffs would be entitled to judgment for 300*l.*, but for the point that this case is governed by the Public Authorities Protection Act 1893. With regard to that there is some difficulty, but I think the defendants are entitled to judgment. Sect. 12 (1) (*b*) of the Locomotives Act 1898, under which this action is brought to recover damages for extraordinary traffic, says: "Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done." Now, this action was commenced, I think, within twelve months of the doing of the damage, and it is said by Mr. Dickens, and this is the only argument which could be used, that this Act of 1898, when it gives twelve months, has laid down a code applicable to all persons, private individuals and public authorities alike. If that be so, the Act of 1898 has repealed, with regard to public authorities, the Act of 1893 in so far as the limitation of time within which the action for damage from extraordinary traffic is to be brought is concerned. It does not say so in plain words, it is absolutely silent upon the matter, and the Act of 1893 was intended obviously to put public authorities in a different position from private individuals. It does not affect to deal with anything but public authorities. Sub-sect. 1 of sect. 1 says: "The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of." I do not think that that provision in favour of the public authorities has been repealed or interfered with by the Locomotives Act of 1898. I think that there still remain two classes of persons, viz., private individuals who are not favoured to the same extent as public authorities and who may be sued within twelve months of the time that they have done this damage, and public authorities. I think there still remains the protection given to public authorities, and I could give very good reasons why it should be so, and no doubt they were given in Parliament in 1893, that no action should lie against them unless it was instituted within six months. I think really that this case is covered by the reasoning that I myself used in the case of *Markey* v. *Tolworth Joint Isolation Hospital District Board* (83 L. T. Rep. 28; (1900) 2 K. B. 454), where Bigham, J. said he agreed, but I notice that he did not say anything upon this point. However, he said "I agree," and then he gave a judgment of his own upon the other point, not on these words we are dealing with now, as to the commencement of the damage, and so on. Why I gave judgment first in that case I cannot in the least remember, but for some reason I appear to have done so, and Bigham, J. said he agreed with it. He gave no reason why he did so. I said this: "It is true, as he says, that the action must be brought under the Fatal Accidents Act within twelve months, and the Act of 1893" (that is, the same Act, the Public Authorities Protection Act) "does not interfere with that limitation except as to actions against certain specified persons, who must be sued within six months; the Act does not interfere with the Fatal Accidents Act, except that as to certain classes a different time limit is imposed, a limit which affects not only an action under that Act, but also any action under any Act. The two Acts do not conflict in any way. This action should have been brought within six months, calculated from the death of the deceased, and our judgment must be for the defendants." It seems to me that that reasoning, good or bad, applies exactly to this case, as if I had said, "The Act does not interfere with the Locomotives Act," instead of, as I said there, "with the Fatal Accidents Act," 'except that as to certain classes a different time limit is imposed, a limit which affects not only an action under that Act, but also any action under any Act." What I said there does apply to this case, because I said, "but also any action under any Act." It seems to me that really I am concluded by that judgment, with which Bigham, J. said he agreed, and I am bound to say, if I had to reconsider the matter without any authority at all, I should still think that that was the true reasoning, and that this Act of 1893 is not repealed as to public authorities by the Locomotives Act of 1898. Therefore I shall enter judgment for the defendants.

Judgment for the defendants.

Solicitors: *Church, Adams*, and *Prior*, for *Charles Turner*, Maidstone; *Holt, Beever*, and *Crowdy*, for *A. F. Kidson*, Folkestone.

Nov. 3 *and* 18, 1904.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

IMPERIAL AND GRAND HOTELS COMPANY LIMITED (apps.) *v.* ASSESSMENT COMMITTEE OF CHRISTCHURCH UNION (resps.). (*a*)

Rating — Poor rate — Appeal — Objection before assessment committee—Appeal to next quarter sessions after hearing by committee—All steps taken within current year—"Next practicable sessions"—Repayment of excess — Poor Relief Act 1743 (17 *Geo.* 2, *c.* 38), *s.* 4—*Union Assessment Committee Amendment Act* 1864 (27 & 28 *Vict. c.* 39), *s.* 1.

By sect. 4 *of the Poor Relief Act* 1743 *a person aggrieved by any poor rate may appeal to the "next general or quarter sessions"; and by sect.* 1 *of the Union Assessment Committee Amendment Act* 1864 *no person can appeal to any sessions against a poor rate unless he has given notice of objection—which might be given "at any time"—to the assessment committee against the valuation list, and has failed to obtain relief.*

A poor rate was made for the ensuing twelve months, payable in two instalments. A ratepayer, after two meetings of the assessment committee had been held, and after payment of the first instalment of the rate, gave to the assessment committee notice of objection to the valuation list, which objection was heard by the

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

committee at their next meeting. The ratepayer appealed to the quarter sessions next after such hearing by the assessment committee, two Courts of Quarter Sessions having previously been held since the making of the rate. Objection was taken that the appeal was out of time, as the appeal was not to the "next quarter sessions." The quarter sessions overruled the objection, heard the appeal, and reduced the assessment, but refused to order the repayment of the excess already paid on the first instalment. The objection to the assessment committee had been lodged and determined and the appeal to quarter sessions brought within the period of the current rate appealed against.

Held, that the appeal was brought to the next practicable sessions, and that the quarter sessions had jurisdiction to hear the same.

Held, also, that the court, having reduced the rate, were bound, under sect. 8 *of the Poor Rate Act* 1801, *to order repayment of the excess in respect of the whole year's rate.*

CASE stated by the recorder of the borough of Bournemouth.

At the Court of Quarter Sessions held for the borough of Bournemouth on the 2nd Jan. 1904, the Imperial and Grand Hotels Company Limited appealed against a rate made by the overseers of the parish of Bournemouth in the Christchurch Union upon the 21st April 1903, the appellants having objected to the valuation list before a meeting of the assessment committee of the repondent union held upon the 12th Nov. 1903, and failed to obtain relief thereat, as required by sect. 1 of the Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39).

When the appeal was called on for hearing counsel for the respondents objected that the recorder had no jurisdiction to hear the appeal, inasmuch as the appellants had not appealed to the next quarter sessions for the borough as required by sect. 4 of the Poor Relief Act 1743 (17 Geo. 2, c. 38).

The following admitted facts were relied upon by counsel for the respondents in support of their objection:

The rate appealed against was made upon the 21st April 1903 to provide for expenses to be incurred before the 31st March 1904, payable by two equal instalments, the first payable on the 1st May 1903 and the second on the 1st Nov. 1903.

The assessment committee of the respondent union held meetings for the purpose of hearing objections to the valuation list, of which due notice was given upon the 15th May, the 13th Aug., and the 12th Nov. 1903.

Courts of Quarter Sessions were held on the 27th June and the 27th Oct. 1903.

The appellants first gave notice of objection to the valuation list, on which the rate was based, on the 26th Oct. 1903, and this objection was heard by the assessment committee at their meeting held on the 12th Nov. 1903.

The appellants on the 5th Dec. 1903 gave due notice of appeal to the quarter sessions to be held on the 2nd Jan. 1904.

The appellants had paid the first instalment of the rate which became payable on the 1st May 1903, in the month of Aug. 1903, before they gave the notice of objection to the valuation list.

The recorder overruled the objection, being of opinion that in the circumstances above stated the appeal was made to the next quarter sessions for the borough within the meaning of the Poor Relief Act 1743 (17 Geo. 2, c. 38), s. 4, and the Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39), s. 1.

Having heard the appeal on the merits on the 2nd Jan. 1904, the recorder delivered judgment therein upon the 12th April 1904 in favour of the appellants with costs, and ordered that the gross estimated rental of the Imperial Hotel be reduced from 1500*l.* to 1325*l.* and that of the Grand Hotel from 2050*l.* to 1530*l.*, but inasmuch as the appellants had not taken steps, as they might have done, to appeal against the rate at an earlier date, he ordered that the alteration of the assessment should only operate in respect of the second instalment of the rate, and refused to order that the excess paid by the appellants in respect of the first instalment should be refunded to them or allowed off the second instalment.

Counsel for the appellants contended that the recorder was bound to order that the excess paid by the appellants in respect of the first instalment should be refunded. The recorder, however, refused to vary his order. The questions for the opinion of the court were: (1) Whether the recorder was right in holding that the appellants were not out of time in bringing their appeal, and that he had jurisdiction to hear their appeal. (2) If the answer to the first question should be in the affirmative, whether the recorder was right in ordering that the alteration made by him in the rate should only apply to the second instalment thereof.

If the answer to the first question should be in the negative, the appeal against the rate was to be dismissed, and judgment was to to be entered for the respondents. If the answer to the second question should be in the affirmative his order was to stand; if in the negative, his order was to be varied, and the court were to make such order therein as the court should think fit.

Sect. 4 of the Poor Relief Act 1743 (17 Geo. 2, c. 38) provides:

> In case any person or persons shall find him, her, or themselves aggrieved by any rate or assessment made for the relief of the poor, or shall have any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any person or persons therein, or shall have any material objection to such account as aforesaid, or any part thereof, or shall find him, her, or themselves aggrieved by any neglect, act or thing done or omitted by the churchwardens and overseers of the poor, or by any of His Majesty's justices of the peace, it shall and may be lawful for such person or persons, in any of the cases aforesaid, giving reasonable notice to the churchwardens or overseers of the poor of the parish, township, or place, to appeal to the next general or quarter sessions of the peace for the county, riding, division, corporation, or franchise where such parish, township, or place lies; and the justices of the peace there assembled are hereby authorised and required to receive such appeal, and to hear and finally determine the same; but if it shall appear to the said justices that reasonable notice was not given, then they shall adjourn the said appeal to the next quarter sessions, and then and there finally hear and determine the same; . . .

Sect. 2 of the Union Assessment Committee Act 1862 (25 & 26 Vict. c. 103) provided that the

board of guardians in every union should at their first meeting appoint from among themselves an assessment committee of the union, and by sect. 18 any person who might feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, might at any time after the deposit of such list, and before the expiration of twenty-eight days after the notice of such deposit of the list, give to the committee a notice in writing of his objection, specifying the grounds thereof, and by sect. 19 the committee were to hold meetings to hear such objections.

Sect. 1 of the Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39) provides:

Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act 1862 applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union: Provided that after the first day of August next no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly.

The Poor Rate Act 1801 (41 Geo. 3, c. 23) provides:

Sect. 8. If upon the hearing of any appeal from any rate or assessment for the relief of the poor, the court of general or quarter sessions of the peace shall order the name or names of any person or persons to be struck out of such rate or assessment, or the sum or sums rated or assessed on any person or persons to be decreased or lowered, and if it shall be made appear to the said court that such person or persons hath or have, previously to the hearing of such appeal, paid any sum or sums of money, in consequence of such rate or assessment, which he, she, or they ought not to have paid or been charged with, then and in every such case the said court shall order all and every such sum and sums of money to be repaid and returned, by the said churchwardens and overseers of the poor, to the person or persons having paid the same respectively, together with all reasonable costs, charges, and expenses, occasioned by such person or persons having paid or been required to pay the same; and all and every the sum and sums of money so ordered to be repaid or returned by the churchwardens and overseers of the poor, or any of them, shall and may, together with all such costs, charges, and expenses as aforesaid, be levied and recovered from them, or any of them, by distress and all such other ways and means as the money charged, rated, or assessed on any person, by any rate or assessment made for the relief of the poor, can or may be by law levied or recovered.

W. C. Byde (*Francke* with him) for the assessment committee.—The recorder was wrong in holding that the appeal was in time. His finding in effect comes to this, that if the appellant allowed, say, ten years to elapse his appeal to quarter sessions would still be in time. By sect. 4 of the Poor Relief Act 1743, a person aggrieved by a poor rate may appeal to the "next general or quarter sessions," so that if he appeals at all his appeal must be to the next quarter sessions, and that has been judicially decided to mean the next practicable sessions. Then, sect. 1 of the Union Assessment Committee Amendment Act 1864 says that on his way to the quarter sessions he must go to the assessment committee and there make his objection to the valuation list. If he is dissatisfied and wishes to appeal, he must still go to the next practicable sessions. At the time the Act 17 Geo. 2 was passed there was no assessment committee in existence. Under the Union Assessment Committee Act 1862 an assessment committee was constituted (sect. 2), and by sect. 14 the overseers were required to prepare valuation lists. By sect. 18 a person aggrieved by the valuation list could within twenty-eight days object before the assessment committee, and by sect. 19 the committee were to hold meetings to hear such objections, and when the list was finally approved no further alteration could be made except by a new list: (sect. 24). The effect of that section was to make the overseers bound by the valuation list, but to leave the ratepayer free, and if he was dissatisfied with the rate his remedy remained (as before) to appeal against the rate to the special or quarter sessions. By sect. 18 a ratepayer had only twenty-eight days wherein to give his notice of objection, and if he missed his opportunity of objecting, then he might be bound for five years. That was the mischief aimed at by sect. 1 of the Act of 1864. That section says that he may give notice of objection "at any time." That cannot mean that he can give notice of objection, say, ten years afterwards. The words are capable of a more reasonable construction. Under the Act of 1862 there was no power to object after the twenty-eight days, or to alter the list after final approval. Sect. 1 of the Act of 1864 liberates the parties from these trammels, and the words "at any time" were put into guard against two things: first, the twenty-eight days' limit for objecting, and, secondly, the provision that the list could not be altered after final approval. The words "at any time" are perfectly intelligible on that view, and they were not intended to repeal the provision in the Act of George II., which says that the appeal should be to the next sessions, and it is conceded that that provision is still in force. The two Acts of George II. and of 1864 are to be construed together, and the right of appeal is given by the Act of George II. on condition that the appellant should go to the next practicable sessions. An appellant must use expedition in going to the assessment committee in order to get to the next practicable quarter sessions, and here the appellants have not done so, as they allowed two meetings of the assessment committee to pass and two quarter sessions to pass before they brought their appeal to the quarter sessions on the 2nd Jan. 1904. The case most against our contention is *Reg.* v. *Great Western Railway Company* (38 J. P. 822), where the point might have been raised, but was not. In *Reg.* v. *Biggleswade Union* (21 L. T. Rep. 494) the appellant had gone to the first meeting of the assessment committee and then to the first quarter sessions

after such meeting, and it was held that that was the next practicable quarter sessions, although one quarter sessions had been passed over, inasmuch as it was the next practicable sessions to which he could have gone after complying with sect. 1 of the Act of 1864. There no meeting of the assessment committee had been passed over, each step having been taken with promptitude. The following cases show the inconvenient results which would follow from the recorder's decision:

Liverpool Gas Company v. *Everton*, L. Rep. 6 C. P. 414; s.c. *Reg.* v. *Recorder of Liverpool*, 23 L. T. Rep. 813;

Reg. v. *Wiltshire Justices*, 40 L. T. Rep. 681; 4 Q. B. Div. 326.

If an appellant can go to the next practicable sessions, he cannot by his own delay make a later sessions a practicable sessions. He also referred to

Reg v. *West Riding Justices*, 31 L. T. Rep. O. S. 232; E. B. & E. 713.

Clavell Salter. K.C. (*Haydon* with him) for the Imperial and Grand Hotels Company. — The appeal was in time. The rate was made on the 21st April 1903; both the objection to the assessment committee and the appeal to quarter sessions were made within the year, so that all the steps were taken within the currency of the rate. If the duty of an appellant appealing against a current rate is, as it was under the old law, to go to the next quarter sessions after the making of the rate, then it must be admitted that the appellants here did not go to the next quarter sessions; but if their duty was to go to the next quarter sessions after they had acquired a grievance, then they have done so. Dealing first with the Act of George II., which gave a general right of appeal to every ratepayer, the right of appeal was to a person "aggrieved" by the rate, and to the "next quarter sessions." The person "aggrieved" had the right to go to the sessions, but his duty was to go to the next quarter sessions after his grievance had accrued. The Act of 1862 gave a right, but a limited one, to the ratepayer to object to the valuation list. Between 1862 and 1864 a ratepayer, who felt himself aggrieved by being over-assessed, might go and complain to the assessment committee; but, if he succeeded before the committee, it did not affect the current rate as to which he would still have to appeal to quarter sessions. That was one of the things which the Act of 1864 altered; but between those dates the assessment committee was not a body who could grant relief against the current rate. Then came the Act of 1864, and sect. 1 consisted of two parts, the first as to procedure under which *Reg.* v. *Biggleswade Union* (*ubi sup.*) was decided, and the second part dealing with the right of appeal, and in one direction limiting that right. The assessment committee was for the first time clothed with the power of giving relief against the current rate. The ratepayer must go first to them, and if he satisfies them they can give relief not only in respect of future rates, but also in respect of the current rate; and in substance he is not clothed with the legal right to go to the quarter sessions until he has gone to the lower authority and has failed; and as to going to this lower authority there is a distinct direction in sect. 1 that he may give his notice to go to the assessment committee "at any time." The law always was, and is, that the appellant must go to the first sessions after his right to go there has accrued. Since 1864 his right to go there does not accrue until he has gone to the assessment committee and has been aggrieved by their decision, and although his right of appeal has been limited in scope, it has been extended as to time—that is, from twenty-eight days to any time. The ratepayer appealing against a rate may, at any time during the currency of the rate—that is, while the assessment committee have power to alter that rate, go to the assessment committee. Then after that he must go to the next sessions, which the appellants in this case did. The ratepayer cannot go to the committee after the currency of the rate, as the committee would then have no power to alter the rate. Then, as to the second point, the recorder was wrong in not reducing the first instalment of the rate. If he had jurisdiction to lower the rate, then he was bound, under sect. 8 of the Poor Rate Act 1801 (41 Geo. 3, c. 23), to order the return of the excess paid on the first instalment of the rate. He referred to

Reg. v. *Great Western Railway Company* (*ubi sup.*);

Reg. v. *Wiltshire Justices* (*ubi sup.*).

Ryde in reply.—It is important "that appeals should be prosecuted promptly, so that the public authorities should not be left in uncertainty whether the rate is to be attacked or not":

Reg. v. *Surrey Justices*, 43 L. T. Rep., at p. 503; 6 Q. B. Div., at p. 111.

[He referred to *Rex* v. *Sussex Justices*, 15 East, 206.]

Cur. adv. vult.

Nov. 18. — The judgment of the court (Lord Alverstone, C.J., Kennedy and Ridley, JJ.) was read by

LORD ALVERSTONE, C.J.—This is an appeal on a case stated from a decision of Mr. Kinglake, the Recorder of Bournemouth, and raises a question of some difficulty under the Poor Relief Act 1743 and the Union Assessment Committee Acts 1862 and 1864. The rate appealed against was made on the 21st April 1903 to provide for expenses up to the 30th March 1904, and was payable by two instalments, one on the 1st May and the second on the 1st Nov. 1903. Meetings of the assessment committee were held on the 15th May, the 13th Aug., and the 12th Nov. Courts of quarter sessions were held on the 27th June and the 27th Oct. The first notice of objection was given by the appellants to the assessment committee on the 26th Oct.; the objection was heard and determined on the 12th Nov., and the notice of appeal to the sessions held on the 2nd Jan. 1904 was given on the 5th Dec. 1903. The appellants in the month of Aug. 1903 paid the first instalment due on the 1st May. Objection was taken to the jurisdiction of the recorder upon the ground that the appeal to the January Quarter Sessions was too late, not having been brought to the next quarter sessions within the meaning of sect. 4 of 17 Geo. 2, c. 38. It is clear from the authorities, and in fact it is not disputed, that up to the passing of the Union Assessment Committee (Amendment) Act 1864 the appeal would have been too late. There are

numerous authorities which establish that an appeal against a rate must be brought at the next practicable sessions at which an effectual appeal could be lodged: see *Rex* v. *Sussex Justices* (15 East, 206), *Reg.* v. *Justices of West Riding of Yorkshire* (E. B. & E. 713), and numerous other cases. Sect. 1 of the Union Assessment Committee (Amendment) Act 1864 provides that no person shall be allowed to appeal against a poor rate unless he shall have given to the assessment committee notice of appeal against the valuation list, and shall have failed to obtain such relief in the matter as he deems just. And the section further provides that: "After notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear" such objections "with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their current rate accordingly." It was contended on behalf of the respondents, the assessment committee of the Christchurch Union, that the proviso to this section, which makes it a condition precedent to an appeal that an appellant shall have given notice of objection to the assessment committee, and shall have failed to obtain relief, had not affected the duty of the appellant, under the 4th section of the Act of 1743, of bringing his appeal to the next practicable sessions after the publication of the rate, and that, inasmuch as the appellants had taken no steps until the 26th Oct., and had allowed the meetings of the assessment committee of May and August to go by, and that no explanation was given to account for the delay, the appellants had failed to comply with the provisions of the Act of 1743. It was further contended that, inasmuch as the recorder had found that the appellants had not taken steps, which they might have taken, to object to the rate at an earlier date, he had in effect decided that the delay in going to the assessment committee, and the consequent postponement of the appeal, showed that the appellants had not brought the appeal to the next practicable sessions. There is a great deal of force in this contention, and there is no doubt the language in some of the judgments which have been given shows that an appellant ought to be prompt in raising objections; for instance, Bovill, C.J., in *Reg.* v. *Biggleswade Union* (21 L. T. Rep. 494), in deciding in favour of an appellant, said that there was nothing to show that the appellant "took more than a reasonable time before taking any step." But we are dealing with the question of jurisdiction. Whatever the true view may be in a case in which it could be proved that as a matter of fact the appellants had unreasonably delayed going before the assessment committee, and had thereby exceeded the time allowed for appealing, we are unable to say that the recorder had no jurisdiction to entertain this appeal. The Act of 1743 provided that the appellant should appeal to the next general or quarter sessions. These words, as we have already said, have been construed to mean the next practicable sessions. Sect. 1 of the Act of 1864 contains no similar direction or limitation. Reliance was placed by the appellants, the Imperial and Grand Hotels Company, upon the words in sect. 1 of the Act of 1864: "At any time," following the words "after notice given," but we doubt whether that argument is entitled to much weight because those words were, undoubtedly necessary in order to extend the limit of twenty-eight days, during which, under sect. 18 of the Union Assessment Committee Act 1862, a person could object to the valuation list, and also to give the committee power to alter the list, notwithstanding approval under the same Act. But apart from this argument the section contains no direction or limitation similar to that contained in the Act of 1743, that the appellant shall lodge his objection before the next or any particular meeting of the assessment committee, and, looking to the practical working of the matter, we think it quite possible that the Legislature recognised that these objections could not be dealt with as speedily as appeals against poor rates under the old law, especially having regard to the extended powers of objection which were conferred by the Union Assessment Committee Acts of 1862 and 1864. Further, the power of the committee to alter a current rate would seem indirectly to limit the time within which objections can be effectually taken. We express no opinion as to what may be the true view to be taken in a case in which the whole period for which the rate was made was allowed to go by, or where, as we have said, persons have been guilty of unreasonable delay in giving notice of their objections. But we are unable to say in this case, in which the objection was lodged and determined, and the appeal brought within the period of the current rate, that the jurisdiction of the Court of Quarter Sessions was ousted, because the appellants might have lodged their objection at one or two earlier meetings of the assessment committee. Upon the whole, therefore, we are of opinion that the recorder was right in hearing the appeal, and in declining to give effect to the preliminary objection. The other point raised in the case must, in our opinion, be answered in favour of the Imperial and Grand Hotels Company. The recorder having reduced the rateable value from 1500*l.* to 1325*l.* in the one case, and from 2050*l.* to 1530*l.* in the other, ordered that the repayment of the excess should operate in respect of the second instalment of the rate and should not apply to the first instalment which the Imperial and Grand Hotels Company had paid in August. Assuming that he could entertain the appeal, as we have already decided, he was bound, having regard to the provisions of sect. 8 of the Poor Rate Act 1801 (41 Geo. 3, c. 23) to order repayment of the excess in respect of the whole rate. We therefore think that the appeal of the assessment committee must be dismissed with costs, and the order varied as above directed, and the appeal of the Imperial and Grand Hotels Company should be allowed with costs.

Judgment accordingly.

Solicitors for the respondents (the assessment committee), *Lovell, Son,* and *Pitfield,* for *Druitt* and *Druitt,* Christchurch.

Solicitor for the appellants, *C. F. Ingram,* for *Charles Lacey,* Bournemouth.

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, Oct. 28, 1904.

(Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.)

MILLARD (app.) *v.* BALBY-WITH-HEXTHORPE URBAN DISTRICT COUNCIL (resps.). (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Local government — Paving expenses — Liability of frontager—Change of ownership of premises —Owner at date of completion of works not owner at date of demand — Summary proceedings—Public Health Act 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257.

Under sect. 150 *of the Public Health Act* 1875 *a local authority served notices upon the owners of premises fronting a certain street requiring them to pave and make up the street, and, upon the notices not being complied with, carried out the required works, and apportioned the expenses on the frontagers.*

One of the frontagers upon whom the notice to pave had been served sold his premises after the works had been completed by the local authority, but before notice of the apportionment of the expenses and of the demand for the apportioned sum had been served on him by the local authority.

The local authority having taken summary proceedings against him to recover the apportioned amount:

Held, reversing the decision of the Divisional Court (90 *L. T. Rep.* 489), *that the frontager, since he was owner of the premises at the date of the completion of the works, was liable to pay the amount apportioned in respect of the premises owned by him at that date.*

Dicta of Cockburn, C.J. in Reg. *v.* Swindon New Town Local Board (4 *Q. B. Div.* 305) *disapproved.*

APPEAL by the respondents, the Balby-with-Hexthorpe Urban District Council, from a judgment of the Divisional Court (Lord Alverstone, C.J., Wills and Kennedy, JJ.) upon a case stated by justices of the peace for the West Riding of the county of York.

The case is set out in the report of the judgment of the Divisional Court (90 L. T. Rep. 489), the facts being shortly as follows:—

The respondents were the urban authority of a district within which was a street called Carr Hill-road.

On the 8th June 1899 they served notices under sect. 150 of the Public Health Act 1875 upon the owners of premises fronting the road requiring them to pave and make up the road.

The appellant was at that time the owner of certain such premises, and was duly served with the notice.

These notices were not complied with by the frontagers, and the respondents thereupon proceeded to carry out the works required by the notices to be done.

On the 4th Dec. 1901 the works were completed.

On the 20th March 1902 the appellant entered into a contract for the sale of his premises in Carr Hill-road, and on the 25th April following the premises were duly conveyed by him to a brewery company.

On the 24th Nov. 1902 the appellant was served with a formal notice in writing of the amount apportioned by the surveyor of the respondents as the proportion due from the appellant in respect of his premises of the expenses incurred by the respondents in the execution of the works.

On the 20th May 1903 a formal demand in writing for payment of the sum of 45*l.* 11*s.* 7*d.* was personally served on the appellant in accordance with the provisions of sect. 257 of the Public Health Act 1875.

The appellant failed to pay this sum, or any part thereof, and the respondents took summary proceedings to enforce their claim.

The justices held that the appellant was liable, and made an order against him for payment, but stated a case for the opinion of the court.

The Divisional Court (Lord Alverstone, C.J., Wills and Kennedy, JJ.) said that if the matter were *res integra* they would have decided that the appellant was liable; but, considering that they were bound by certain dicta of Cockburn, C.J. in *Reg.* v. *Swindon New Town Local Board* (4 Q. B. Div. 305), they reversed the decision of the justices, but gave leave to appeal (90 L. T. Rep. 489).

The respondents appealed.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides as follows:

Sect. 150. Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriage-way, footway, or any other part of such street is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged, or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel, or make good or to provide proper means for lighting the same within a time to be specified in such notice. . . . If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority. . . .

Sect. 257. Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding five pounds per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred. In all summary proceedings by a local authority for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand. Where such expenses have been settled and apportioned by the surveyor of the local

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

authority as payable by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months from the service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same. The local authority may, by order, declare any such expenses to be payable by annual instalments within a period not exceeding thirty years, with interest at a rate not exceeding five pounds per centum per annum, until the whole amount is paid; and any such instalments and interest, or any part thereof, may be recovered in a summary manner from the owner or occupier for the time being of such premises, and may be deducted from the rent of such premises in the same proportions as are allowed in the case of private improvement rates under this Act.

Macmorran, K.C. (*Scholefield* with him) for the respondents.—The appellant is liable to pay the sum apportioned by the surveyor because he was owner of the premises in question at the date of the completion of the works. The exact point here was not actually raised in the case by which the Divisional Court felt themselves bound, and the words of Cockburn, C.J. in that case which are relied upon by the appellant are therefore only *obiter*:

Reg. v. *Swindon New Town Local Board*, 4 Q. B. Div. 305; reported *nom. Hinton* v. *Swindon New Town Local Board*, 40 L. T. Rep. 424.

Moreover, these dicta are only to be found in the report in the Law Reports; they are not in the LAW TIMES or the *Law Journal* reports of the case. These dicta were referred to in a case before North, J., who said that they did not impress him in the least, and that the section of the Act clearly said that the owner when the works are completed is liable:

Re Bettesworth and Richer, 58 L. T. Rep. 796; 37 Ch. Div. 535.

That, it is true, was a case of vendor and purchaser, but the opinion of North, J. has been several times referred to with approval by the Court of Appeal:

Hornsey Local Board v. *Monarch Investment Building Society*, 61 L. T. Rep. 867; 24 Q. B. Div. 1;
Stock v. *Meakin*, 82 L. T. Rep. 248; (1900) 1 Ch. 683;
Surtees v. *Woodhouse*, 88 L. T. Rep. 407; (1903) 1 K. B. 396;
Re Allen and Driscoll's Contract, 21 Mag. Cas. 535; 91 L. T. Rep. 676; (1904) 2 Ch. 227.

Coming, then, to the words of the Act, I submit that sect. 257 clearly says that payment may be recovered "from any person who is the owner of such premises when the works are completed." It is said that only "the owner in default" who is referred to in sect. 150 is liable, and that until demand for payment has been made there is no default. But the word "default" as there used means "default in executing the works," not "default in payment of the apportioned sum." Moreover, even if the subsequent owner is liable under that section, his liability would be in addition to, not in substitution of, the liability of the previous owner who was owner "when the works were completed" within sect. 257.

Israel Davis for the appellant.—I submit that Cockburn, C.J. in the dicta which the Divisional Court relied upon laid down the law correctly. Even if this court should be inclined to disagree with those dicta it ought not now to overrule them. They have stood for twenty-five years, often cited, but never overruled, and no doubt, in many cases that have not come before the courts, have been acted on as a correct statement of the law. Under such circumstances as these it would be in accordance with the well-known practice of the court to adopt as law that which has existed so long:

Palmer v. *Johnson*, 51 L. T. Rep. 211; 13 Q. B. Div. 351;
Foakes v. *Beer*, 51 L. T. Rep. 833; 9 App. Cas. 605.

The opinion of Cockburn, C.J. was approved by Pollock, B.:

Reg. v. *Vestry of St. Marylebone*, 58 L. T. Rep. 180; 20 Q. B. Div. 415.

The case of *Re Bettesworth and Richer* (*ubi sup.*) was a question between vendor and purchaser. In *Hornsey Local Board* v. *Monarch Investment Building Society* (*ubi sup.*) the question was as to the effect of the Statute of Limitations with reference to a charge upon the premises. *Stock* v. *Meakin* (*ubi sup.*) was decided upon sect. 13 of the Private Street Works Act 1892. *Re Allen and Driscoll's Contract* (*ubi sup.*) carries the case no further. As to the meaning of the Public Health Act 1875, the scheme of the Act is to throw the burden of these expenses on the property which is to be benefited—see the last paragraph of sect. 257. The principal remedy that the local authority has is a charge on the property. The summary proceedings are intended as only a subsidiary remedy, and are intended to be used only against a person who is owner while the charge is in existence and was also owner at the time of the completion of the works. "Default" in sect. 150 means default in payment of what is due from him.

COLLINS, M.R.—This is an appeal from a decision of the King's Bench Division which has held that the appellant Millard is not liable in respect of certain expenses, in the nature of paving expenses, which have been incurred by the local authority, who have demanded repayment from him. At the time when the local authority gave notice to the frontagers to pave a certain road, he was one of the frontagers. He did not carry out the works himself, and thereupon the ordinary proceedings ensued involving the execution of the works by the local authority, the apportionment of the expenses among the frontagers, and the demand for payment. Up to the time of the completion of the works the appellant continued to own the premises in respect of which he had received the notice to pave, but before the date of the notice of the apportionment and of the demand upon him to pay the amount apportioned on his premises he had ceased to be the owner. Now, upon those facts the court below have held, contrary to their own view, but in deference to certain observations of Cockburn, C.J. in 1879 in the case of *Reg.* v. *Swindon New Town Local Board* (*ubi sup.*), that the appellant is not liable to pay the apportioned sum. That obliges us to look at the statute—viz., the Public Health Act 1875—under which this obligation is imposed. The first section to be considered is sect. 150. I need not deal with the earlier part of the section, but I will read the second paragraph beginning with "If such notice." [His Lordship read it.] The "default" of the owner there contemplated is a default in

his not doing something which he has been ordered to do. If he fails to carry out the works as he has been ordered, the local authority may execute the works themselves, and then they are enabled to recover in a summary manner the expenses incurred by them from the "owner in default." Therefore, taking that section by itself, the "default" of the frontager which is thus contemplated is presumably a default in not carrying out the works as he has been ordered to do. Then I come to sect. 257, which introduces a specific provision under which the appellant is liable if he is liable at all. [His Lordship read it.] Now, that in absolutely unambiguous language defines the person who is liable to pay the apportioned sum. The sum may be recovered "from any person who is the owner of such premises when the works are completed for which such expenses have been incurred." In the present case the appellant was unquestionably the owner when the works were completed, though he ceased to be the owner before the actual demand for the apportioned sum was made. On the language of sect. 257 it seems to me that there is no doubt whatever that the appellant is liable, and the only suggestion of an argument against this view is based on sect. 150. It is said that the "default" there mentioned is a default in the payment of money when demanded. The local authority are empowered to "recover in a summary manner the expenses incurred by them in so doing from the owners in default." Whether sect. 150 makes the appellant in the present case liable or not, it is unnecessary for us to say, because the language of sect. 257 is perfectly clear and unambiguous to the effect that the person who is owner at the time that the works are completed is liable to pay the apportioned sum. Whether or not any other person is also liable under sect. 150 is a question which does not now arise, and it is not necessary for us now to decide it. I now come to the case of *Reg.* v. *Swindon New Town Local Board* (*ubi sup.*), on the authority of which the court below thought themselves bound to decide in favour of the appellant. The court said that if the matter had been *res integra* they would have decided the other way, but they felt themselves bound, not by the decision in the case referred to, but by dicta of Cockburn, C.J., which they thought really formed the *ratio decidendi* of that decision. The cardinal distinction between that case and the present case is that the person who was there sought to be made liable was a person who had ceased to be the owner of the premises before the works were completed. It is absolutely clear that he did not come within the provisions of sect. 257, which are relied upon by the local authority in the present case. In the case cited Cockburn, C.J. used these words: "I cannot think it was ever intended by the Legislature that when the owner has parted with his property, and somebody else is in possession of it, and therefore getting the benefit of the work done, and who ought, therefore, to pay the expenses incurred, it should be competent for the local authority to follow him up wherever he may have gone, and hold him personally liable. I think that defect is remedied by sect. 257, which treats owners upon whom notice was originally served and who are the owners at the time the work is completed, and the expenses demanded, as the persons upon whom the local board shall be able to come for the expenses. I cannot suppose it was intended that both should be liable—the owner who made default originally in not doing the work, and the owner who is the person who has become the owner at the time the work is completed. What was meant was this: if the owner who is called upon to do the work and who makes default in doing it continues the owner at the time the work is executed and when the money laid out upon it is demanded, then he is liable under sect. 150, but if in the meantime he has ceased to be owner, he cannot be said to be the owner in default at the time the money is demanded, and when another has stepped into his shoes and become the owner." As has been pointed out in the court below, that is a dictum properly so called, inasmuch as it was not essential to the decision of the case, but was only an opinion that a person would not be liable unless he continued to be owner, not merely up to the time of the completion of the works as is expressly enacted in the statute, but up to the time of the demand of the apportioned sum, as to which there is no provision at all in the Act. Therefore it seems to me that we are not bound to give effect to an opinion on a point like that in a case where the facts did not raise the point. In the case before us, the appellant had undoubtedly not ceased to be the owner of the premises until after the crucial date, the completion of the works, and therefore he is liable under the express words of the statute. In my judgment, therefore, we must give effect to what was really the view of the court below, and, for the reasons I have stated, reverse their decision.

STIRLING, L.J.— I am of the same opinion. In this case Mr. Millard was owner of the property at the time when the works in respect of which he is sought to be charged were completed, and under sect. 257 of the Public Health Act 1875, if taken alone, it is quite clear that he is liable. It is said, however, that sect. 150 must be read along with sect. 257. Sect. 150 provides that the expenses may be recovered in a summary manner from the "owner in default," and it is argued that in order to make Mr. Millard liable he must not only be owner at the time of the completion of the works, but also he must be "owner in default." Now, what is the "default" which is spoken of in sect. 150? It appears to me that it is a default in executing the works which the urban authority have required to be done. The section provides for giving notice to owners of land adjoining highways, and it proceeds to say that, if such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein, and may recover in a summary manner the expenses incurred by them in so doing from the owners in default—*i.e.*, from the owners who have not complied with the notices served upon them. If that be the meaning, Mr. Millard remains liable if he was the owner of the property in question at the time when the notices were issued by the urban authority, and on whom the notice was served with which he failed to comply. Therefore, if we look at the words of the Act alone, it seems to me that the liability of Mr. Millard is made out, and I have the less difficulty in coming to that conclusion as it appears to me that it was arrived at by every member of the court from which the appeal comes.

The learned judges in that court, however, thought that they were constrained to give effect to what was laid down by Cockburn, C.J. in the case of *Reg.* v. *Swindon New Town Local Board* (*ubi sup.*), where the question which arose and was decided was a different one. In that case the person who was sought to be charged was the person who was owner of the property at the time when notice for executing the works was served, but who had ceased to be the owner when the works were completed. He, therefore, did not come at all within sect. 257, and the decision does not form a precedent for the decision in the present case. But it is said that one of the grounds of decision was the principle which, according to the report of the case in the Law Reports, was laid down by Cockburn, C.J.—viz., that the person who is to be liable under sect. 257 is the person who was both the owner on whom notice was originally served and also the owner at the times when the works were completed and the expenses demanded. Unquestionably Mr. Millard was not the owner at the time the expenses were demanded, though he was owner at the time when the work was completed. Upon that I observe, as has been already observed by the Master of the Rolls, that no question arose in that case whether the person who was liable was to be the owner at the time when the expenses were demanded. That is not to be found in sect. 257, and, speaking for myself, I am unable to see how that limitation can be arrived at. Sect. 257 appears to me to be perfectly clear. Now, we are not asked to apply the decision in *Reg.* v. *Swindon New Town Local Board* (*ubi sup.*), but to extend it to a new case, as to which the Queen's Bench gave no decision. If we were satisfied that the reasoning of Cockburn, C.J. was right, it might be right to do as we are asked. But as we are not satisfied, and the court below also was not satisfied that the reasoning was right, I do not think we are bound to give effect to that observation of the Lord Chief Justice. I agree, therefore, that the appeal ought to be allowed.

MATHEW, L.J.—I am of the same opinion. I concur in what has been said by my Lord and my brother Stirling.

Appeal allowed.

Solicitors for the appellant, *Halse, Trustram,* and *Co.*, for *A. Muir Wilson*, Sheffield.

Solicitors for the respondents, *Speechly, Mumford,* and *Craig*, for *Frank Allen*, Doncaster.

Nov. 11, 12, *and* 14, 1904.

(Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.)

THOMPSON *v.* ECCLES CORPORATION.

HAREDICKE *v.* FRIERN BARNET URBAN DISTRICT COUNCIL. (*a*)

APPEALS FROM THE KING'S BENCH DIVISION.

Local government—Drain or sewer—Pipe draining two or more houses belonging to different owners —"Single private drain"—Nuisance—Liability of owner to abate nuisance—Notice by local authority—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *s.* 41—*Public Health Acts Amendment Act* 1890 (53 *&* 54 *Vict. c.* 59), *s.* 19.

A line of pipes, which is wholly situate on private ground and carries the drainage of two or more houses not all belonging to the same owner into a public sewer, is a "single private drain" within sect. 19 *of the Public Health Acts Amendment Act* 1890, *and, if that drain causes a nuisance, the local authority may proceed under sect.* 41 *of the Public Health Act* 1875 *to compel the owner of the premises to do the works necessary to abate the nuisance.*

When a nuisance is caused by a "single private drain," the local authority may either themselves do the work necessary to abate the nuisance and recover the expenses from the owner of the premises on which the nuisance exists, or they may compel the owner to do the work by proceedings under sect. 41 *of the Public Health Act* 1875.

It is sufficient for the local authority to give notice, under sect. 41 *of the Public Health Act* 1875, *to the owner of the premises on which the nuisance exists to do the work necessary to abate the nuisance, and it is not necessary to give notice to the owners of the other premises drained by the single private drain.*

Judgment of the Divisional Court in the first case, and of Channell, J. in the second case, reversed.

Bradford *v.* Eastbourne Corporation (74 *L. T. Rep.* 762; (1896) 2 *Q. B.* 205) *approved.*

THOMPSON *v.* ECCLES CORPORATION.

APPEAL of the Corporation of Eccles from the judgment of the Divisional Court (Lord Alverstone, C.J., Darling and Channell, JJ.) upon a case stated by justices.

The Corporation of Eccles preferred a complaint against Thompson, under sect. 41 of the Public Health Act 1875 and sect. 19 of the Public Health Acts Amendment Act 1890, for having made default in complying with the requisitions of a notice served upon him to abate a nuisance on certain premises belonging to him.

Thompson was the owner of a block of seven houses in Liverpool-road, within the district of the corporation. One of these houses was the subject of the above complaint.

These seven houses were built in 1875, in accordance with plans approved by the then local authority, the predecessors of the corporation.

Adjacent to this block of seven houses, and separated therefrom only by a private passage giving access to the backs of the houses, there were twelve houses belonging to one Johnson. These twelve houses were divided into two blocks of six houses each by a private passage giving access to the backs of the houses. These twelve houses were in the Liverpool-road, and on the same side as Thompson's houses.

Thompson's houses were drained by a 9in. pipe running through and under the cellars of his seven houses, and receiving the drainage of each house. This 9in. pipe carried the drainage into a main sewer of the corporation in an adjoining street.

This 9in. pipe was a continuation of, and received the drainage from, a 6in. pipe which passed through and under the cellars of the twelve houses belonging to Johnson, and received the drainage from each of the twelve houses before reaching the 9in. pipe.

The whole of the 6in. and 9in. pipe was laid through private property until it reached the main sewer in the adjoining street.

(*a*) Reported by J. H. WILLIAMS and W. W. ORR, Esqrs., Barristers-at-Law.

On the 6th March 1903 a complaint was made to the corporation that the drain or sewer belonging to one of Thompson's houses was a nuisance and injurious to health.

Upon examination this drain or sewer was found to be in a bad condition, and to require alteration or amendment. It was part of the 9in. pipe above mentioned.

On the 16th March 1903 the corporation served on Thompson a notice requiring him to abate the nuisance, and for that purpose to execute certain specified works of a structural kind.

On the hearing of the complaint it was contended on the part of Thompson that as the drain of the house received the drainage of more than one building, not within the same curtilage, it was a sewer, under the provisions of sects. 4 and 13 of the Public Health Act 1875, and was vested in the corporation, whose duty it was to repair it and keep it so as not to be a nuisance; and that the drain was not a "single private drain," within the meaning of sect. 19 of the Public Health Acts Amendment Act 1890.

On the part of the corporation it was contended that the drain at the place where the nuisance occurred was a "single private drain" to which sect. 19 of the Act of 1890 applied, and that they had power to require Thompson to execute the necessary works under and by virtue of the provisions of sect. 41 of the Act of 1875.

The justices found that the drain was used by two or more houses belonging to different owners, and that the drain was a "single private drain" within the meaning of sect. 19 of the Act of 1890; and they made an order upon Thompson to abate the nuisance and to do any work necessary for that purpose within twenty-eight days.

The justices stated a case for the opinion of the court, in which the question was whether the justices had come to a correct determination and decision in point of law, and, if not, what should be done in the premises.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

Sect. 4. "Drain" means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed. "Sewer" includes sewers and drains of every description except drains to which the word "drain" interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act.

Sect. 13. All existing and future sewers within the district of a local authority, together with all buildings, works, materials, and things belonging thereto, except (1) sewers made by any person for his own profit, or by any company for the profit of the shareholders . . . shall vest in and be under the control of such local authority.

Sect. 15. Every local authority shall keep in repair all sewers belonging to them . . .

Sect. 19. Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied.

Sect. 41. On the written application of any person to a local authority, stating that any drain, water-closet, earth-closet, privy, ashpit, or cesspool on or belonging to any premises within their district is a nuisance or injurious to health (but not otherwise) the local authority may, by writing, empower their surveyor or inspector of nuisances, after twenty-four hours written notice to the occupier of such premises, or in case of emergency without notice, to enter such premises, with or without assistants, and cause the ground to be opened, and examine such drain, water-closet, privy, ashpit, or cesspool. If the drain . . . is found to be in proper condition, he shall cause the ground to be closed, and any damage done to be made good as soon as can be, and the expenses of the works shall be defrayed by the local authority. If the drain . . . on examination appear to be in bad condition, or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring him forthwith or within a reasonable time therein specified to do the necessary works; and if such notice is not complied with, the person to whom it is given shall be liable to a penalty not exceeding ten shillings for every day during which he continues to make default, and the local authority may, if they think fit, execute such works, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses.

The Public Health Acts Amendment Act 1890 (53 & 54 Vict. c. 59) provides:

Sect. 19 (1). Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section forty-one of the Public Health Act 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a court of summary jurisdiction. (2) Such expenses may be recovered summarily or may be declared by the urban authority to be private improvement expenses under the Public Health Acts, and may be recovered accordingly. (3) For the purposes of this section the expression "drain" includes a drain used for the drainage of more than one building.

The Divisional Court (Lord Alverstone, C.J., Darling and Channell, JJ.) held that the justices were wrong, and gave judgment in favour of Thompson (90 L. T. Rep. 507).

The Eccles Corporation appealed.

HAEDICKE v. FRIERN BARNET URBAN DISTRICT COUNCIL.

Appeal of the defendants from the judgment of Channell, J. at the trial of the action without a jury.

The plaintiff brought this action to recover from the defendants the sum of 73*l.* as money expended by her at the request of the defendants in relaying a sewer.

The plaintiff was the owner of four houses within the district of the defendants, which were built before 1888.

These four houses were drained by the usual house drains into a 9in. pipe, which was laid through the back gardens of these houses and also of sixteen other houses belonging to another owner.

The 9in. pipe carried the drainage of the sixteen houses as well as that of the plaintiff's houses, and was entirely on private ground.

The 9in. pipe existed and drained all these houses before 1888, when it was diverted by the local authority into their public sewer.

In Jan. 1903 the 9in. pipe became obstructed near one of the plaintiff's houses. A nuisance

was thereby caused, of which complaint was made by the occupier to the defendants.

The defendants, on the 24th Feb., caused a notice to be served on the plaintiff stating that the council were satisfied of the existence of a nuisance at her houses and requiring her within three days to abate the same, and for that purpose to relay the drains at the back of the houses in a certain way. This was the ordinary form of notice for the abatement of a nuisance.

The plaintiff objected to the notice, and wrote to the defendants saying that it related to a "sewer." The defendants replied that the drains in question were repairable by the owner and not by the local authority, and that the notice must be complied with without delay. The plaintiff replied that she would in self-defence do the repairs to the drainage, and would enforce payment in a court of law.

The plaintiff thereupon did the work necessary to abate the nuisance, and subsequently brought this action to recover 73*l*., the cost of the alteration and repair of the 9in. pipe.

The whole of the work was done upon the premises belonging to the plaintiff, and the nuisance was thereby remedied.

The action was tried before Channell, J. without a jury.

Macmorran, K.C. and *R. F. Colam* for the plaintiff.

Clavell Salter, K.C. and *W. H. Duckworth* for the defendants.

Cur. adv. vult.

June 7.—CHANNELL, J. read the following judgment.—In this case the plaintiff is the owner of four houses in Friern Barnet-road, within the district of the defendant district council, which houses were drained by the usual house drains into a 9in. pipe, which was laid through the back gardens of these and other houses, about sixteen in number. That 9in. pipe, when first laid a considerable number of years ago, communicated with a similar pipe behind other houses, between thirty and forty in number, and both parts of the pipe were entirely on private ground, and the outfall was into a ditch or a cesspool, it does not clearly appear which. In 1888 the defendants or their predecessors constructed a sewer in the roadway, and they then made a communication from the 9in. pipe into that sewer, so diverting the drainage of the sixteen houses through the 9in. pipe into the sewer. The 9in. pipe in the neighbourhood of one of the plaintiff's houses about Jan. 1903 became obstructed, and a nuisance was caused of which the occupier complained to the defendant council, and after some correspondence and the service of two notices, which I need not further refer to, the district council served a notice dated the 24th Feb. 1903, stating that the council were satisfied of the existence of a nuisance at 5, 7, and 9, Friern Barnet-road (being three of the four houses owned by the plaintiff), and requiring her within three days to abate the same, and for that purpose to relay the drains in the rear of the houses in a certain way, and also to reconstruct the water-closets and do other work within the houses. The notice was the ordinary notice for the abatement of a nuisance, and was accompanied by a somewhat peremptory letter from the clerk to the council. The plaintiff's husband, who managed her property, replied by a letter of the 25th Feb, stating that the notice related to a drain "which is a combined drain or sewer." The clerk replied by a letter of the 27th Feb. that "the drains in question are repairable by the owner and not by the local authority, and that the notice should be complied with without further delay." The plaintiff's husband replied by a letter dated the 28th Feb., in which he said that he would "in self-defence do the repairs to the drainage, and enforce payment in a court of law." The plaintiff then proceeded to do both the work inside the houses included in the notice, and also the work required in the 9in. pipe. Under the direction of the defendants' surveyor the plaintiff took up the 9in. pipe not only behind the houses named in the notice, but also behind the house No. 3, which also belonged to her, adjoining to the houses named in the notice. The fall of the pipe was altered, and a 6in. pipe substituted in the upper part. The plaintiff then brought this action to recover from the defendants the money expended on alteration of the 9in. pipe, and in remaking the connection with it (admitting, of course, that she must bear the expense of the inside work), on the ground that the work to the 9in. pipe was work which the defendants ought themselves to have done. The first question which was argued was whether under these circumstances, even if the expense incurred by the plaintiff was in respect of work which the defendants ought themselves to have done, the plaintiff can recover, or whether she was merely in the position of a volunteer who had voluntarily chosen to perform the obligation of another person. If my decision in *North* v. *Walthamstow Urban Council* (67 L. J. 972, Q. B.) is correct, the plaintiff clearly can recover, but in my opinion the present case is stronger in favour of the plaintiff than that case was. There, as in many of the cases, the plaintiff acquiesced at the time in the notice served on him, and only claimed to be reimbursed by the local authority when he subsequently discovered either facts or law which in his view threw the burden on the local authority. In the present case the plaintiff, through her husband, acting as her agent, protested at the time, and under protest submitted to the defendants' notice and threats. Under these circumstances there is really no difficulty in implying the necessary promise on the part of the defendants to reimburse the expenditure, if their contention as to the liability proves to be wrong. I think still that my decision in *North* v. *Walthamstow Urban Council* (*ubi sup.*) was right, and was entirely justified by the authority of *Andrew* v. *St. Olave's Board of Works* (78 L.T. Rep. 504; (1898) 1 Q. B. 775), on which it was based. I do not think any case, except possibly *Oliver* v. *Camberwell Borough Council* (21 Mag. Cas. 461; 90 L. T. Rep. 285), in any way lessens such authority as my decision might otherwise have had. In that case, *Oliver* v. *Camberwell Borough Council* (*ubi sup.*), Wills, J. expressly agreed with my view, and he and Kennedy, J. decided that case on the ground that there had only been an intimation and not a statutory notice, and they thought, rightly or wrongly, that certain cases to which they referred were authorities which showed the difference between an intimation and a notice to be important. It seems to me, I must say, that at least two of the cases to which they referred,

including the one, *Thompson and Norris Manufacturing Company* v. *Hawes* (59 J. P. 580), on which they really based their judgment, were quite different. *Thompson and Norris Manufacturing Company* v. *Hawes* (*ubi sup.*) was a case in which a tenant was suing his landlord for money paid under alleged compulsion of a local authority. It seems to me that there the tenant would have to prove real compulsion. In *Harris* v. *Hickman* (21 Mag. Cas. 369; 89 L.T. Rep. 722; (1904) 1 K. B. 13) the action was by the landlord against the tenant, and raised a similar question. It is quite different where one person sues another in respect of money alleged to have been paid by him by reason of pressure put on him by the person whom he is suing. When suing a third party, such as his landlord, the plaintiff has to prove he was actually compelled, that the proceedings against him were such as he could not have effectually resisted; whereas when a plaintiff is suing the person who put on the compulsion, the fact of the compulsion being such as must succeed would probably be fatal to his case. Here if the plaintiff had defended the proceeding which would have followed on her non-compliance with the defendants' notice, she would have been entitled to ask the magistrate to say that she was not the person by whose act and default the nuisance had arisen, but that the defendants were. If that question had been decided against her by a court of competent jurisdiction, and the decision had stood without successful appeal, the plaintiff never would have recovered the money from the defendants, at all events unless she could have shown, as is suggested by Lord Russell, C.J. in *Andrew* v. *St. Olave's Board of Works* (*ubi sup.*), that both were liable. On the whole, I come to the conclusion that on the facts before me the plaintiff may recover if she shows that the obligation to keep the 9in. pipe in repair was on the defendants. It is, as it appears to me, an ordinary case of recovering money extorted by duress and paid under protest. I pass now to the question whether it was the duty of the defendants to do what was required to this 9in. pipe. Dealing with the question in the first instance, apart from the Public Health Acts Amendment Act 1890, the pipe was undoubtedly a sewer within sect. 4 of the Public Health Act 1875, which was vested in and under the control of the defendants by sect. 13, and which by sect. 15, unless a distinction can be drawn between "vested in" and "belonging to," the defendants had an express duty to repair. Wright, J. in both *Self* v. *Hove Commissioners* (72 L. T. Rep. 234; (1895) 1 Q. B. 685), and in *Reg.* v. *Mayor, &c., of Hastings* (75 L. T. Rep. 377; (1897) 1 Q. B. 46), suggested that there is no duty on a local authority to do specific works, and that the general duty of properly draining their district can only be enforced at the instance of the Local Government Board. This is so as regards the general duty (see *Pasmore* v. *Oswaldtwistle Urban District Council*, 78 L. T. Rep. 569; (1898) A. C. 387); but where an existing sewer belonging to the local authority is out of repair they are bound by sect. 15 to repair it. If they were bound to repair the defects in the 9in. pipe (which apart from the Act of 1890 they clearly were), I do not think that they are at liberty to say that works done at their instance, and under the direction of their surveyor, were not works necessary to remedy the defects in the pipe. This, I think, prevents the defendants from saying that the works, the expense of which the plaintiff is seeking to recover, were different works from those, if any, which they would themselves have been liable to do. It is true that they would have had a wide discretion as to what should be done, but they have, in my opinion, exercised their discretion so as to preclude themselves from objecting to what the plaintiff did, and they directed the works which were done behind house No. 3, as well as those behind the other houses. If, therefore, the Act of 1890 had never been passed, I think that, subject to small questions of amount, the plaintiff's action would have been maintainable. It remains to consider the difficult question of the construction of sect. 19 of the Public Health Act 1890, and its effect on the question in this action. That section has been considered in *Self* v. *Hove Commissioners* (*ubi sup.*), *Hill* v. *Hair* (72 L. T. Rep. 629; (1895) 1 Q. B. 906), *Bradford* v. *Mayor, &c., of Eastbourne* (74 L. T. Rep. 762; (1896) 2 Q. B. 205), *Seal* v. *Merthyr Tydfil Urban District Council* (77 L. T. Rep. 303; (1897) 2 Q. B. 543), and possibly in other cases, and lastly in a case of *Thompson* v. *Eccles Corporation* (21 Mag. Cas. 524; 90 L. T. Rep. 507; (1904) 2 K. B. 1), decided recently in the Divisional Court, and reported since the argument of this case before me. I was a party to that last case, which is now said to be contrary to *Bradford* v. *Mayor, &c., of Eastbourne* (*ubi sup.*), and now that I have had the opportunity of examining the cases again, with the assistance of the extremely clear arguments of Mr. Macmorran and Mr. Clavell Salter, I feel bound to say that I do not consider the last case to be a satisfactory decision. Whether it does differ from *Bradford* v. *Mayor, &c., of Eastbourne* (*ubi sup.*) or not, and whether, if it does, it is right or wrong in so doing, the Court of Appeal, to which I understand the case has been taken, will, of course, decide; but I may say at once that, although I adhere to what I appear to have said as to the effect of sect. 19 and its general construction, I see now that I omitted to notice what I now think to be an important point in the case. Counsel in the case of *Thompson* v. *Eccles Corporation* (*ubi sup.*) referred the court to the case of *Bradford* v. *Mayor, &c., of Eastbourne* (*ubi sup.*), but did not call our attention to it in detail. I did not have the report actually before me, nor, so far as I recollect, did my brothers. We all thought we knew, and no doubt we did know, its general effect. I do not desire to put the blame on counsel, for what they did was to attribute to me a more accurate knowledge of all the points decided in the *Eastbourne* case (*ubi sup.*) than I in fact possessed. The case of *Thompson* v. *Eccles Corporation* (*ubi sup.*) was argued before us as if the question was whether the pipe was a sewer or whether it was a drain. It was suggested that it was a sewer at one part of its course, when it was serving several houses belonging to one owner, and that at another part of its course, when it was, in addition, serving another house belonging to another person, it would cease to be a sewer and would become "a single private drain." It was also suggested that the mere fact that it drained the houses of more than one owner made it, *ipso facto*, a drain as distinguished from a sewer, and, further, that it was not a case of "houses belonging to different

owners," because two out of the twelve houses or so belonged to the same person. Those arguments did not commend themselves to me then or now. They certainly show the difficulties arising out of the section, but it was not brought home to my mind that what was really decided in the *Eastbourne* case (*ubi sup.*) was that, on the true construction of sect. 19 of the Act of 1890, a thing which for all other purposes was a sewer might for the purposes of that section be the thing referred to in the section as a single private drain. The reasoning of the court on sub-sect. 3 of sect. 19 is very strong as to this when the case is carefully read. I cannot speak with the same freedom of the judgments of my learned brothers as I can of my own, but I do not think that this point was present to their minds any more than it was to mine. I observe that what the Lord Chief Justice said of the matter was that it could not now be disputed that under the Act of 1875 a drainpipe which receives the drainage of more than one building is a sewer none the less because it is made entirely through private property. In that I agreed at the time and agree now, but I now think that it does not conclude the question, and that we ought to have gone on to consider the question whether, notwithstanding that the construction which we had then to deal with was a sewer under the Public Health Act 1875, it was not also a construction in respect of which the powers of sect. 19 of the Act of 1890 might be exercised. I think that sect. 19 may be paraphrased thus, leaving out some immaterial words and altering others to show the meaning which I attach to them: "Where two or more houses are connected with a public sewer, not by a separate drain for each house, as the local authority may require them to be, but by one drain for all the houses, that drain, provided it is a private drain, and notwithstanding that it is for purposes other than this section a sewer, may be dealt with under sect. 41 of the Public Health Act 1875, notwithstanding that all the houses do not belong to the same owner, and the expenses may be recovered from the owners of the houses in such proportion as the surveyor may settle." In this paraphrase, as in the section itself, the difficulty is to see what is meant by "private drain." Now, this section is in an Act which local authorities have the option of adopting if they like. One would think that such an Act would be confined to machinery for enforcing and dealing with existing rights and liabilities, and would not be found to have the effect of substantially altering rights and creating new liabilities, or, at all events, that it would not enable a local authority, in adopting the Act, to relieve themselves from liability to repair existing structures, and to transfer that liability to private owners. Further, if it was really intended to transfer to private owners the liability of maintaining structures which before the adoption of the Act had been maintained by the public, it is inconceivable that it could have been intentionally enacted that that liability should be so transferred when the houses did not all belong to the same owner, but that if the houses, though constructed and drained in precisely the same way, happened to belong to one person, that person should be entitled to have his drain kept in order at the expense of the public. There are, therefore, very strong grounds for holding that when this section contrasts, as it clearly does, "private drain" with "public sewer," the words "private" and "public" refer to the liability to repair being on the private owner or on the public respectively. If I had to construe the section apart from the authority of the *Eastbourne* case (*ubi sup.*), I should certainly say that if such things could be found as drains connecting more than one house with a public sewer, which were, apart from the Act of 1890, repairable by the owner of the houses, those were the things referred to as "private drains," and that the intent of the section was to provide machinery for dealing with such cases when there was more than one owner for apportioning the expense. I agree that such things would not be numerous, but I do not at all think that they are non-existent. In addition to the case suggested by Cave, J. in *Hill* v. *Hair* (*ubi sup.*), I think there are, in fact, a considerable number of cases of semi-detached houses or small rows of three or four houses which private owners repair under provisions of a local Act more or less similar to the combined drainage clause of the Metropolitan Management Acts, or under conditions imposed by the local authorities when asked to consent to such modes of drainage. During the argument of the case before me, and upon my stating that I believed such cases did exist, a gentleman who was a clerk to a local authority not engaged in the case, but who happened to be in court, stated through Mr. Macmorran, who was arguing the case, that he personally knew many such cases, and Mr. Macmorran, who himself has a large experience, was of the same opinion. I adhere, therefore, personally to the opinion I expressed in *Thompson* v. *Eccles Corporation* (*ubi sup.*), that the view of Cave, J. was the most logical solution of the difficulties arising from the section, though his instances are not, in my opinion, exhaustive. I think, however, after careful consideration of the *Eastbourne* case (*ubi sup.*), that the contrary was there decided, and I do not think it is open to me to disregard that decision, more especially as Cave, J. in the subsequent case of *Seal* v. *Merthyr Tydfil Urban Council* (*ubi sup.*), himself followed it. I must therefore hold that "private" refers, not to private liability to repair as distinguished from public, but to the fact that the structure is on private ground. I doubt whether the court in the *Eastbourne* case (*ubi sup.*) meant to decide that all sewers on private ground draining houses of more than one owner and communicating with a sewer in a highway were to be held to be "single private drains." To my mind, although "two or more" includes "more than two," and a hundred is more than two, yet "two or more" was never meant to include a hundred. Here there were a very considerable number of houses all drained into what seems to me to be not merely by the definition in the Public Health Act 1875, but in fact, a sewer going along the back of the house instead of at the front; that is, no doubt, in private ground, but still in every respect of the character of what is ordinarily called a sewer. I am not sure that the judges who decided the *Eastbourne case* (*ubi sup.*) would really have held this to be a "single private drain," but there were a considerable number of houses in that case, and still more, apparently, in *Seal* v. *Merthyr Tydfil Urban Council* (*ubi sup.*), so I ought not to distinguish this case on that ground. I do not think the

recent decision of *Thompson* v. *Eccles Corporation* (*ubi sup.*), decided, as I think it was, by inadvertence (unless distinguished on the last ground by reason of the number of houses), would justify me in disregarding the *Eastbourne* case (*ubi sup.*). I have commented on the extraordinary result of this legislation, that the same structure must be repaired by the local authority if it serves the houses of one person only, but that if it serves the houses of different owners, these different owners may be required to repay the expense of making it good. It is, however, right to point out that the thing which is extraordinary is not the enactment as to several owners, but the omission to enact the same thing when there is only one owner. The omission appears clearly accidental. The draftsman of the section must have thought, and the Legislature which adopted his language must have thought, that this had been already provided for, and, consequently, by a misapprehension omitted to provide for it. It is right to point out that the real difficulty in the way of the court doing justice in so many of these cases on this subject arises from the automatic vesting in the local authority of all sewers, and the automatic imposition of liability for their maintenance and repair by reason merely of the form of the construction and the purpose they serve, and without any assent or acceptance on the part of the local authority. If it were provided that no sewer should be repairable by a local authority until adopted and taken over, as is the case with regard to a new highway, proper provision being, of course, made for requiring local authorities to take over such sewers on notice and on their being put in proper order, all these difficulties would disappear. The difficulty as to the effect of a surreptitious and wrongful joinder of one drain with another, the difficulty of ascertaining on whom the liability of repairing a particular structure is, would all be got rid of, and, so far as I see, the existing machinery would all work satisfactorily as regards all drains and sewers made after such an amendment of the law. It is a discredit to our Legislature, or the department of the executive which has charge of such matters, that so simple an amendment of the law should not have been made long ago, as for the last fifteen years or more there has been constant litigation on these points. Of course, if there is to be an amendment of this law, it would be desirable, besides the simple amendment required to prevent difficulty as to future constructions, to have some declaratory enactment dealing with existing structures, and I presume it is the difficulty of framing satisfactorily such a declaratory enactment which has led to there being as yet no amendment of the law. I have now to consider how the view I have expressed as to the *Eastbourne* case (*ubi sup.*) affects the case before me. I must hold that, in the present case, if the defendants had proceeded under sect. 41 of the Act of 1875 and sect. 19 of the Act of 1890, they would have been able to impose a proportion of the charge, the subject of the action, on the plaintiff. It would be a proportion only, because the cost, if the proceeding had been taken in that way, would have fallen, not on the owner, on whose property the defect happened to be, but on the owners jointly in proportions to be settled by the surveyor. The defendants did not, in fact, take any proceedings under that section. I do not lay any stress on the fact that the complaint of the nuisance was not in writing in the first instance, or that notice in writing of intention to enter was not given. Those provisions (at any rate the notice to enter) are clearly introduced for the benefit of the occupier, and may be waived by him, and were so in this case. The reason I say the defendants were not really acting under sect. 19 is that they did not give notice to all the owners, and were seeking to impose the whole liability on the plaintiff on the ground that the nuisance arose on her premises. It is necessary, however, to consider the case on the basis that proceedings might have been taken under sect. 19, because if the defendants were not liable to repair, but the owners jointly were, the plaintiff has a difficulty in showing that when incurring the expenses sued for she was performing the defendants' obligation, and was paying money for the defendants. To meet this point *Reg.* v. *Mayor, &c., of Hastings* (*ubi sup.*) was quoted by Mr. Macmorran. There a *mandamus* appears to have been issued to a local authority to repair a structure to which sect. 19 of the Act of 1890 was assumed, rightly or wrongly, to be applicable. It was, however, said that there no complaint of a nuisance existing had been made to the local authority, and that until such complaint the powers of sect. 19 did not arise. This seems an authority that in cases under sect. 19 the burden of repair does remain on the local authority, but with power in a special event and by special proceedings to recover even against other persons. I think this as an authority is equally binding on me as the *Eastbourne case* (*ubi sup.*), but it is not completely in point, because in the case before me I think there was a sufficient complaint to give the defendants jurisdiction to proceed under sect. 19. They did not, however, so proceed, and in particular the proportions to be payable by the various owners had never been assessed by their surveyor. The apportionment by the surveyor seems to me to be a condition precedent to any portion of those expenses being payable by the plaintiff. I must therefore hold, not without considerable hesitation, that the defendants have by the duress of an erroneous notice in a case of nuisance, when prompt action was necessary, compelled the plaintiff to incur under protest expenses which the defendants were, in the then existing state of things, themselves liable to. If the apportionment of the surveyor were a mere matter of form, and I had myself the materials for making the calculation of how much the plaintiff ought to bear, I should probably hold that the plaintiff could only recover the excess beyond her own proportion of the expenditure. But I have no materials for making the apportionment, and it appears to me a matter specially delegated to the surveyor. I do not, therefore, see how I can do otherwise than hold that the plaintiff is entitled to recover the whole expenses of the work, which I assess at 65*l.* I think no deduction should be made for the part of the work done at No. 3, but I do not think that the loss of rent, which was claimed was made out in such a way as to be recoverable. I therefore give judgment for the plaintiff for 65*l.*

Judgment for the plaintiff.

The defendants appealed.

Macmorran, K.C. and *Fleetwood Pritchard* for the Eccles Corporation.—The short question on this appeal is really whether the local authority are obliged to repair the pipe in question or whether they can compel the owner of the premises to do so. By the definitions in sect. 4 of the Public Health Act 1875, speaking broadly a "drain" is that which drains one house only, and all other drains are "sewers"; by sect. 13 "sewers" are vested in the local authority; and by sects. 15 and 19 the local authority are bound to keep "sewers" in repair and so as not to be a nuisance. By sect. 41 the local authority, on a written application to them stating that any "drain" is a nuisance or injurious to health, if on examination the drain appears to be in bad condition or to require amendment or alteration, may give notice to the owner or occupier of the premises requiring him to do the works necessary to abate the nuisance. *Primâ facie*, therefore, any pipe which conveys the drainage of two or more houses is a "sewer," and must be kept in order by the local authority; but any pipe which drains one house only is a "drain," and must be kept in order by the owner or occupier, who can be compelled to keep it in order. The difficulty in cases like the present arises from sect. 19 of the Amendment Act of 1890. The *primâ facie* meaning and effect of that section is that it enables the local authority to deal with pipes, which would *primâ facie* be sewers, as if they were "drains," and to impose the burden of keeping them in order upon the owner of the premises. The real question, then, is, What is a "single private drain" within the meaning of sect. 19? There are many cases upon that section, some of which are conflicting. The case of *Travis* v. *Utley* (70 L. T. Rep. 242; (1894) 1 Q. B. 233) was not decided upon sect. 19 of the Act of 1890, but under the Public Health Act 1875. The first case under sect. 19 was *Self* v. *Hove Commissioners* (72 L. T. Rep. 234; (1895) 1 Q. B. 685), in which it was decided that a single pipe which was in private ground and drained two houses belonging to different owners was a "single private drain" within sect. 19. The decision in *Hill* v. *Hair* (72 L. T. Rep. 629; (1895) 1 Q. B. 906) apparently conflicts with the former case; but that decision was considered in the next case of *Bradford* v. *Eastbourne Corporation* (74 L. T. Rep. 762; (1896) 2 Q. B. 205), in which, in a considered judgment, the court held that a common drain on private ground, into which there was no public right of draining, was a single private drain within sect. 19 if it drained two or more houses belonging to different owners. That case has been followed ever since until the decision in the present case. In the case of *Reg.* v. *Hastings Corporation* (75 L. T. Rep. 377; (1897) 1 Q. B. 46) the decision was only that the local authority could be compelled by *mandamus* to repair a pipe, which was a sewer within the Act of 1875, when they had taken no steps to deal with it as a single private drain under sect. 19 of the Act of 1890. In *Seal* v. *Merthyr Tydvil Urban District Council* (77 L. T. Rep. 303; (1897) 2 Q. B. 543) the court followed the decision in *Bradford* v. *Eastbourne Corporation* (*ubi sup.*). Then came the decision in the present case, which is contrary to the decision in *Bradford* v. *Eastbourne Corporation* (*ubi sup.*). In the later case of *Haedicke* v. *Friern Barnet Urban District Council*, the appeal in which is being heard with this appeal, Channell, J. said that in the present case the decision in *Bradford* v. *Eastbourne Corporation* (*ubi sup.*) had not been fully considered, and he followed the earlier case upon this point. Sect. 19 must have been intended to give a local authority some power which it did not possess before, and, unless the construction given to that section by the decision in *Bradford* v. *Eastbourne Corporation* (*ubi sup.*) is adopted, no real operation can be given to the section.

Rhodes for the respondent Thompson.—The decision of the Divisional Court was right. Before the Act of 1890 this pipe was clearly and undoubtedly a "sewer" within the Act of 1875, and was vested in the local authority, which was bound to keep it in repair. The plan of drainage was sanctioned by the local authority, who must have known that the result would be that the pipe would become a sewer in fact. In passing the plan the local authority accepted that position, and the local authority cannot subsequently alter that position by adopting the Act of 1890. The words of sect. 19, "two or more houses belonging to different owners," were used advisedly, and mean that all the houses must belong to different owners. The fact that the pipe is all laid in private ground does not make it any the less a "sewer" which vests in the local authority:

Bonella v. *Twickenham Local Board*, 20 Q. B. Div. 63.

In this case this pipe drains several houses in a block belonging to Thompson, and therefore that part of the pipe is not within sect. 19:

Heaver v. *Fulham Borough Council*, 91 L. T. Rep. 31; (1904) 2 K. B. 383.

In none of the cases which have been cited has it been held that a pipe which drains more than one house of the same owner is a single private drain within sect. 19. The case of *Jackson* v. *Wimbledon Urban District Council* (21 Cox Mag. Cas. 499; 90 L. T. Rep. 417; (1904) 2 K. B. 359) is a clear authority that, where a pipe drains several houses belonging to the same owner, that part of the pipe is not a "single private drain" within sect. 19. Therefore, in this case, that part of the pipe which drains Thompson's seven houses is a "sewer," and is not a single private drain within sect. 19.

Macmorran, K.C. in reply.—In *Jackson* v. *Wimbledon Urban District Council* (*ubi sup.*) the pipe which drained Jackson's houses did not receive the drainage of any other houses. This case would be the same as that if Johnson's houses did not drain into this pipe before it received the drainage of Thompson's houses.

Clavell Salter, K.C. and *W. H. Duckworth* for the appellants, Friern Barnet Urban District Council.—The learned judge has decided that this pipe was a "single private drain" within sect. 19 of the Act of 1890, and that decision was right. A complaint was made to the local authority of the existence of a nuisance, and thereupon they had power to proceed under sect. 41 of the Act of 1875. The notice which they served on the plaintiff was a notice under sect. 41, and that proceeding cast upon the plaintiff the burden of doing the work necessary to abate the nuisance and of bearing the expense of so doing. The local authority are not limited to the remedy given to them by sect. 41, of doing the work themselves

and then recovering the expenses from the owners according to an apportionment by their surveyor; they may also take proceedings under the Act of 1875 to compel the owners to do the necessary work. In the present case the fact was that the nuisance existed entirely upon the premises of the plaintiff and that all the work necessary to abate the nuisance was done upon her property. No question of apportionment between her and the owners of the other premises drained by this single private drain could therefore arise; and it could not be necessary to serve any notice upon any of the owners of the other premises. By reason of the provisions of sect. 19 the liability to repair this single private drain was upon the plaintiff, and not upon the local authority, and therefore the plaintiff cannot recover.

Macmorran, K.C. and *Colam* for the respondent.—This pipe was not a "single private drain" within sect. 19 of the Act of 1890. It was a "sewer" within the definition in the Act of 1875, and it had in fact been adopted as a public sewer and treated as a public sewer by the local authority. The local authority cannot now say that it is not a public sewer, and that they can cast the burden of repair upon a private person. Sect. 19, whatever may be its proper construction, can only apply to what is undoubtedly a single private drain, and cannot apply to a pipe which has in fact been adopted by the local authority as a public sewer. The local authority in this case have not in fact acted under the powers conferred by sect. 19 of the Act of 1890 and sect. 41 of the Act of 1875. The only power conferred on them by those sections is that of doing the work themselves and recovering the apportioned expenses from the different owners using the single private drain. Notice must be given to the owners of the various houses, and the expenses must be apportioned before any liability or burden is cast upon the owner:

Lancaster v. *Barnes District Council*, 78 L. T. Rep. 355; (1898) 1 Q. B. 855.

The notice served upon the plaintiff was not a notice under sect. 41 at all, and no notices were served on the other owners. Therefore the liability to repair this pipe, which was *primâ facie* a sewer, remained upon the local authority and was not cast upon the plaintiff.

Salter, K.C. in reply.—It is expressly provided by sub-sect. 3 of sect. 19 that for the purposes of the section a "drain" shall include a drain used for the drainage of more than one building, and the effect of that is that a single private drain which drains two or more buildings not belonging to the same owner is not to be called a "sewer" within the definition in sect. 4 of the Act of 1875. The decision in *Lancaster* v. *Barnes District Council* (*ubi sup.*) was only that a joint notice on two owners of different houses was good where the nuisance existed on the premises of both; that case does not show that the notice must be served on all the owners.

COLLINS, M.R.—This is an appeal in two cases which raise substantially the same point; another point which might have been taken, but was not taken, in the first appeal was taken upon the second appeal. The first is an appeal in the case of *Thompson* v. *The Eccles Corporation*, and raises the question as to what is the effect of sect. 19 of the Act of 1890, and how far it extends in altering the old law. Now, sect. 19 of the Public Health Acts Amendment Act 1890 is in these terms: "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under sect. 41 of the Public Health Act 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses; then sub-sect. 3: "For the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building." Now, up to that time unquestionably a drain which was used for the drainage of more than one building was not a drain, but a sewer. This particular sub-section, for the purposes of this section only, makes the expression "drain" include a drain used for the drainage of more than one house. That raises the difficulty in the case. That being so, the new definition of "drain" being introduced, sect. 19 makes applicable sect. 41 of the Public Health Act 1875, which is in these terms: "On the written application of any person to a local authority, stating that any drain"—at that time that meant a drain in the old sense, namely, a drain that was used for the purpose of one building only—"on or belonging to any premises within the district is a nuisance or injurious to health (but not otherwise) the local authority may, by writing, empower their surveyor or inspector of nuisances, after twenty-four hours' written notice to the occupier of such premises, or in case of emergency without notice, to enter such premises with or without assistants, and cause the ground to be opened and examine such drain, water-closet, earth-closet, privy, ashpit, or cesspool. If the drain, water-closet, privy, ashpit, or cesspool on examination is found to be in proper condition, he shall cause the ground to be closed, and any damage done to be made good as soon as can be, and the expenses of the works shall be defrayed by the local authority. If the drain, water-closet, earth-closet, privy, ashpit, or cesspool on examination appear to be in bad condition, or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises, requiring him forthwith or within a reasonable time therein specified to do the necessary works; and if such notice is not complied with the person to whom it is given shall be liable to a penalty not exceeding 10*s.* for every day during which he continues to make default, and the local authority may, if they think fit, execute such works, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses." Now, in *Thompson's* case the points are very shortly set out in the headnote to the report in the court below (1904) 2 K. B. 1), which I think I had better read: "Where two or more houses are drained by a single pipe, neither the fact that the pipe is wholly situate on private land, nor the fact that the houses belong to different owners, will suffice to make the pipe a single private drain within the meaning of sect. 19 of the Public Health Acts Amendment Act 1890, so as to entitle the local authority, in the event

of the pipe becoming a nuisance, to require the owner or occupier of the premises to amend it under sect. 41 of the Public Health Act 1875. *Semble*, the words 'belonging to different owners' in sect. 19 of the Act of 1890 mean 'not all belonging to the same owner.' In order to bring a case within the section it is not necessary that all the houses should belong to different owners." The facts are these: Thompson was the owner of a block of seven houses numbered 436 to 438, Liverpool-road, of which the house the subject of the complaint was one. The said houses were built in the year 1875 in accordance with plans deposited with the then sanitary authority, the predecessors of the corporation, and approved by them. On the 6th March 1903 complaint was made to the corporation—that is, the local authority—that a certain drain or sewer belonging to 428, Liverpool-road was a nuisance and injurious to health. On examination the said drain or sewer was found to be in bad condition and to require alteration or amendment, and the corporation thereupon served the notice dated the 18th March requiring him within fourteen days from the service thereof to take up the existing yard and cellar drains and gullies and tops, and in lieu thereof provide and lay down efficient drains constructed of glazed and socketed stoneware pipes, the joints to be properly made good with cement, the cellar drain to be embedded in concrete to a thickness of 6in. all round the pipes, and to provide efficient wash-out gullies with lipped tops. The works therein specified were necessary for the purpose of abating the nuisance. The notice was not complied with. The said drain or sewer was part of a 9in. pipe running through and under the cellars of the said seven houses belonging to Thompson, and receiving the drainage of each house before falling into the corporation's main sewer in Hampson-street, a street running at right angles to Liverpool-road. This 9in. pipe was a continuation of and received the drainage from a 6in. pipe which passed through and under two blocks of six houses each, numbered respectively 424 to 414, Liverpool-road and 402 to 412, Liverpool-road, and situate further away from Hampson-street than Thompson's houses, and belonging to one Edward Johnson. The 6in. pipe received the drainage from each of the twelve houses before reaching the 9in. pipe. The meaning of all that is that in point of fact this drain received the drainage of two or more houses belonging to different owners, and was connected with a public sewer. The drain in Thompson's case seems to me to be in all material facts indistinguishable from the drain which was the subject-matter in discussion in one or two cases, and undoubtedly in what I think is the leading case on the point—*Bradford* v. *Eastbourne Corporation* (74 L. T. Rep. 762; (1896) 2 Q. B. 205). The question as to what is the true meaning of sect. 19 and what is meant by the expression a "single private drain" has been the subject of a great deal of discussion in several different cases, but it appears to me on examining those cases there is a clear balance of authority in favour of the present appellants. I do not think it is necessary for me to travel in detail through the various reasons which have been given in the different cases, because it seems to me I cannot improve upon the judgments given by Lord Russell, C.J. and Wills, J. in *Bradford* v. *Eastbourne Corporation* (*ubi sup.*). That case, though it differed from one of the cases decided before it, was ultimately followed again, as I shall show, more than once. It seems to me that it does lay down a perfectly intelligible interpretation of a section which it is impossible to interpret so as to remove all possible difficulties and objections; but it seems to me on the whole that that interpretation does give the most reasonable and workmanlike interpetation. Now, the state of the authorities is this: The first case, I think, in which the effect of sect. 19 was discussed, in which Wills, J. was one of the judges, was *Self* v. *Hove Commissioners* (72 L. T. Rep. 234; (1895) 1 Q. B. 685). The law was there laid down which was subsequently adopted by a court consisting of Lord Russell, C.J. and Wills, J. giving a wide effect to this sect. 19, and holding that a drain which, as far as I can see on the facts, was indistinguishable from the drain in Thompson's case, was such a drain as is contemplated by sect. 19, and that, therefore, the effect of sect. 19 being thrown into sect. 41 of the old Act, was to let in the powers of the local authority to compel the person on whose premises a nuisance existed, in respect of what would have been a sewer but for the introduction of sect. 19, to be at the expense of making it good instead of leaving it, as it otherwise would be, upon the authority itself. Now, as I have said, I regard the facts in this case as indistinguishable from the facts in *Bradford* v. *Eastbourne Corporation* (*ubi sup.*), and I propose to see what is the condition of the authorities with which we have to deal at this moment. I have stated what was the view of Wills, J. in *Self* v. *Hove Commissioners* (*ubi sup.*); but in another case shortly afterwards, *Hill* v. *Hair* (72 L. T. Rep. 629; (1895) 1 Q. B. 906), Cave and Lawrance, JJ. took exactly the contrary view to that of Wills, J. Then came the case of *Bradford* v. *Eastbourne Corporation* (*ubi sup*) to which I have already referred. There, in a very elaborate judgment, the late Lord Chief Justice and Wills, J. adopted the view taken by Wills, J., and held, as I have said, that in fact that with which we are here dealing was such a drain as is contemplated by sect. 19, with the result that the combined effect of sect. 19 of the Act of 1890 and sect. 41 of the Act of 1875 imposed the obligation upon the private owner to repair what otherwise would have been a sewer, and it imposed that obligation at the instance of the local authority. It does not stand there, because the same question again came before Cave, J. in *Seal* v. *Merthyr Tydvil Urban District Council* (77 L. T. Rep. 303; (1897) 2 Q. B. 543), and when it came before him again he seems to have reconsidered his earlier opinion, and to have followed *Bradford* v. *Eastbourne Corporation* (*ubi sup.*). Now, that was the state of the law when the present case of *Thompson* v. *Eccles Corporation* came before the Divisional Court. When the matter came before the Divisional Court it is true that *Bradford* v. *Eastbourne Corporation* (*ubi sup.*) was cited, but does not seem to have been referred to in detail at all, and we have the authority of Channell, J. who was a party to the decision in the present case, for saying that *Bradford* v. *Eastbourne Corporation* (*ubi sup.*) was not thoroughly considered or understood by the court of which he was a member when he gave the decision in the case now under appeal. Channell, J. in a later case had occasion to

examine *Bradford* v. *Eastbourne Corporation* (*ubi sup.*) carefully, and he came to the conclusion and stated that in his view *Thompson's* case must be considered as decided through inadvertence, and in a very elaborate judgment he himself followed *Bradford* v. *Eastbourne Corporation* (*ubi sup.*) That is the case of *Haedicke* v. *Friern Barnet District Council*, which is the second of the two cases now under appeal before us. On the main question which is common to these two appeals —namely, whether we are to prefer the view taken in the first instance by Wills, J. or the view taken by Cave, J., of the combined effect of sect. 19 of the later Act and sect. 41 of the older Act, the balance of authorities, as I have already said, is entirely in favour of the view of Wills, J. Inasmuch as that has been discussed before us and we have had an opportunity of reconsidering it and reading the argument which prevailed against it in the earlier decisions which were placed before us on this hearing, I think it would be a waste of public time if I were to attempt to again go through and explain why I agree with arguments which appear to be as well stated as it is possible to state them in *Bradford* v. *Eastbourne Corporation* (*ubi sup.*), and which, in my opinion, must prevail. I am content to rest my judgment upon *Bradford* v. *Eastbourne Corporation* (*ubi sup.*) and to adopt the reasons there given, and in that view it seems to me that in the first case of *Thompson* v. *Eccles Corporation* the reasons which commended themselves to the Lord Chief Justice and Wills, J., and which were followed afterwards by Cave, J. and by Channell, J. himself, must prevail and are sufficient to decide the first appeal in favour of the appellants. Now comes the second case. It broadly turns upon the same point, but a certain special argument has been addressed to us upon the facts of that case. The drain again appears to me to be indistinguishable in fact from the drain that we have been already dealing with. Now, there is a special ground taken, which might have been taken, but was not taken, in *Thompson's* case. There the local authority sought to enforce the obligation upon the owner at his own expense to remove a particular nuisance on his premises, which happened to be a drain within sect. 19. In *Haedicke's* case, the second case, matters had gone a step further; notice had been served calling upon the plaintiff to abate a nuisance, which was also a drain within the description or definition in sect. 19, and the owner having been called upon to abate this nuisance had herself intervened and done the work, and having done the work brought an action against the local authority on the ground that she had been compelled to do work which they were in point of law liable to do themselves, inasmuch as the work which she had done was done on a sewer and, being a sewer, the obligation was upon the authority and not upon herself. The answer was that this particular place where the nuisance existed, which the owner had been at the expense of making good, though it was a sewer before sect. 19 of the Act of 1890, and though it may be—it is not necessary to decide it—still a sewer for many purposes, still as far as sect. 19 is concerned, which is the section with which we have to deal, it is a drain, and the owner comes under the liabilities in respect of such a drain resulting from the joint operation of sect. 19 of the later Act and sect. 41 of the earlier Act. On the main facts of the case, and the main point of the appeal, there can be no doubt it is on all fours with the case we have just decided. Then comes the special difficulty raised in this case. On the hypothesis that it is a drain within sect. 19, what difference is there in this case by reason of the fact that the lady has done the work at the instance of the local authority and now claims to be recouped by them? It must be admitted at the beginning of the discussion, on the reasoning which I have already gone through, that the obligation as between the lady and the local authority was clearly upon the lady. This was for all purposes, as between them, a drain, a drain in respect of which they had the right to insist upon her removing the nuisance to which they had called attention. But it is said that, conceding that point, and Channell, J. adopted this view, although the local authority might, if they had taken proper steps under sect. 19 and sect. 41, have compelled the owner to perform this work which she has performed, yet they have not taken the proper steps; that this was a nuisance existing in what was really a sewer, though for the purposes of sect. 19 it should be regarded as a drain, and inasmuch as the local authority cannot localise upon one particular premises or against one particular individual a nuisance arising in a sewer, which *ex hypothesi* is contributed to by all the people who drain into the sewer, they are not in a position to say that this particular owner and she alone is the person against whom they could enforce the machinery of sect. 19, compelling her to go to expense to abate the nuisance; that therefore, inasmuch as they have sought to place it all upon her, and furthermore inasmuch as they have not followed that up by doing the work and apportioning the cost, they are outside the provisions of sect. 19, and, whatever their rights might have been if they had taken the proper course, they have not taken the proper course to fix the liability upon her; and that therefore what she has spent has not been spent in her own relief but in respect of relieving a burthen upon them of making good the nuisance and removing it. It seems to me that the answer to that is simple, and that we ought not to strain after these technicalities. Broadly, the Legislature, by these enactments, has thrown back upon the private owners that which for the time being and before had been shifted from them and placed on the public authorities—namely, the liability to make good nuisances in this particular class of what are called "single private drains." Those being the rights of the parties at the outset, it seems to me in the highest degree technical to travel into the particular machinery that was brought into motion in seeking to enforce against the lady the obligation which was upon her. I think that broadly, that being the state of the law, the real burden or obligation of making good nuisances upon her premises in respect of that drain was upon the lady, and, that being the burden placed upon her, she was debarred from saying that any work done by her under the the exigency of the local authority was done in their relief and not her own. The Legislature placed the burden on her, and when she discharged it she did so for her own benefit and not for the benefit of the public authority. It seems

to me to be a misconception to say that the local authority cannot set up the fact that the burden by law is placed on the owner and not on them because they have not taken the strictest steps to place the burden on the owner. They had the right to put the burden upon her, and that is, I think, sufficient to determine the rights of the two parties. Now, the other argument on behalf of the respondent is that this particular section, which applies machinery applicable to a drain to that to which it is not really applicable—namely, a sewer—carries with it this consequence, that the local authority cannot apply machinery which was applicable only to that which was necessarily done on the premises of one individual owner, to something necessarily done on premises not all within the control of one particular owner—namely, a sewer; that a sewer is a subject-matter which exists for the common benefit and user of a number of different persons, and the local authority cannot trace out and particularise to one individual owner some nuisance which arises in a sewer; that it must be taken to arise from the joint operation of all who use the sewer, and cannot be concentrated all upon one person, and that one person be made responsible for it. How about the facts in the case? The facts in this case are that the nuisance was asserted by the local authority to be on the premises of this lady; and furthermore it is proved as a fact that that nuisance was abated by the lady herself without travelling out of her own premises. Therefore, in the particular facts of this case, it seems to me not open for the lady to contend that the nuisance complained of was not a nuisance on her property, and one which was not capable of being abated by action taken on her property; and that is the case which is covered by sect. 41 as introduced by sect. 19. Therefore, it seems to me that, on the facts of this case, it must be taken that the nuisance was one which could be reached by the machinery of sect. 19, and which was reached by it, and that this lady is by these proceedings seeking to throw back upon the public authority a burden which in terms has been placed on herself. The question of apportionment does not arise: there is nothing to apportion, the whole obligation is upon her; she has discharged it; and she cannot fall back upon the question of apportionment, even if it had been *ad rem* in the discussion at all. For the reasons which I have given I do not think it was *ad rem*, because it does not come in till after the right of the parties are determined, and the right to throw back the burden, or the obligation to keep it, has been determined. For these reasons I think that in both cases the appeal must be allowed.

STIRLING, L.J.—I am of the same opinion, and I shall add very little to what has been said so fully by the Master of the Rolls. The first question which we have to consider is the very difficult one, what is the true meaning and effect of sect. 19 of the Public Health Acts Amendment Act 1890? Now, that point was considered and decided by the Divisional Court consisting of the late Lord Chief Justice, Lord Russell of Killowen, and Wills, J. in *Bradford* v. *Mayor of Eastbourne* (*ubi sup.*), and those learned judges gave most careful and most valuable judgments on the subject. That decision having been given in the year 1896, effect has been given to it from that time forward down to the present time till the case of *Thompson* v. *Eccles Corporation* was decided. The question, as I have said, is a difficult one, and reasons of great weight are given by Channell, J. to show that a different conclusion ought to be arrived at. I have considered these reasons to the best of my ability, but it appears to me to be sufficient to say that, though the question is one which admits of very considerable argument, I am not satisfied that the reasons adduced by Channell, J. in that judgment are of such weight that we ought in this court to depart from the decision which was given in 1896 by the two learned judges to whom I have referred. I think, therefore, that that decision ought to be followed, and consequently the decision in the case of *Thompson* v. *Eccles Corporation* ought to be reversed. With regard to the second case, the same thing holds; but in addition another point has been raised and has been argued at considerable length. That point also is raised as to the meaning of sect. 19. It provides, in the first place, that "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under sect. 41 of the Public Health Act 1875." Then it passes from that to say that "the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a court of summary jurisdiction." In terms sect. 19 does not say how the application is to be dealt with, and it is suggested that the meaning of these two portions of the section read together is this, that, upon the application being made under the Public Health Act, the local authority may proceed to execute the works under the powers conferred by the section, and then recover any expenses in such proportion as may be settled by the surveyor. I confess I do not think that that is the true meaning of the section. I think the true meaning of the section is this, that, upon such an application being made, the procedure pointed out by sect. 41 of the Public Health Act 1875 was to follow, and that, over and above the powers and rights conferred upon the local board by that section, there are given additional powers and rights—namely, that of recovering the expenses in apportioned parts from the several owners who may be affected. Now, speaking generally, the procedure to be adopted under sect. 41 was this: The local authority was through their surveyor or inspector of nuisances to give a written notice to the occupier of the premises affected and then to proceed to open the ground and examine the drain or structure in question with a view to ascertaining the cause of the nuisance. If the drain, applying the section only to a drain, was found to be in quite good condition, then it was to be closed up as speedily as possible. If, on the other hand, it appeared to be in bad condition or to require alteration, the local authority was forthwith to give notice in writing to the owner or occupier of the premises requiring him forthwith, or within a reasonable time, to do the necessary works; if that notice was not complied with, penalties were imposed, and, in the alternative, the local authority might execute the

works and recover in a summary manner the expenses incurred by so doing. That is the general outline. Now, as it stands, that applies only to a drain which lies entirely on the grounds of a single owner connected with a single house; but it is by the express terms of sect. 19 extended to a drain used for draining more than one building, and to a drain where the houses belong to different owners. It seems to me that, when application is made to them under this section pointing to the defective state of a single drain which may pass through the grounds of many owners, their duty is to go upon the place where the nuisance is said to exist and to begin their examination there. Having made the examination, they may discover that it exists there, or that it does not exist there only, but may be traced to other portions of the drain. In that case the authority would have to pursue their inquiries further, and it may be that more owners than one would be found to have on their premises defects in the drain, but it may turn out that only a single owner is affected, and that when the ground of that person is examined, by works executed on that spot and confined to that spot the whole defect may be remedied. What is to be done by the local authority in that case? I cannot see that sect. 41, read together with sect. 19, imposes on the local authority the duty in such a case as that of serving notices on all the owners of the various portions of the drain. It seems to me that it is enough to satisfy the terms of sect. 41 if the owner on whose premises there is found to be a defect in the drain is alone served. If that be so, the argument as to the procedure which was adopted in the second case seems to me to fall to the ground. Where the drain is found on the property of more than one owner to be in a defective state it would be necessary to serve several owners, but where it is found to be defective on the property of one owner only, it seems to me that that one may be properly served. That being so, it seems to me to be equally clear on the terms of sect. 41 that from that one owner the whole of the expenses necessarily incurred by the local board may be recovered, and it is not necessary to add the superadded authority which is conferred by the last portion of sub-sect. 1 of sect. 19. I think, therefore, that the ground on which Channell, J. proceeded, that there was no apportionment in the second case under the sections which apply to the facts of this case, is not sound, and the result is that the defence to that action which was set up by the local authority is a good one, and that the appeal ought to be allowed.

MATHEW, L.J.—I am of the same opinion. I think that *Bradford* v. *Eastbourne Corporation* (*ubi sup.*) was rightly decided, and ought to have been followed by the Divisional Court. It is said that it ought not to be followed because it treated sect. 19 as an intelligible section, whereas it is said on the part of the owners against the local authority that it is an unintelligible section, and introduces great perplexity into the decision of these cases. I do not agree. The perplexity that is suggested is this: According to the Public Health Act 1875 the common drain to a block of houses was a sewer as long as the houses remained in the possession of one owner; one owner could call upon the local authority to repair the common sewer of his block of houses; but it is said that this section leads to this extraordinary result, that the moment one of the houses has been sold by the original owner it ceases to be a sewer and becomes a drain, and that is repugnant and absurd. It was suggested that sect. 19 was not an extension of sect. 41 at all, but that it introduced a small exception in the general liability created by the Public Health Act 1875—that it applied to the case of two houses in a curtilage; but that is one of the most unlikely cases that it is possible to suggest, and it is incredible that the Legislature would pass a section dealing with something so very unlikely to occur. Then it is said that the operation of the section should be confined to the case where the drain is not for domestic use, but made for the purpose of profit. There is not a trace or indication of any such intention. The suggestion seems to me, whatever was the object of the Legislature in passing sect. 19, to be wholly impossible. I think it is quite possible to give a fairly reasonable account of the genesis of sect. 19. Under the Public Health Act 1875 the local authority was in this position, that it might insist that each building owner should have a single drain communicating with the sewer. That would be a highly inconvenient condition of the law for the builder, because the houses might be far away from the sewer, and to require with respect to each house that there should be a separate drain would frequently involve what would be impracticable from a business point of view for a building owner to do. Accordingly it would seem that the local authorities all over the country were approached with a proposal to modify this state of the law, and to enter into an agreement under which the building owner might have a common drain to a block of houses; but when the local authority was approached to give their sanction it would be inevitable that they, in the discharge of their duty, would say that they could not grant this indulgence at the expense of the ratepayers, and that if the building owner was to be allowed to have a common drain he must take upon himself the responsibility of those who use drains. Is there any reason to doubt that that state of things was common all over the country, and that that was an ordinary course of proceeding? Mr. Macmorran has told us it was frequently the subject of written agreements between the building owner and the local authority. We have not had the form of the agreement before us, but it was not disputed that they existed commonly, and were come to for the purpose of imposing upon the owner the obligation that otherwise under the Public Health Act would fall upon the local authority. Now, that was all very well as long as the houses with the common sewer remained in the possession of the first owner, the original owner. Here the public authority must be efficiently protected by the arrangement come to that the building owner should take upon himself the liability to repair and maintain the drains; but the moment the houses began to be sold a state of things existed where the local authority was without a protection that they had as between them and the original owner; and that seems to me to explain the meaning of this section. The section was not intended to apply to, and did not deal with, the case of the houses remaining in the possession of the original owner. While that condition of things remained, no difficulty appears to have

arisen in respect to it; but the other difficulty had arisen, and we find a section framed in this way: "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under sect. 41" of the earlier Act to compel the owners of premises abutting upon this drain to bear the responsibility of repairing and maintaining it. That makes the section intelligible and deprives it of all perplexity. That perplexity being gone, is there any question but that the intention of the Legislature was to treat the common drain as a series of drains for the benefit of the houses for which the common drains are used? In my opinion the decision in *Bradford* v. *Eastbourne Corporation* (*ubi sup.*) was perfectly right and ought to be followed. But questions were raised in the second case, even upon the assumption that *Bradford* v. *Eastbourne Corporation* (*ubi sup.*), as far as it went, was an authority in favour of the local authority. In the second case it is said that there were other considerations which escaped the learned judges in that case, and which ought to have led to a different conclusion. Now what are these? It is said that this is a common sewer or drain, whichever you like to call it; it is a drain according to the definition in the sub-section; it is a common drain; it does not belong to one individual, but belongs to several individuals; it is one structure; and for any complaint with reference to an obstruction or nuisance created in any part of that drain all those that use it are responsible. That is an extraordinary contention. Anything more unreasonable, it seems to me, it is impossible to suggest; and it is inconsistent entirely with the language of sect. 41, which is the section incorporated with sect. 19, because that section applies to a nuisance existing on certain premises and enables the notice to be given to the owner of those premises to abate the nuisance, a perfectly reasonable state of things. The person on whose premises the nuisance exists is under a serious liability, not merely as between the local authority and that person, but as between that person and the public. It is perfectly reasonable, therefore, to say that as between the local authority and the individual the nuisance should be abated because it was a nuisance on the premises of the particular owner. That is the notice which was given and acted upon here. What reason can be suggested for citing anybody else? Any inference of fact to be drawn from the evidence would be unfavourable to any such suggestion, because when the owner was called upon here to do the repairs it was never suggested that anybody else using the drain with her was responsible for what had occurred. It may be that in a particular case the obstruction was due to the wilful default of the individual on whom the notice was served; if that is so or not, the language of sect. 41 points to a notice to be served upon the individual on whose premises the nuisance exists. But it is said that there is to be found in this Act an intention to treat all the owners as liable, and therefore the local authority cannot shift its burden from its shoulders unless it serves proper notices upon each of the individuals who use the sewer. I see nothing in the Act of Parliament to require anything so unreasonable. See what the position of the local authority would be where there were twenty or more owners of houses in a block all using the drain. Are they to serve notices on every one of them? What time would it be likely to take? The matter is generally an urgent one and requires to be dealt with at once. Again, why should people who have had nothing to do with the creation of the obstruction be summoned or threatened with legal proceedings in respect of that for which they are in no way answerable? I can see no reason to suggest that that was the intention of the Legislature. Then it is said that there is another answer. It is this: that there ought to be an apportionment. I can only say that the apportionment seems to be called for only when expenses have been incurred by the local authority and have to be distributed among the different persons liable. That is an entire answer it seems to me to the technical objections. These reasons, in addition to those given by the Master of the Rolls and Stirling, L.J. make me think the appeal must be allowed in both cases.

Appeals allowed.

Solicitors for the Eccles Corporation, *Sharpe, Parker,* and *Co.* for *W. H. Hickson,* Eccles.

Solicitor for Thompson, *E. Lorimer Wilson,* Manchester.

Solicitors for the Friern Barnet Urban District Council, *Miller, Wiggins,* and *Naylor.*

Solicitors for Haedicke, *Emmanuel* and *Simmonds.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

July 14, 15, *and* 16, 1904.

(Before SWINFEN EADY, J.)

HERTFORDSHIRE COUNTY COUNCIL *v.* GOVERNORS AND COMPANY OF THE NEW RIVER. (*a*)

Highway—Repair—Bridges—Approaches—Highway for 300*ft. from ends of bridge—Statute of Bridges* (22 *Hen.* 8, *c.* 5)—*New River Company's Acts* (3 *Jac.* 1, *c.* 18; 4 *Jac.* 1, *c.* 12)—*New River Company's charter.*

The Statute of Bridges provided that persons liable to repair a bridge should be liable to repair the roadway at either end of the bridge to the extent of 300*ft. from the ends of the bridge.*

The statute 3 *Jac.* 1, *c.* 18, *authorised the predecessors in title of the New River Company to make a new river* 10*ft. wide to convey the water from certain specified places to London, and by sect.* 6 *enacted that they and their successors should make and maintain convenient bridges over the New River; and the charter of the company in* 17 *Jac.* 1 *provided that the Governors and Company of the New River and their successors should maintain and repair the bridges.*

The company had kept the bridges in repair, but not the approaches or any part of the adjoining highways.

In an action by the county council of the county in which the bridges were situated for a declaration that the company were bound to keep in repair the bridges and approaches, including in

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

the approaches such part of the highways adjoining the bridges as lay within 300ft. from the ends of the bridges:

Held, that the Statute of Bridges did not apply to the company, whose liability to repair was imposed by their more recent Acts, and that they were bound to keep in repair the bridges and the approaches, including in the approaches such portions of the highways adjoining the bridges as had been raised or interfered with by the erection of the bridges, but not necessarily to the distance of 300ft. from the ends of the bridges; and that the extent of the approaches must be determined as a matter of fact in each case.

ACTION by the Hertfordshire County Council for a declaration that the Governors and Company of the New River were bound to repair and keep in repair three bridges: (1) The bridge at Broxbourne carrying the highway from London to Hoddesdon over the New River; (2) the bridge at Stanstead St. Margaret's carrying the highway from Hertford to Stanstead over the New River; and (3) the bridge at Wormley carrying the highway from Wormley to Wormleybury and West End over the New River, and the arches and other parts of such bridges and the roadways thereon, together with the approaches thereto, including in the approaches such parts of the highways adjoining the bridges as lay within 300ft. from the ends of such bridges.

Under or by virtue of the powers conferred upon them by the statutes 3 Jac. 1, c. 18, and 4 Jac. 1, c. 12, and ultimately by the charter in 17 Jac. 1, which incorporated the New River Company and provided (*inter alia*) that "the said Governors and Company of the New River . . . and their successors at all and every tyme and tymes hereafter shall well and sufficiently maintaine, repair, preserve, and scour the said New River and stream and all the bancks and bridges of and belonging to the same as now it is," the defendants' predecessors in title had made a new river 10ft. wide to convey the water from Chadwell and Amwell to London, and had built over the New River the three bridges above mentioned to carry the highways which would otherwise have been intercepted by their operations; and the defendants' predecessors in title and the defendants respectively had maintained and kept in repair the bridges and the highways over them, but not the approaches to the bridges and not the highways adjoining the bridges to the extent of 300ft. from the ends of the bridges.

The highways connected by the three bridges above mentioned were main roads under the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), and had been repaired by the plaintiffs or their predecessors in title.

The plaintiffs' case was that by virtue of the Statute of Bridges the defendants were bound to repair and keep in repair the highways adjoining the three bridges above mentioned to the extent of 300ft. from the ends of such bridges.

The defendants admitted liability to repair and keep in repair the bridges and the approaches thereto, including in the approaches so much of the highways adjoining the sides of the bridges as had been raised or otherwise interfered with by the construction of the bridges, the limits of such approaches being ascertainable as a matter of fact in each case, but denied that they were bound to repair and keep in repair such highways to the extent of 300ft. from the sides of the bridges in the case of every bridge.

22 Hen. 8, c. 5, s. 9, enacts:

Forasmuch that albeit bridges decayed were amended and repayred accordyng to the tenour of this Acte, yet nevertheless, if spedy remedy for amendment of the wayes next adjoynyng to every of the endes of suche bridges showld not be hadd and made, the Kyng's subjectes shuld take lytle or none avayle or comodyte in many parts of this realme by the makyng the bridges; (2) in consideration whereof be it enacted by the Kyng our sovereign lorde and the lordes spirituall and temporall and the comons in this present Parliament assembled and by auctorite of the same that suche parte and porcion of the highwayes in every part of this realm as well within franchise as without as lye next adjoynyng to any endes of any bridges within this realme distant from any of the said endes by the space of CCC fote be made, repayred, and amended as often as nede shall requyre; (3) and that the justices of the peace in every shire of this realme, franchise, citie, or borough, or four of them at the leaste, whereof one to be of the quorum, within the limits of their comyssions and auctorities shall have power and auctorite to enquire, hear, and determyne in the King's generall sessions of peace all manner of anoysaunces of and in suche highwayes so beyng and lyeng next adjoynyng to any endes of bridges within this realme distante from any one of the endes of such bridges CCC fote, and to do in every thyng and thynges concernyng the makyng, repayryng, and amendyng of such highways and every of them in as large and ample manner as they mought and may do to and for the makynge, repayryng, and amendyng of bridges by virtue and auctorite of this presente Acte.

Danckwerts, K.C., *Micklem*, K.C., and *Barnard Lailey* for the plaintiffs.—The statutes by which the plaintiffs' predecessors in title were empowered to make the new cut and erect the bridges impose on the defendants the liability of keeping the bridges in repair; and the persons bound to repair the bridges are at common law also bound to repair the approaches. The defendants admit their liability as far as the bridges, including the roadways thereon and so much of the highways on the sides of the bridges as have been raised or interfered with by their construction; but the Statute of Bridges, which governs this liability, has fixed the extent at 300ft. from each end of each bridge. This liability for the repair of the approaches of a bridge was judicially recognised in 1806 in *Rex* v. *Inhabitants of the West Riding of York* (7 East, 588; 8 R. R. 688; 5 Taunt. 283; 14 R. R. 751), where the earlier authority, *Abbot of Combe's* case (43 Assize 275 B, pl. 37) is referred to; and the Statute of Bridges was held binding on a navigation company where the Act giving them their powers required them to erect a bridge (*Rex* v. *Inhabitants of Kent*, 13 East, 220; 12 R. R. 330), and also where the Act giving them their powers was silent as to their liability to erect a bridge, leaving them to their common law liability to do so: (*Rex* v. *Inhabitants of Lindsey*, 14 East, 317; 12 R. R. 529; *Rex* v. *Kerrison*, 3 M. & S. 526; 16 R. R. 342; *Reg.* v. *Inhabitants of the Isle of Ely*, 15 Q. B. 827). In *Reg.* v. *Lincoln Corporation* (8 Ad. & E. 65; 47 R. R. 484), where a corporation were liable by prescription to repair a bridge, it was held that the 300ft. rule applied. In *Reg.* v. *South-Eastern Railway Company* (32 L. T. Rep. 858) it was held

that the defendant company were bound to keep in repair a roadway over a bridge constructed by them over their railway, although the roadway had always been maintained and repaired by the inhabitants of the parish. The law is correctly stated in Pratt on Highways, 13th edit., pp. 78, 79. The case of *Bury Corporation* v. *Lancashire and Yorkshire Railway Company* (59 L. T. Rep. 193; 20 Q. B. Div. 483; and on appeal 61 L. T. Rep. 417; 14 App. Cas. 417) shows that the same general principle applies in cases under the Railways Clauses Act. Before the Statute of Bridges, there existed bridges authorised by statute: (8 Hen. 6, c. 28). They also referred to Coke's 2nd Inst., p. 700, and 1 Roll Abr. 368 for statements of the early law on the question.

Eve, K.C. and *Vaughan Hawkins* for the defendants.—The obligation to repair the roadway for a distance of 300ft. from each end of a bridge, imposed by the Statute of Bridges on persons liable to repair the bridge, does not apply to all bridges built after the date of the statute. The obligations of the New River Company must be based on the statutes by which they were empowered to carry out their undertaking. Those statutes fix the width of the New River at 10ft., but do not prescribe that the company are bound to keep in repair the roadway for a distance of 300ft. from each end of any bridge they are authorised to build and bound to maintain with its approaches, and the question in the case of each bridge is what is the actual extent of its approaches. In the case of bridges dating back from time immemorial, it would be uncertain how much of the highway had been interfered with by their construction, and the Statute of Bridges therefore prescribed a fixed limit, but that rule is not applicable to bridges built under the authority of a statute which imposes a liability to keep them in repair, but does not fix the extent of that liability. In such cases the liability is measured in the case of each bridge by the extent to which the highway is affected by the construction of that bridge:

> *Nottingham County Council* v. *Manchester, Sheffield and Lincolnshire Railway Company*, 71 L. T. Rep. 430.

In that case the decision was based on the principle that the company were bound to repair so much of the roadway on each side of the bridge as had been interfered with by its construction, and not on the ground that they were liable to repair the roadway to the extent of 300ft. from each end of the bridge, because, if so, there would have been no necessity to inquire into the extent of such interference. In most cases the construction by the New River Company of a bridge does not affect the highway to the extent of 300ft. from each end of the bridge; and why should an ancient statute be invoked to fix the limit of their liability to repair that highway when the extent of their interference with the highway can be ascertained? In the case of *Rex* v. *Staffordshire and Worcestershire Canal Company* (65 J. P. 505), where the defendants were indicted for non-repair of a bridge and highway adjoining the ends of the bridge to the distance of 300ft. thereof, Wright, J. amended the indictment by substituting the extent to which the approaches to the bridge were admitted to be out of repair. The decision in the case of *Reg.* v. *Mayor of Lincoln* (*ubi sup.*) only applies where no evidence can be produced of conduct not in accordance with the rule fixed by the Statute of Bridges.

Danckwerts, K.C. replied.

SWINFEN EADY, J.—The question remaining for decision is whether the defendants, the New River Company, are liable to maintain and keep in repair the roadway at either end of their bridges to the extent of 300ft. adjoining the ends of the bridges, or whether they are only liable to maintain and keep in repair the bridges and the approaches, leaving the question what the extent of the approach is to be determined as a question of fact in each case. The defendants admit their liability to maintain and keep in repair the bridges and approaches, but dispute that they are liable in every case to maintain and keep in repair 300ft. of the roadway measured from each end of the bridge. The plaintiffs base their contention on the Statute of Bridges (22 Hen. 8, c. 5). The first statute leading up to the formation of the New River Company is the statute of 3 Jac. 1, c. 18, by which the Lord Mayor, commonalty, and citizens of London were empowered to bring water to the city of London, and for that purpose had certain statutory powers conferred on them. They were empowered to make a trench 10ft. wide for the New River to convey the water from Chadwell and Amwell to London, and by sect. 6 it was provided that "the Mayor, commonalty, and citizens of London, and their successors for ever, shall make and maintain at their costs and charges from time to time convenient bridges and ways for the passage of the King's subjects and their cattle and carriages over or through the said new cut or river in places meet and convenient." A subsequent statute of 4 Jac. 1, c. 12, explained the previous statute and authorised the corporation to bring the water through brick vaults or pipes instead of an open trench. The corporation assigned their rights to Sir Hugh Middleton, and ultimately, by a charter of King James I., dated the 21st June 1619, Sir Hugh Middleton and certain other persons were incorporated under the name of the Governors and Company of the New River to carry out the undertaking. Amongst other things the charter provided that the governors and company should well and sufficiently maintain, repair, preserve, and scour the New River and stream and all the banks and bridges of and belonging to the same as now it is. Now, it is contended that on the true construction of the Statute of Bridges the defendants are liable to maintain the roadway for a distance of 300ft. from each end of the bridges. The case is put in this way: At common law, where a person cuts through a highway, even when acting under powers conferred by statute, he is under obligation, even if the statute is silent on the point, to make as good a passage for the King's subjects as there was before he interfered with the highway. That obliges him to make a bridge and approaches for the passage of people and carriages where it is a carriage-way, and to maintain them. Then, it is said, that being the common law liability, the Statute of Bridges fixed the extent of the approaches by a hard-and-fast rule at 300ft. in every case, instead of leaving it be determined as a fact in each particular case what the extent of the approach is which the person is liable to maintain. The statute does

not in terms contain any such provision, but the statute has been the subject of judicial interpretation; and it is contended that, having regard to that interpretation, it is within the intendment of the statute that all persons liable to repair a bridge whether *ratione tenuræ* by prescription or otherwise, even in a case like the present where a highway has been cut through, should be bound by the rule fixed by that statute. Numerous cases have arisen on the construction of the statute. In 1806 there was the case of *R.* v. *Inhabitants of the West Riding of York* (7 East, 588), in which it was determined that where the inhabitants of a county are liable to the repair of a public bridge they are liable also to repair to the extent of 300ft. of the highway at each end of the bridge; and if indicted for the non-repair thereof they can only exonerate themselves by pleading specially that some other is bound by prescription or tenure to repair the same. The bridge in that case—the Tame Water Bridge—was erected long after the passing of the Statute of Bridges. It was the third bridge of that name, the two previous ones having been swept away by floods, and a dispute arose as to the non-repair of that bridge. All three bridges were built some time in the eighteenth century. Then cases arose where bridges had been made by navigation companies under statutory powers, and these divide themselves into two classes. The first class is where their special Act required the navigation company to so place the bridge as to make the highway as convenient as before they interfered with it. The second class is where the special Act was silent as to any substitute and the company was bound by the common law. An instance of the first class of cases is *Rex* v. *Inhabitants of Kent* (*ubi sup.*). There the Medway Navigation Company were empowered under a local Act to make the river navigable, and to take tolls, and "to amend or alter such bridges or highways as might hinder the passage or navigation, leaving them or others as convenient in their room," and it was held that the liability to repair was on the navigation company, and not on the inhabitants of the county at large. An instance of the second class of cases is *Rex* v. *Kerrison* (*ubi sup.*), where certain persons and their successors were authorised by Act of Parliament to make navigable the river Waveney from Beccles to Bungay, and to cut the soil of any persons for making any new channel, and, by virtue of their powers, they cut through a highway and rendered it impassable, and a bridge was built over the cut over which the public passed, and which had been repaired by the proprietors of the navigation; and it was held that the proprietors of the navigation were the persons who were liable to repair the bridge. There Le Blanc, J. said: "The proprietors had a right to make a cut through the highway, and so far were not wrongdoers; but if they had left it so, I conceive they would have been wrongdoers, and might have been indicted." Again, in *Reg.* v. *Inhabitants of Isle of Ely* (*ubi sup.*), where the question was whether the Commissioners of Bedford Level or the inhabitants of the Isle of Ely were liable to repair a bridge, an indictment was preferred against the inhabitants of the Isle of Ely for non-repair of the bridge. The defendants pleaded that the bridge was in a public highway over an artificial cut made in the highway by the adventurers for draining Bedford Level; that the bridge was rendered necessary by the cut for the purpose of the highway; that the cut was made for the benefit of the lands of the adventurers, and was maintained by the adventurers until statute 15 Car. 2, c. 17, when the property in the cut and its banks, and in the bridge, and in the lands benefited by the cut, which lands had previously been vested in the adventurers, became vested in the Corporation of Conservators of the Fens; and the cut was from that time maintained by the corporation for their own benefit; and they have repaired and been liable to repair the bridge. On demurrer it was held that the plea was good. Patteson, J. in giving judgment said: "As the first count has shown the defendants liable *primâ facie*, the question on this plea will be whether it shows any other party really liable; unless it does, the *primâ facie* liability will not have been displaced. Now, the plea shows a highway interrupted and an artificial drain or river laid across it for the use, profit, and advantage of the adventurers, the necessity of a bridge thereby created, and the bridge in consequence constructed on the line of the former highway by them and the former highway thenceforth and now carried upon the bridge. . . . It appears to us that when the adventurers first cut the drain and interrupted the public highway, that act, however authorised by commissions of sewers or other power vested in them, was done for their own use, benefit, and convenience, and could be legal only on condition of substituting another highway, which could be only by a bridge as convenient for the public as the old one; that the public were in truth no gainers by the change; they were by this hypothesis merely placed in the same situation as before; and that the condition which was necessary to legalise the first cutting of the drain was and is a continuing one; the instant it is broken the indefeasible rights of the public revive, and the cut becomes a nuisance." The court decided that the defendants' plea was good, and that on the facts being established by proof they would be exonerated from repairing the bridge. It is to be observed in the cases last referred to no question was raised as to the extent of the liability, whether it was a liability to repair the bridge and its approaches, or 300ft. from either end of the bridge, and, so far as appears from the reports of these cases, no reference was made to the 300ft. There is another case, *Reg.* v. *Lincoln Corporation* (*ubi sup.*), where the question was as to the liability by prescription of the corporation of Lincoln to repair a bridge, and it was held that a party who is liable, by prescription, to repair a bridge is also *primâ facie* liable to repair the highway to the extent of 300ft. from each end. So far the decisions on the Statute of Bridges show that the statute applies where the inhabitants of a county are liable to repair a bridge, and also where a person is liable, by prescription, to repair a bridge. And the same reasoning would apply where the liability arises *ratione tenuræ*. There still remains the question whether, where the liability to repair and maintain a bridge is imposed by an Act of Parliament subsequent to the statute of Henry VIII., the liability extends to 300ft. from each end. That question has arisen in two modern cases. In *Nottingham County Council* v. *Manchester, Shef-*

field, and Lincolnshire Railway Company (*ubi sup.*) there was a special case stated by consent to determine the question whether a railway company was liable to repair certain raised approaches to a bridge over a canal. In the special case the plaintiffs put forward two contentions—(1) that the defendants were under their Act bound to repair the approaches as part of the bridges made and perfected by them, and (2) that they were by common law bound to repair the highway for a distance of 300ft. from each end of the bridge. The defendants admitted that under the Act they were liable to maintain the fabric of the bridge and so much of the highway as was comprised in the plan annexed to the special case, but they contended that they were not liable to maintain and repair the raised approaches. The question submitted to the court was whether under the circumstances the defendants were legally bound to maintain and repair the raised approaches. No question was in form submitted as to whether the defendants were liable to repair to the extent of 300ft. from each end of the bridge. The Divisional Court held that the railway company was liable to maintain and repair the raised approaches to the bridge, and that the approaches were part of the bridge. Mathew, J. said: "The particular bridge which was made over the canal was on a higher level than the highway leading up to the spot in question, and so it became necessary to carry the bridge over the canal, and to do that, and for the convenient passage, it was necessary to provide approaches of a higher level than the former, of 180ft. on the south side of the canal and 174ft. on the north side. This was the bridge perfected and made under the provisions of the Act of Parliament." This decision is rather against the plaintiffs than in their favour; for if the defendants in that case were held liable to maintain and repair the approaches for a fixed limit of 300ft. from each end of the bridge it would not have been necessary to ascertain what the limits of those approaches were. If the plaintiffs' contention is right, the short answer to that case would have been, "It is within the fixed limit of 300ft. from each end of the bridge, and therefore under the Statute of Bridges you are bound to maintain it. It is to be treated as part of the bridge, and it is not necessary for us to consider any of the facts with regard to it." The question was again raised in *Rex* v. *Staffordshire and Worcestershire Canal Company* (*ubi sup.*). In that case the first indictment alleged a failure to repair a bridge at Penkridge, and a second count alleged that the defendants had failed to repair "certain parts of the highway adjoining the east and west ends of the bridge, and of the distance of 300ft. thereof." Wright, J. held that in law there was a liability upon the defendants to repair, but he did not give any decision as to whether the Statute of Bridges applied and whether the liability extended for 300ft. on either side of the bridge as laid down by the Statute of Bridges, and as contended by the prosecution. He amended the indictment by striking out the "300ft." and substituting therefor the actual figures of the extent of the disrepair in the two cases. That case is therefore no decision on the point one way or the other. Under these circumstances I have to determine whether the defendants are liable to repair to the extent of the 300ft. The case is not one in which the liability to erect the bridge is left to the common law, but one in which it is imposed by the statute. It is not a case where the statute "authorized" a company to make a bridge. This statute enacts that they "shall make and maintain" bridges: (see 3 Jac. 1, c. 18., s. 6). In my judgment, where a statute passed so late as the reign of James I. empowers a company to cut a highway and imposes upon it a liability to make and maintain a "bridge," the word "bridge" does not necessarily mean a bridge with the approaches as defined by the Statute of Bridges—that is, a bridge and approaches to the extent of 300ft. from each end. The liability of the defendants in the present case must be measured by the terms of the statute, and they are not under an obligation to maintain the approaches to the extent of 300ft. as determined by the statute of Henry VIII. In my opinion it would be a modern extension of the Statute of Bridges for which no precedent has been found to hold that where a subsequent statute has imposed an obligation to make and maintain a bridge it has *ipso facto* imposed an obligation to repair the roadway for a distance of 300ft. from each end of the bridge. From the time of Henry VIII. to the present time it has never been so held, and I am of opinion that in this case I am not entitled so to extend the operation of that ancient statute. There will, therefore, be a declaration that the defendants are bound to repair and keep in repair the bridges in question and the approaches thereto (including the roadways thereon), including in the approaches so much of the highway on each side of the bridge as has been raised or otherwise interfered with by reason of the construction of the bridge, the extent of which must be determined as a matter of fact in each case; but they are not bound to repair the highway to the extent of 300ft. from each end of the bridge. The plaintiffs must pay the costs of the action.

Solicitors: *R. A. Read*, for *C. E. Longmore*, Hertford; *Tompson* and *Debenhams*.

Aug. 3, 4, 5, 6, 8, 9, *and Nov.* 23, 1904.

(Before SWINFEN EADY, J.)

SOOTHILL UPPER URBAN DISTRICT COUNCIL *v.* WAKEFIELD RURAL DISTRICT COUNCIL AND ARDSLEY EAST AND WEST URBAN DISTRICT COUNCIL. (*a*)

Local government—Supply of water by one local authority to another—Sanction of Local Government Board — Use of supply—Agreement for supply between an urban authority and a rural authority—Pecuniary penalty—Public Health Act 1875 (38 *& 39 Vict. c.* 55), *ss.* 61, 174 (2).

Where one local authority contracts to supply water to another local authority, sect. 61 *of the Public Health Act* 1875 *merely empowers the Local Government Board to sanction the supply by the one local authority to the other, but not to prescribe the use to which the supply is to be put by the local authority receiving it, or to approve of any agreement entered into between the local authorities for the supply, or to decide any question in dispute between them as to the terms of the*

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

agreement; but the fact that the written sanction of the Local Government Board to the supply of water by one local authority to another mentions the use to which the supply is to be put by the local authority receiving it does not render the sanction invalid as authorising the supply by the one local authority to the other; and an agreement between an urban authority and a rural authority for the supply of water by the former to the latter at a price to be paid by the latter does not come within sect. 174, sub-sect. 2, of the Public Health Act 1875, so that the omission from such an agreement of the pecuniary penalty prescribed by that sub-section (assuming that that sub-section is obligatory and not merely directory) does not render the agreement invalid.

WITNESS ACTION.

In the year 1881 the predecessors of the Soothill Upper Urban District Council, having obtained their supply of water from Halifax, entered into negotiations with the predecessors of the Wakefield Rural District Council for a supply of water to them, but, being unable to come to terms, those authorities made a joint application to the Local Government Board to settle their differences and sanction the projected supply. The Local Government Board replied that they were not aware of any reason why such sanction should not be given, but pointed out that sect. 61 of the Public Health Act 1875 only authorised them to sanction a supply of water by one local authority to another, and that they had no power to determine the questions in dispute, or to sanction the terms of the contract. The agreement, by which the parishes of East and West Ardsley were included in the area of supply, was, however, completed in July 1882, and the water was supplied by the one authority to the other without any further sanction by the Local Government Board.

In 1885, in reply to a written request by the clerk of the Soothill authority, the Local Government Board sanctioned an increased supply by that authority to the Wakefield authority for the benefit of the parishes of East and West Ardsley.

In 1889 the Local Government Board sanctioned a supply of the Soothill water by the Wakefield authority to Hunslet.

On the 14th Jan. 1895 the Local Government Board sanctioned a supply of the Soothill water by the Wakefield authority to Rothwell.

On the 31st Jan. 1895 the Soothill Upper Urban District Council entered into a fresh agreement with the Wakefield Rural District Council whereby the urban authority agreed to supply and the rural authority agreed to take for thirty years from the 24th Dec. 1894 for their district or any part thereof, or any place outside their district that they might contract to supply, a minimum quantity of 100,000 gallons of water by the day of twenty-four hours, based on a weekly average reading of the meters therein mentioned, at a fixed price for each 1000 gallons, payable by quarterly payments, with interest at the rate of 5 per cent. per annum on payments in arrear, and the rural authority thereby agreed to pay for such minimum quantity whether actually taken or not, and to maintain the meter-house and meters therein mentioned in good working order and condition.

This agreement did not provide that any pecuniary penalty should be paid to either party in case the terms of the contract were not duly performed by the other party.

In reply to an application by the Soothill Upper Urban District Council to the Local Government Board inclosing a copy of this agreement and asking the board to sanction it, the board stated that under sect. 61 of the Public Health Act 1875 their sanction was only required to the supply of water by one local authority to another, and that it was not the practice of the board to sanction agreements, but that, if the area of supply under the new agreement was the same as or wholly comprised in the area of supply previously sanctioned, no further sanction was required. Although the contemplated area of supply under the new agreement was larger than the area of supply covered by the sanction previously given, that sanction covered the actual area of supply in question in the present case—viz., the supply to East and West Ardsley.

In 1900, after East and West Ardsley had been constituted an urban district and had agreed to take over the water agreement and to indemnify the Wakefield Rural District Council from all liabilities thereunder, it appeared from correspondence with the Local Government Board that their sanction for the supply of water to the Ardsley East and West Urban District Council still held good.

The Wakefield Rural District Council took less than the minimum quantity of 100,000 gallons of water by the day of twenty-four hours, and paid for the smaller quantity actually used, but refused to pay for the minimum quantity according to the terms of the agreement of the 31st Jan. 1895.

This was an action by the Soothill Upper Urban District Council against the Wakefield Rural District Council and the Ardsley East and West Urban District Council for payment of the balance making up the price of the minimum quantity of 100,000 gallons of water by the day of twenty-four hours according to the terms of the agreement of the 31st Jan. 1895, notwithstanding that such quantity had not been actually taken by the Wakefield Rural District Council.

The defence was (*inter alia*) that the agreement of the 31st Jan. 1895 was invalid on two grounds (1) that the sanction of the Local Government Board was not obtained pursuant to sect. 61 of the Public Health Act 1875; and (2) that the agreement did not specify any pecuniary penalty pursuant to sect. 174 (2) of the same Act.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

Sect. 61. Any local authority for the time being supplying water within their own district may, with the sanction of the Local Government Board, supply water to the local authority of any adjoining district on such terms as may be agreed on between such authorities, or as, in case of dispute, may be settled by arbitration in manner provided by this Act.

Sect. 173. Any local authority may enter into any contracts necessary for carrying this Act into execution.

Sect. 174. With respect to contracts made by an urban authority under this Act the following regulations shall be observed (*inter alia*): (2) Every such contract shall specify the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and the

time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed.

Eve, K.C. and *Edward Clayton* for the plaintiffs.—The defendant authorities, or one of them, are liable to pay for the full minimum supply of 100,000 gallons of water by the day of twenty-four hours, according to the terms of the agreement of the 31st Jan. 1895, whether they have taken that quantity or not. The sanction of the Local Government Board covers the area of supply in question, and the agreement is a valid and binding one. The provision of sect. 174, sub-sect. 2, requiring the contract to specify some pecuniary penalty to be paid to and for the benefit of an urban authority in case of non-performance, is directory and not imperative, and is inapplicable to the agreement in question as against that authority:

Mellis v. *Shirley Local Board*, 53 L. T. Rep. 810; 16 Q. B. Div. 446;
Nowell v. *Mayor, &c., of Worcester*, 9 Ex. 457.

In *Young* v. *Mayor, &c., of Royal Leamington Spa* (49 L. T. Rep. 1; 8 App. Cas. 517), Lord Blackburn in his judgment suggests that the provision is directory, not imperative. The case of *British Insulated Wire Company Limited* v. *Prescot Urban District Council* (73 L. T. Rep. 383; (1895) 2 Q. B. 463) is inapplicable. The requirement is satisfied by the provision for payment of interest at 5 per cent. per annum on payments in arrear for the water supply.

Micklem, K.C., *R. J. Parker*, and *T. J. C. Tomlin* for the defendant district councils.—The agreement of the 31st Jan. 1895 is invalid and cannot be enforced. First, because the sanction of the Local Government Board has not been given to the supply of water by the plaintiffs to the Wakefield Rural District Council under that agreement as required by sect. 61 of the Public Health Act 1875. Also because that agreement omits to specify any pecuniary penalty to be paid in case its terms should not be duly performed, as required by sect. 174, sub-sect. 2, of the same Act. That provision is obligatory and not directory according to the decisions in *Young and Co.* v. *Mayor, &c., of Royal Leamington Spa* (*ubi sup.*), *Mellis* v. *Shirley Local Board* (*ubi sup.*), and *British Insulated Wire Company Limited* v. *Prescot Urban District Council* (*ubi sup.*). The provision for charging interest on payments in arrear for water supplied by the plaintiffs does not satisfy the requirements of sect. 174, sub-sect. 2.

Eve, K.C. replied.

SWINFEN EADY, J. — The first question is whether the sanction of the Local Government Board has been given to the plaintiffs supplying water to the Wakefield Council, being the local authority of an adjoining district. The plaintiffs contend that the sanction has been duly given. The defendants deny it. To determine this point it is necessary to go back to the year 1881. On the 24th Dec. 1881 the Soothill Upper Local Board (the predecessors of the plaintiffs) and the guardians of the Wakefield Union acting as the rural sanitary authority (the predecessors of the Wakefield Council) jointly applied in writing to the Local Government Board to sanction the supply by Soothill to Wakefield for the parishes of East and West Ardsley of water which Soothill obtained in bulk from the corporation of Halifax. A question also arose between the parties upon a clause of the draft agreement then being negotiated, and, as they were unable to agree upon this clause, an application was made to the Local Government Board to determine the matter. In reply, the Local Government Board, on the 15th and 17th May 1882, stated in writing to the two authorities respectively, that as regards the supply of water by Soothill to Wakefield, the board were not aware of any reason why, at the proper time, the consent should not be given, but they pointed out that under the statute no sanction on their part was required to the proposed terms of agreement, and that they had no power to deal with the question in dispute between the parties as to the terms of clause 3 of the proposed agreement. Shortly afterwards an agreement in writing, dated the 17th July 1882, was come to between the two authorities, and water was duly supplied on the terms of it by Soothill to Wakefield, but I do not find that any further formal sanction was then given by the Local Government Board. In 1885 it was proposed that Soothill should give to Wakefield an increased supply, and on the 26th June 1885 the clerk to the Soothill Upper Local Board wrote to the Local Government Board stating that it was proposed to increase the supply, and sent a copy of the proposed agreement for that purpose, and expressly asked for the sanction of the Local Government Board under sect. 61. In reply the Local Government Board, on the 15th July 1885, stated in writing that under sect. 61 of the Public Health Act 1875 the board thereby sanctioned the supply of water by the Soothill Upper Local Board to the rural sanitary authority of the Wakefield Union for the benefit of the parishes of East and West Ardsley. This sanction has never been withdrawn. Although the words "for the benefit of the parishes of East and West Ardsley" are added to the formal consent, there does not appear to be any statutory power to prescribe the use which the Wakefield authority is to make of the water when obtained. Sect. 61 merely requires the sanction of the Local Government Board to the supply of water by one authority to another, and the board gave its consent to the Soothill authority supplying the Wakefield authority. On the 16th Nov. 1889 the Local Government Board, understanding that an agreement had been come to between the Wakefield and Hunslet Unions for the supply of water to the township of Middleton, gave its sanction under sect. 61 to the supply by Wakefield to Hunslet for the purposes of that district, and at the same time forwarded to the Wakefield authority a copy of the letter addressed by the Local Government Board to the Soothill authority sanctioning the supply given by that authority to Wakefield. By an order of the 14th Jan. 1895 the board sanctioned the supply of water by Wakefield to Rothwell Urban District Council, and the agreement of the 27th March 1895 shows that this water was intended to be Soothill water supplied to Wakefield and by Wakefield to Rothwell for Lofthouse and Thorpe. Thus far everything was done with the sanction of the Local Government Board, so far as such sanction was requisite. In 1895 the successors of

the Soothill and Wakefield authorities negotiated a new water agreement, which is dated the 31st Jan. 1895, and is the one sued upon. On the 28th Jan. 1895 the Soothill authority (the plaintiffs) wrote to the Local Government Board inclosing a copy of the proposed agreement, and asking for the sanction of the Local Government Board to the agreement. In reply, the board stated that, under sect. 61 of the Public Health Act 1875, the board's sanction was only required to the supply of water by one authority to another, and that it was not their practice to approve of the agreements entered into by the authorities. They added that, if the area for which the supply under the new agreement was to be given was the same as or wholly comprised in the area for which the board previously sanctioned the supply, no further sanction on the part of the board was required. Now, the area of supply contemplated was, in fact, a wider area, and on the 22nd May 1895 the Local Government Board said that it was not their practice to give a general sanction in respect of all the contributory places in a rural district, but they would consider applications in respect of particular contributory places when the supply was actually furnished. The matter remained in this position until the 16th Jan. 1900, when the plaintiffs wrote to the Local Government Board with reference to the correspondence of 1895, and asked whether they were right in regarding, as they had done, the sanction given by the Local Government Board in 1882 for the supply of water by Soothill to Wakefield for East and West Ardsley as extending to sanction a supply of water to East and West Ardsley under the agreement of 1895, so far as such supply was confined to the district of East and West Ardsley. At this date the townships of Ardsley East and Ardsley West had been been constituted an urban district. The Local Government Board, in reply, expressed their opinion that the terms of art. 8 of the order constituting the urban district of Ardsley East and West were sufficiently wide to cover the transfer of powers vested in the Wakefield authority by virtue of any sanction given by the board under sect. 61 of the Public Health Act 1875; but with reference to the question of the agreement stated that it was not their practice under sect. 61 of the Act to go beyond the actual duty imposed on them by that section—namely, sanctioning the supply of water by the one authority to the other. On the 8th March 1900 the plaintiffs wrote to the board that from their letter the plaintiffs gathered that they had still the sanction of the Local Government Board to the supply of water by them to the urban district council of East and West Ardsley, and asking if that understanding was correct, and in reply the board stated that they had nothing to add to their letter of the 28th Feb. 1900. Under these circumstances, it seems to me to be clear that the supply of water by the plaintiffs has been sanctioned by the Local Government Board whether it is to be treated as a supply to the Wakefield authority or as a supply direct to the urban district of Ardsley East and West, and that is the only supply which I have to consider in this action. The Local Government Board were certainly acting within their rights in refusing to consider any particular agreement and in confining themselves to the actual duty imposed on them by sect. 61, and in my opinion the correspondence shows that the sanction of the board was obtained to the supply of water by the plaintiffs to the local authority of the adjoining district, whether Wakefield or Ardsley. The second objection taken by the defendants to the validity of the agreement of 1895 is the absence of any pecuniary penalty under sect. 174, sub-sect. 2, of the Public Health Act 1875. Assuming that this sub-section is obligatory, and not merely directory (see *Young* v. *Mayor of Leamington, ubi sup.*, and *British Insulated Wire Company Limited* v. *Prescot Urban District Council, ubi sup.*), it applies only to contracts made by an urban authority, and therefore it has to be considered how the plaintiffs, who are an urban authority, are affected by it; the defendants, the Wakefield Council, are a rural authority, and therefore not bound by any such provision. The provisions of sect. 174 are for the protection of an urban authority and of the ratepayers of their district. The penalty in sub-sect. 2 is a penalty to be made payable to and in no case by the urban authority, in case the terms of the contract are not duly performed—that means, not duly performed by the other party. The "price to be paid" is a price to be paid by the urban authority for the work, materials, matters, or things to be furnished, had, or done to or for the urban authority. Accordingly this sub-section can, from the nature and terms of it, only apply to cases where work, materials, matters, or things are to be furnished, had, or done to or for an urban authority, for a price in money to be paid by the urban authority. In those cases the contract is to specify the time within which the contract is to be performed, and is also to specify some pecuniary penalty. The provisions of sub-sects. 3 and 4 of sect. 174 also show that the section refers only to contracts where the money is to be paid by the urban authority, and does not include cases where the contract is to be carried out by the urban authority, and the consideration paid to it. In the present case, it is the urban authority—the plaintiffs—who are to supply water to another person for a price in money to be paid to the urban authority. Is the urban authority to stipulate that, if they do not carry out the terms of the contract—that is, if they do not supply the water—they shall themselves pay a penalty? This is absurd. Are they, then, to stipulate that if the purchasers do not pay the price in money they shall pay some pecuniary penalty? Obviously not, for the penalty is to be paid in case the contract is not duly performed within the stipulated time, and not if the price is not paid. Here the urban authority has, in fact, stipulated that, if the price is not punctually paid, interest thereon at 5 per cent. shall be paid, and it might be contended that this is sufficient penalty within the meaning of the statute; but the real answer to the argument is that the present contract for the supply of water by an urban to a rural authority is not within the section at all. There must be judgment for the amount claimed against the Ardsley East and West District Council.

Solicitors: *Jacques* and *Co.*, for *Scholefield, Taylor*, and *Maggs*, Batley; *Blundell, Gordon*, and *Co.*, for *H. Beaumont*, Wakefield; *Barton* and *Pearman*, for *Scatcherd, Hopkins*, and *Middlebrooke*, Leeds.

KING'S BENCH DIVISION.

Friday, Nov. 18, 1904.

(Before Lord Alverstone, C.J., Kennedy and Ridley, JJ.)

Ash (app.) v. Nicholl (resp.).

Cox (app.) v. Merriman (resp.). (a)

Franchise—Registration of voters—Education rate—Poor rate—Nonpayment of part of poor rate consisting of education rate—Claim to be on voters' list—Representation of the People Act 1867 (30 & 31 *Vict. c.* 102), *s.* 3, *sub-ss.* 3, 4—*Poor Rate Assessment and Collection Act* 1869 (32 & 33 *Vict. c.* 41), *s.* 20—*Municipal Corporations Act* 1882 (45 & 46 *Vict. c.* 50), *s.* 9, *sub-s.* 2 (*d*) (*e*)—*Education Act* 1902 (2 *Edw.* 7, *c.* 42), *s.* 18.

The education rate payable under the Education Act 1902 *is a part of the "poor rate" within the meaning of sect.* 3, *sub-sects.* 3 *and* 4, *of the Representation of the People Act* 1867 *and sect.* 9, *sub-sect.* 2 (*d*) *and* (*e*), *of the Municipal Corporations Act* 1882, *and where a poor rate includes, among other charges, a sum levied in respect of education under the Education Act* 1902, *a ratepayer who has not paid the amount so included in respect of education has not paid the "poor rate" within the meaning of those sections, and is not entitled to have his name placed on the occupiers' list of Parliamentary or local government electors, although he may have paid the whole of the poor rate properly so called.*

Ash (app.) v. Nicholl (resp.).

Case stated by the revising barrister for the borough of Scarborough.

At a court held on the 14th Sept. 1904 before the revising barrister, Frederick Ash, the appellant, duly claimed to be inserted in the list of inhabitant householders.

The facts of the case were as follows:—

1. The borough of Scarborough is a Parliamentary and a municipal borough, and has a borough fund for which a borough rate is levied.

2. A poor rate for the borough for the year 1903-04 had been duly made and signed by the overseers, and had been duly signed by the justices on the 24th April 1903. A demand note for payment of the poor rate had been duly made upon the appellant.

3. The poor rate included, among other charges, an education rate of 1*d.* in the pound, and a burial rate of 1½*d.* in the pound.

4. No separate rate had been levied for the education rate under sect. 18 of the Education Act 1902, and no separate rate had been levied for the burial rate under sect. 1 of the Burial Act 1860.

5. The education rate and the burial rate were not collected with the poor rate for the sake of convenience.

6. The name of the appellant had been omitted by the overseers from the list of inhabitant householders on the ground that the poor rate on the qualifying property due on the 5th Jan. 1904 had not been fully paid on or before the 20th July 1904.

7. On or before the 20th July 1904 the other ordinary occupiers, with the exception of the appellant and thirty-nine other persons, all of whom were known by the name of "Passive Resisters," had *bonâ fide* paid all poor rates that had become payable by them in respect of the premises occupied by them up to the preceding 5th Jan. 1904.

8. The inhabitant householders' list is made out in three divisions, carrying the following franchises: (1) Both Parliamentary and burgess; (2) Parliamentary only; and (3) burgess only.

9. It was admitted that the appellant had refused to pay, and had not paid, that portion of the poor rate levied for the purposes of education in the borough, and that the amount of 1*s.* 6*d.* was due thereon on the 5th Jan. 1904, and that the same had not been fully paid on or before the 20th July 1904.

10. Thirty-nine other persons, whose names and qualifications, together with the name and qualification of the appellant, were set out in a schedule hereunto attached, claimed to be inserted in the list of inhabitant householders under similar circumstances.

Three points of law were taken: (*a*) That the education rate was not a poor rate, and that nonpayment of poor rates alone, and of no other rates, disqualified an inhabitant householder in a Parliamentary and municipal borough from being inserted in division 1 of the list of voters. (*b*) That the education rate was not a borough rate for the purposes of the Registration Acts. (*c*) That nonpayment of the burial rate did not disqualify an inhabitant householder in a Parliamentary and municipal borough from being inserted in division 1 of the list of voters.

The revising barrister decided as follows:—

(*a*) On the first point he decided that the education rate was chargeable upon the poor rate according to law; that it formed part of the poor rate, and that the poor rate, as made and demanded, was one rate and indivisible. "Poor rate" is defined in sect. 20 of the Poor Rate Assessment Act 1869 in these words: "Poor rate shall mean the assessment for the relief of the poor and for other purposes chargeable thereon according to law," clearly indicating that there may be poor rates other than those to be expended simply for the relief of the poor. Statutes dealing with education point to the conclusion that the education rate is part of the poor rate. By sect. 18 of the Education Act 1902 the expenses of an urban district council other than a borough are to be raised in the manner provided by sect. 33 of the Elementary Education Act 1876—that is, they are to be paid out of a fund to be raised out of the poor rates for the parish or parishes for which the committee of management act, and, as to a borough, by the same sect. 18 of the Education Act 1902 the expenses are to be paid out of the borough fund or rate; and by sect. 145 of the Municipal Corporations Act 1882 the council of a borough has power to order a parish within the borough to pay its contribution to the borough rate out of the poor rate. He further decided that in a Parliamentary and municipal borough an unpaid poor rate was not the only disqualifying rate; that payment on or before the 20th July 1904 of all borough rates as well as poor rates due on the 5th Jan. 1904 was essential to registration in division 1 of the list of inhabitant householders, as to the Parliamentary

(a) Reported by W. W. Orr, Esq., Barrister-at-Law.

franchise by sect. 3, sub-sect. 3, of the Representation of the People Act 1867, and as to the burgess franchise by sect. 9, sub-sect. 2 (*d*) and (*e*) of the Municipal Corporations Act 1882, and he also decided that these disqualifications operated respectively in regard to the insertion of the name of the appellant either in division 2 or in division 3.

(*b*) On the second point he decided that the education rate was a borough rate payable out of the borough fund for the purposes of the Registration Acts. The point seemed to him unarguable, having regard to sect. 18 of the Education Act 1902; the words "The expenses under the Act shall be paid out of the borough fund or rate" seemed to him to admit of no other construction.

(*c*) On the third point it was contended that by sect. 1 of the Burial Act 1860 (23 & 24 Vict. c. 64) the burial rate was levied as a separate rate, and therefore nonpayment of it did not disqualify the appellant from being inserted in the list, and that, as the amount due on the burial rate (1½*d.* in the pound) exceeded by one halfpenny in the pound the amount due on the education rate (1*d.* in the pound), it followed that the education rate had been fully paid, and that no part of the poor rate remained unsatisfied. The revising barrister decided that the true construction of sect. 1 was that for the purposes of the Burial Acts the authority had an option to levy either a general or a separate rate, and that in the present case the authority had levied a general and not a separate rate, and that the burial rate was a borough rate, the nonpayment of which disqualified the appellant from being inserted in the list of inhabitant householders by virtue of sect. 3, sub-sect. 3, of the Representation of the People Act 1867 (Parliamentary), and of sect. 9, sub-sect. 2 (*d*) and (*e*) of the Municipal Corporations Act 1882 (Burgess).

(*d*) The revising barrister also decided that the appellant had not on or before the 20th July 1904 *bonâ fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that had become payable by him in respect of his premises up to the preceding 5th Jan. 1904, and that he was disqualified thereby from being inserted in the list by sect. 3, sub-sect. 4, of the Representation of the People Act 1867. He disallowed the claim of the appellant Frederick Ash and the thirty-nine other persons to be inserted in the list of inhabitant householders.

If the court should be of opinion that all the decisions of the revising barrister were wrong, the register was to be amended by inserting the names of the appellant Ash and of the thirty-nine other persons in the list of inhabitant householders; but if the court should be of opinion that any one of his decisions in *a*, *b*, *c*, or *d* was right, then the list should stand without amendment.

The demand note addressed to the appellant, the Rev. Frederick Ash, was a

Poor rate demand note.—Parish of Scarborough.—The overseers of the poor demand payment of the poor rate made on the 24th day of April 1903 to meet expenses which will be incurred before the 25th March 1904, now due from you in respect of the hereditaments of which the assessment numbers and rateable values are stated below.

The description of the property was "Buildings and other hereditaments not being agricultural land." The rateable value was 17*l.* 12*s.*, and the rate at 3*s.* in the pound was 2*l.* 12*s.* 10*d.* Then underneath was the following:

Note.—The poor rate is payable in one sum.—Purposes for which the above-mentioned rate was made, and amount in the £ levied for each purpose; half the amount being levied on agricultural land.—Amount in the £:

	s.	*d.*
Relief of the poor, and other expenses of the guardians	0	11¾
County contributions	0	2
Borough rate, including 10¾*d.* in the £ for expenses of elementary education, and 9½*d.* in the £ for miscellaneous expenses	1	8¼
Burial Board	0	1½
Expenses of the overseers	0	0½
Total	3	0

Sect. 18 of the Education Act 1902 (2 Edw. 7, c. 42) provides:

(1) The expenses of a council under this Act shall, so far as not otherwise provided for, be paid, in the case of the council of a county, out of the county fund, and, in the case of the council of a borough, out of the borough fund or rate, or, if no borough rate is levied, out of a separate rate to be made, assessed, and levied in like manner as the borough rate, and, in the case of the council of an urban district other than a borough, in manner provided by section thirty-three of the Elementary Education Act 1876, as respects the expenses mentioned in that section—(that is, out of a fund to be raised out of the poor rate of the parish or parishes comprised in the district).

The Municipal Corporations Act 1882 (45 & 46 Vict. c. 50) provides:

Sect. 9 (1). A person shall not be deemed a burgess for any purpose of this Act unless he is enrolled as a burgess. (2) A person shall not be entitled to be enrolled as a burgess unless he is qualified as follows: . . . (*b*) Is on the fifteenth of July in any year, and has been during the whole of the then last preceding twelve months, in occupation, joint or several, of any house, warehouse, counting-house, shop, or other building (in this Act referred to as qualifying property), in the borough; and . . . (*d*) Has been rated in respect of the qualifying property to all poor rates made during those twelve months for the parish wherein the property is situate; and (*e*) Has on or before the twentieth of the same July paid all such rates, including borough rates (if any) as have become payable by him in respect of the qualifying property up to the then last preceding fifth of January.

Sect. 145 (1). Where a parish is wholly in a borough, the council may from time to time, if they think fit, order the overseers to pay the contribution of the parish to the borough rate out of the poor rate made or to be made for the parish.

The Representation of the People Act 1884 (48 & 49 Vict. c. 3) in sect. 2 establishes a uniform household franchise in all counties and boroughs throughout the United Kingdom, and enacts that every man possessed of a household qualification shall if the qualifying premises be situate in a county in England or Scotland, or in a county or borough in Ireland, be entitled to be registered as a voter, and, when registered, to vote at an election for such county or borough; and by sect. 7 (1) the expression "a household qualification" is defined as meaning, as respects England and Ireland, the qualification enacted by the 3rd section of the

Representation of the People Act 1867, and the enactments amending or affecting the same.

The Representation of the People Act 1867 (30 & 31 Vict. c. 102) provides:

Sect. 3. Every man shall . . . be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in Parliament for a borough, who is qualified as follows (that is to say): (1) Is of full age, and not subject to any legal incapacity; and (2) Is on the last day of July in any year, and has during the whole of the preceding twelve calendar months been an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough; and (3) Has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises; and (4) Has on or before the twentieth day of July in the same year *bonâ fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that have become payable by him in respect of the said premises up to the preceding fifth day of January. . . .

The Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41)—an Act for amending the law with respect to the rating of occupiers for short terms, and the making and collecting of the poor's rate—provides:

Sect. 20. The words "poor rate" shall mean the assessment for the relief of the poor, and for the other purposes chargeable thereon according to law, and in the metropolis shall extend to every rate made by the overseers, and chargeable upon the same property as the poor rate.

Cyril Dodd, K.C. for the appellant.—The two points raised for the appellant are, first, that the education rate is not a poor rate; and, secondly, that it is not a borough rate. By sect. 18 of the Education Act 1902 the expenses of a council under the Act are payable out of the county fund, or, in the case of a borough, out of the borough fund or rate. By sect. 144 of the Municipal Corporations Act 1882 the borough rate is a rate raised in aid of the borough fund, and it appears from sects. 145, 147, and 250 (3) that for some purposes, at all events, there is a distinction between borough rate and poor rate. With regard to the Parliamentary franchise, sect. 2 of the Representation of the People Act 1884 establishes a general household qualification, and that means (sect. 7, sub-sect. 1) the qualification enacted in sect. 3 of the Representation of the People Act 1867—that is, that the person must have been rated as an ordinary occupier to "all rates made for the relief of the poor" (sub-sect. 3), and must have paid "all poor rates" (sub-sect. 4). At the time when these franchise Acts were passed, including the Act of 1884, there was nothing in the nature of a charge for education charged upon or payable out of the poor rate. The old borough franchise was founded upon payment of scot and lot, and the main object of the rating was not the collection of the rate, but to secure that the person was a *bona fide* occupier of the premises during the year. The condition required for the Parliamentary franchise was the payment of the poor rate, and the poor rate which affected that franchise was originally the old poor rate — namely, that which was made for the relief of the poor and union charges; and new charges, such as the charge for education or the burial charge, though collected with and in some sense forming part of the poor rate, were not originally so, and were not necessary to be paid for franchise purposes. The true distinction is drawn on the face of this demand note itself; thus, "Relief of the poor and other expenses of the guardians," so much, and "Borough rate, including the expenses of elementary education," so much. That shows that the education rate does not come under the rate for the relief of the poor and union charges. Then the revising barrister relies on the definition of "poor rate" in sect. 20 of the Poor Rate Assessment and Collection Act 1869, and he bases the greater part of his judgment on the fact that that section has altered into a poor rate that which was not a poor rate before. That section is the interpretation section for that Act, and the definition of "poor rate" there given is simply the meaning of poor rate in that Act—that is, for purposes of assessment and collection of the rate; and the only reason why these charges were put on the poor rate was that that was the only machinery by which the rates could be raised. But sect. 20 does not refer to or define what is poor rate in other Acts before or since that Act, and does not carry the case any further. When in the Act of 1884 it is said that rating is essential, that must mean what it meant before, a rate for the relief of the poor. It never could have been intended by Parliament that every new charge put upon the poor rate should, if unpaid, be a disqualification; otherwise they would be making the conditions of the franchise harder and harder. If the case were one of contract, as, for instance, a contract between landlord and tenant as to the payment of poor rates, "poor rate" in such a contract would not include such a charge as the education rate (*Earl of Cork* v. *Cork County Council* (1903) 2 I. R. 490), and there is no distinction in construing a contract and construing an Act of Parliament, the one being construed according to the intention of the parties, and the other according to the intention of the Legislature. He also referred to

M'Daid v. *Galbraith*, (1901) 2 I. R. 490.

Jeeves for the respondent, the town clerk of Scarborough, did not argue.

Cox (app.) *v.* Merriman (resp.).

Case stated by the revising barrister for the eastern division of the county of Wilts sitting at Marlborough on the 25th Sept. 1904, when Edward Cox duly claimed to have his name inserted in the list of the inhabitant householders in division 1 as a Parliamentary elector for the eastern division of the county, and as a county and parochial elector for the administrative county of Wilts.

The facts were as follows:—

Edward Cox, of No. 24, Herd-street, Marlborough, duly made a claim, dated the 17th Aug. 1904, to have his name inserted in the occupiers' list (division 1) as a duly qualified voter for the parish of St. Mary, Marlborough, entitling him to vote at a Parliamentary election, and also at any county council or parochial election held in or for the eastern division of Wiltshire, in respect of a certain dwelling-house situate at No. 24, Herd-street, of which he was the occupier.

It was proved by the assistant overseer of the parish, upon oath, that the whole of the poor rate due on the 5th Jan. 1904, in respect of the

dwelling-house, had not been paid either on or before the 20th July 1904 as required, or at all.

The trustees of the Primitive Methodist Chapel in the parish were rated as owners of the premises, and the overseers of the poor of the parish demanded from them payment of the poor rate made on the 20th Oct. 1903 to meet expenses which would be incurred before the 25th March 1904, and of the arrears of the former rates.

The rates as demanded amounted on the 5th Jan. 1904 to 6*s.* 0½*d.*, made up of 4*s.* 6*d.*, being an instalment of the rate made on the 20th Oct. 1903, and 1*s.* 6½*d.*, arrears of former rates.

The rate, however, due on the 5th Jan. 1904 was reduced to 5*s.* 4½*d.*, by reason of the chapel trustees having compounded for the rates as owners of the premises.

The owners paid on account of the rates 3*s.* 5½*d.* on the 26th Feb. 1904, leaving a balance still due of 1*s.* 11*d.*, which was still unpaid on the 20th July 1904.

The demand note showed on the back of it how the rate of 1*s.* 6*d.* in the pound was made up, and was as follows:

	s.	*d.*
Relief of the poor and other expenses of the guardians	0	6½
County contributions	0	10½
Expenses of the overseers	0	1
	1	6

With the exception of the demand note, no evidence whatever was given or tendered to the revising barrister as to what part of the rate was unpaid, but it was contended by the party agent that the amount so left unpaid was in respect of the rate for education, and that that part was included in the 10½*d.* for county contributions.

The revising barrister invited evidence of these contentions, but none was forthcoming.

Eight other persons, whose names were set out in a schedule hereunto attached, claimed to be inserted in the list under similar circumstances.

The revising barrister decided as a fact that the whole of the poor rate due on the 5th Jan. 1904 and duly demanded by the overseers in respect of the premises had not been paid on or before the 20th July 1904, and he therefore disallowed the claim of Edward Cox and of the eight other persons to be put on the list. Due notice of appeal from his decision was given, and he ordered the appeals in all the cases to be consolidated.

If the court should be of opinion that his decision was wrong, the register was to be amended by inserting the name of Edward Cox and the names of the eight other persons in the list.

The Local Government Act 1888 (51 & 52 Vict. c. 41) provides:

Sect. 2, sub-sect. 4. As respects the electors of the county councillors—the persons entitled to vote at their election shall be, in a borough, the burgesses enrolled in pursuance of the Municipal Corporations Act 1882, and the Acts amending the same, and elsewhere the persons registered as county electors under the County Electors Act 1888.

The County Electors Act 1888 (51 & 52 Vict. c. 10) provides:

Sect. 2 (1). For the purpose of the election of county authorities in England, the burgess qualification—that is to say, the qualification enacted by section nine of the Municipal Corporations Act 1882—shall extend to every part of a county not within the limits of a borough, and a person possessing in any part of a county outside the limits of a borough such burgess qualification shall be entitled to be registered under this Act as a county elector in the parish in which the qualifying property is situate. (2) Sections nine, thirty-one, thirty-three, and sixty-three of the Municipal Corporations Act 1882, and any enactments of that or any other Act affecting the same, shall extend to so much of every county as is not comprised within the limits of a municipal borough in like manner as if they were herein re-enacted, with the substitution of "county" for "borough" and of "county elector" for "burgess," and with the other necessary modifications.

Sect. 3. Every person who is entitled to be registered as a voter in respect of a ten pounds occupation qualification within the meaning of the provisions of the Registration Act 1885, which are set out in the schedule to this Act, shall be entitled to be registered as a county elector, and to be enrolled as a burgess, in respect of such qualification, in like manner in all respects as if the sections of the Municipal Corporations Act 1882 relating to a burgess qualification included the said ten pounds occupation qualification.

By sect. 44 of the Local Government Act 1894 (56 & 57 Vict. c. 73), the parochial electors of a parish consist of the local government register of electors and the Parliamentary register of electors, so far as they relate to the parish.

R. M. Montgomery for the appellant.—In this case the two qualifications claimed are the Parliamentary qualification and a county council and parochial qualification. With regard to the vote for a Parliamentary election, the qualification is the household qualification, and by sects. 2 and 7 of the Act of 1884 and sect. 3 of the Act of 1867 that means the payment of all poor rates. In this case the balance of the rate unpaid was in respect of the education rate, which was included in the "county contributions" set out on the back of the demand note, and there the poor rate, properly so called, is distinguished from the "county contributions." The real question, therefore, is whether "county contributions" are a poor rate for the purpose of the franchise. "County contributions" are contributions for general or special county purposes (Local Government Act 1888, s. 68, sub-s. 6), and are determined by the standard or basis for the county rate, and by sect. 2 of the County Rates Act 1852 (15 & 16 Vict. c. 81) the standard or basis for the county contributions is provided for and is made on behalf of the justices (now the county council), and not for the overseers. That shows that there is some distinction between county contributions and the poor rate, although both may be levied by the overseers and by one demand note. A poor rate was in this case demanded, but on the back of the demand note the rate was divided into a poor rate properly so called and county contributions, and it does not follow that because the words "poor rate" were used that necessarily includes county contributions, such as the education rate. A ratepayer is entitled to be told what part is to be for poor rate, and what part for other purposes, and he can allocate his payment to any part he chooses, either to the rate for the relief of the poor or to the county contributions, and although the overseers may not be bound to take part of the rate in this case they have done so. In sect. 9, sub-sect. 2 (*d*) and (*e*) of the Act of 1882, as to the burgess qualification, there is a clear distinction between "borough rates" and "poor rates," and it is submitted that there is the same distinction between poor rates

and county contributions, and the same distinction appears in other Acts between local rates and poor rates. In these franchise Acts "poor rate" means the poor rate made under the Act of Elizabeth, and does not include rates which may be charged upon or made payable out of the poor rate; and the only disqualifying rate for the Parliamentary franchise, which is not affected by anything in the Local Government Act 1888 (s. 92, sub-s. 1) is the poor rate properly so called. For the local government franchise the disqualication is if the ratepayer has not paid either the county rate or the poor rate (sect. 2 (4) of the Local Government Act 1888, and sect. 2 of the County Electors Act 1888, which makes applicable to a county elector the burgess qualification in sect. 9 of the Municipal Corporations Act 1882). With regard to the second point as to the nonpayment of the rate by the compounding owner, the tenant may be disqualified by the owner who has compounded for the rates not paying the rates. Sect. 10 of the Poor Rate Assessment and Collection Act 1869 applies sect. 28 of the Representation of the People Act 1867, with respect to notice to be given of rates in arrear, and provides for notice of the nonpayment of the rate being given to the tenant. That notice must be given before the tenant is disqualified. Here there was no evidence that such notice was given to the appellant which is sufficient for the appellant as the onus is on the other side.

The respondent did not appear.

Lord Alverstone, C.J.—Upon the substantial point argued before us in these two cases none of us have any doubt. It has been contended that although in the demand note a demand for poor rate had been properly made upon the persons who were liable to pay that rate, yet, inasmuch as that rate so demanded was made not only for the poor rate properly so called, but for other purposes that could not properly be called poor rate, the ratepayer was at liberty to pay only so much of the rate as was for the relief of the poor, and it was contended that that was a sufficient ground for justifying a ratepayer in saying that he declined to pay a portion of the rate because that portion was not poor rate properly so called, and that, in doing so, he did not become thereby disqualified for being on the lists of Parliamentary, county, or parochial electors. For the purpose of dealing with that contention it is not necessary to go through all the statutes which have been referred to during the argument. It is necessary to refer to two only of those statutes—namely, sect. 3, sub-sects. 3 and 4, of the Representation of the People Act 1867, and sect. 9, sub-sect. 2 (*d*) and (*e*), of the Municipal Corporations Act 1882. Those are the statutes applicable for the purposes of the Parliamentary and burgess franchise, and those are the statutes to which we have to refer whether we take the question as relating to the Parliamentary franchise or to the burgess franchise. The question which arises upon those sections, apart from any subsequent legislation, is whether a person who objects to part of the purposes for which the rate was to be applied could refuse to pay that part of the rate to which he objected and yet claim to have his name inserted on the list of voters. I desire to point out that this case does not depend for the purposes of argument on the particular objection that was now raised by the people who were called, for the purposes of this case, "Passive Resisters." It is obvious when we refer to the sections that for a number of years, I think ever since the year 1867, a number of purposes had been included in respect of which the poor rate was levied which could not properly be called poor rate purposes. That had been the accepted state of things for a long time, and I think that the Municipal Corporations Act 1882 recognised, and it is perfectly plain that the Legislature were conscious of the fact, that the poor rate included expenses for charges other than the poor rate properly so called. Exactly the same question as is raised in these cases might have been raised by any person who desired to say that he had paid enough to cover so much of the poor rate as was referable to the objects of that rate as existing in 1867, and who declined to pay for something which he considered did not come within the poor rate. I do not think that a person can refuse to pay that part of the rate. With regard to the borough rate, I do not think it necessary to add anything more than what the learned revising barrister has said in his judgment. He there says that he decided that the education rate was a borough rate payable out of the borough fund for the purposes of the Registration Acts. The point raised by the appellant that the education rate was not a borough rate really seems unarguable when we look at the words in sect. 18 of the Education Act 1902, that the expenses under the Act in the case of the council of a borough shall be paid "out of the borough fund or rate." It seems to me that those words can admit of no other interpretation than that put upon them by the revising barrister, and I think that contention is sufficiently answered by what he has said. Among the expenses included in this poor rate is a burial rate, and, as the revising barrister has thought, the main question is, Can a man decline to pay more than he thinks is due in respect of the poor rate properly so called, and then claim a vote on the ground that any payment beyond that will be applied to some other purpose? In my opinion he cannot do so, and I think he would be met with the argument that such a proceeding would be most embarrassing to the local authorities. I only desire to say that this conclusion is in accordance with common sense. I further wish to say that our decision in these cases does not turn on the particular ground of objection which the appellants have raised, but applies equally to an objection taken to any other part of the poor rate. The question is, Has the ratepayer paid the poor rate? In my opinion the appellants have not paid the poor rate, and I therefore think the revising barrister was right, and that these appeals should be dismissed. With regard to the important point raised by Mr. Montgomery in the second case, as to the position of the tenant if the landlord who had compounded for the rates had not paid the rates, no point of the kind is raised in the case, and therefore we do not deal with it. We cannot assume in favour of the appellant that a notice had not been served upon the appellant by the overseers stating that the landlord had not paid the rate, nor ought we to assume that the point was raised before the revising barrister. I consider that these two cases were intended to

raise the main question whether a person who has not paid the education rate can claim to vote at a Parliamentary or local government election, and in my opinion he cannot so claim.

KENNEDY, J.—I am of the same opinion, and I propose to add very little. It is, in my opinion, impossible to say that the poor rate, which is levied as one rate, is not in fact one rate merely because the total rate is to be used for separate purposes. I have great doubt as to whether a ratepayer could appropriate a part payment of the whole rate to any particular part of that rate, or whether the officer could properly accept such part payment; and I do not see how the officer could give a receipt for such a part payment appropriated to some particular portion of the rate. In my opinion the poor rate is one indivisible claim, and it is impossible to say that that claim has been paid in these cases.

RIDLEY, J.—I agree, and have nothing to add.

Appeals dismissed. Leave to appeal.

Solicitors (in the first case) for the appellant, *Jaques* and *Co.*, for *Richardson* and *Parker*, Scarborough; for the respondent, *D. A. Nicholl*, Scarborough.

Solicitors (in the second case) for the appellant, *Lloyd-George*, *Roberts*, and *Co.*

Friday, Nov. 4, 1904.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

STONE (app.) *v.* TYLER (resp.). (*a*)

Weights and measures—Weighing paper with article—Scales correct—Weights and Measures Act 1878 (41 *&* 42 *Vict. c.* 49), *s.* 26.

No offence is committed within sect. 26 *of the Weights and Measures Act* 1878, *where a customer, having asked for* 1*lb. of sugar, is sold sugar in a bag which together with the bag weighs* 1*lb., but without the bag is less than* 1*lb., such sugar and bag having been previously weighed, where the vendor has no intention to defraud the customer and the scales are just and accurate.*

CASE stated on an information preferred by the respondent against the appellant under sect. 26 of the Weights and Measures Act 1878, charging that the appellant on the 25th Jan. 1904, at Chiswick, did unlawfully and wilfully commit a fraud in the use of a certain weighing instrument, contrary to the statute.

The respondent, an inspector under the Act, went on the 25th Jan. to the appellant's shop, where he carried on the business of a grocer, and purchased, amongst other things, 1lb. of loaf sugar.

The respondent asked for 1lb. of loaf sugar, and paid 2½d., the price of it.

The sugar was handed wrapped in a paper bag or wrapper.

The gross weight of the package—that is to say, the weight of the sugar and the paper bag or wrapper—was exactly 1lb., and the sugar without the paper bag or wrapper weighed ¾oz. less than 1lb.

This package of sugar had been previously weighed by the appellant or his servants in the paper in which it had been delivered to the purchaser in the scales, and the package was one of a number of similar 1lb. packages of sugar in the shop that had been previously weighed in the same scales, and none of these packages weighed as much as 1lb. without including the paper in which they were wrapped.

The scales in which the sugar had been weighed with the wrapper were perfectly just and accurate, and gave the weight of the package correctly.

The respondent, when he asked for 1lb. of sugar, expected to get 1lb. weight of sugar without including the weight of the paper in which it was wrapped.

The appellant knew and the respondent did not know that in fact the appellant was giving the respondent less than 1lb. weight of sugar, and, as the sugar was not weighed in the presence of the respondent, the respondent had no means of knowing that he was being given less than 1lb. weight of sugar.

The paper bag contained 35 per cent. of mineral matter and was unnecessarily heavy for the purpose of wrapping sugar. The pecuniary value of ¾oz. of sugar was shown to be greater than the value of the paper bag.

Evidence was tendered on behalf of the appellant that it was the custom or usage in the trade to weigh sugar in the paper wrapper in which it was delivered to the purchaser, and the appellant himself gave evidence to the same effect.

It was contended on behalf of the appellant that the evidence established a custom or usage of England in the trade of grocers to weigh sugar in the paper in which it was delivered to the purchaser, and that, even if there were no such custom, no offence had been committed. That weighing the sugar with the paper wrapper, the weight of the package being correct, did not constitute an offence under sect. 26 of the Act, and that that section was not applicable to the facts of the case. That there was no evidence of any fraud in the using of the scales in which the sugar with the paper wrapper was weighed, and, again, even if there was no such custom, no offence had been committed in the absence of fraudulently heavy paper.

No evidence was given on behalf of the respondent to disprove the custom or usage referred to in the trade, and the respondent admitted that he knew that with a great many grocers it was the custom to weigh the sugar in the paper bag or wrapper in which it was sold and delivered.

It was contended on behalf of the respondent that there could be no valid custom or usage of trade to weigh the sugar with the paper, and that even if such a custom or usage of trade existed it was not material. The weighing sugar in the paper in which it was delivered was in itself an offence under sect. 26 of the Weights and Measures Act 1878.

It was admitted, and the justices found as a fact, that the appellant made no attempt to conceal, and had no intention of concealing, the fact that the paper had been weighed with the sugar, and in so weighing it he had no intention to defraud the purchaser.

The justices held that weighing the sugar in the paper in which it was sold and delivered, although the weight of the package—that is to say, the weight of the sugar with the paper—was correct, and although it was done in the mistaken

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

belief that there was in England such a custom in the trade, was in itself sufficient to constitute a fraud wilfully committed in the using of the scales within the meaning of sect. 26, and they convicted the appellant.

By sect. 26 of the Weights and Measures Act 1878:

Where any fraud is wilfully committed in the using of any weight, measure, scale, balance, steelyard, or weighing machine, the person committing such fraud, and every person party to the fraud, shall be liable to a fine not exceeding five pounds, or in the case of a second offence ten pounds, and the weight, measure, scale, balance, or steelyard shall be liable to be forfeited.

Asquith, K.C., *Avory*, K.C., and *Bonsey* for the appellant.—The information here was under sect. 26 of the Weights and Measures Act 1878, and the questions arise whether the section applies at all and whether on the facts there was sufficient to justify the justices in saying that a fraud had been wilfully committed in the using of the scales. With regard to the first point, in order for the section to apply, there must be a fraud committed in the manipulation of the machine itself, and it is found as a fact that the appellant here had no intention to defraud the purchaser. That being so, on the admitted facts there was no fraud wilfully committed. The machine was accurate, and it was not fraudulently used or manipulated so that the machine did not accurately state the weight of what was put into it.

Eustace Hills for the respondent.—The facts disclosed in the case show that in the using of a weighing machine a fraud had been wilfully committed, for the appellant knew when he was weighing out these packages that they did not contain a pound of sugar. A fraud was committed, it was wilfully committed, and committed in the using of a weighing machine, and that is sufficient to constitute an offence within sect. 26. The mere fact that the justices have found that there was no intention to defraud the purchaser makes no difference, for it is clear from *Derry* v. *Peek* (61 L. T. Rep. 265; 14 App. Cas. 337), in the judgment of Lord Herschell, that fraud is committed when a false representation has been made knowingly, or without belief in its truth, or recklessly and carelessly whether it is true or false. In *King* v. *Spencer* (91 L. T. Rep. 470; 2 L. G. R. 979) it was held that weighing paper with the article may amount to wilful fraud, and in both *Lane* v. *Kendall* (81 L. T. Rep. 445; (1899) 2 Q. B. 673) and in *London County Council* v. *Payne* (21 Cox Mag. Cas. 350; 89 L. T. Rep. 632; (1904) 1 K. B. 194), where it is true that the informations were under sect. 25 of the Weights and Measures Act 1878, it was argued, and no suggestion of the inaccuracy of such argument was made by the court, that weighing paper with the article, provided fraud existed, would be an offence under sect. 26 of the Act of 1878.

Lord ALVERSTONE, C.J.—This case has been very well argued on both sides, particularly by Mr. Eustace Hills, and I confess I have tried throughout to see any ground upon which we could support the conviction, because I am satisfied that this practice of selling articles and paper does to the ordinary poor purchaser very often inflict a considerable amount of injustice. I quite agree with Mr. Hills that there may be difficulties in protecting those purchasers by means of purchases which are made by inspectors, but at the same time that is a matter with which the Legislature must deal. We are not justified in straining an Act of Parliament which seems to me to have a clear purpose for curing an evil in another way. As I have pointed out, it has to a certain extent been dealt with, and it is by no means clear to my mind that a person who sells paper and sugar when he is asked for sugar and does not inform the purchaser, may not bring himself within the criminal law quite apart from civil liability. But we have to concern ourselves with whether this conviction can be upheld under sect. 26 of the Weights and Measures Act 1878. It seems to me clear, looking to the facts that occur within the Weights and Measures Act, that it follows on the section which deals with scales which are unjust in themselves, the possession of those scales being unlawful, and it refers to fraud wilfully committed in using a weight, measure, scale, or balance. It points to tricks in the course of weighing, and I think it is not unfair to test Mr. Hills' argument by pointing out that the fraud is not, I might also say, any step in the fraud really taken by weighing in a particular manner, because *non constat* the paper and the sugar will not be sold by somebody who says they are paper and sugar, or announces that it is paper and sugar instead of sugar only. The real fraud here, as my brother Kennedy has pointed out, is handing over the counter that which is represented in weight by sugar and paper in response to an application for sugar. If that is an evil of sufficient magnitude to be dealt with by the Legislature, it ought to be dealt with. I come to the conclusion that for the purpose of an offence under the section there must be some fraud in connection with the using of the scale, and, in my opinion, the scale being for the purpose of weighing accurate, it does not make it an offence under that section afterwards to take a weighed product and use it in a way which is either dishonourable or dishonest, or in a way in which it ought not to be used. I desire only for myself to say I am not altogether very much pressed by the statement made that the appellant had no intention of concealing the fact that the sugar was weighed with the paper, and in so weighing it he had no intention to defraud the purchaser. If that means that in so weighing it he had no intention that these packages should be sold of this particular description or in answer to the particular invitation, then I think it is material, because it negatives the idea that there is any fraud subsisting, but, if I had come to the conclusion that it was within the section, I should not be pressed by the finding that the appellant had not intended to defraud the particular purchaser. On the whole, I think, however desirable it may be to safeguard these kind of transactions, it cannot be done by taking proceedings under the 26th section unless there is evidence of an improper use of the scales in the act of weighing. I think, therefore, this appeal must be allowed..

KENNEDY, J.—I have come to the same conclusion. When you look at the facts of this case it does not seem to me that any other conclusion is possible. The offence according to the section is "where any fraud is wilfully committed

in the using of any weight, measure, scale, balance, steelyard, or weighing machine." The appellant here, or his shopman, put upon the machine a certain quantity of sugar and paper which together did weigh a pound, and that was indicated by the machine on the other side. No fraud was committed by him in the using of the machine, and he has not with this machine committed any fraud upon anybody else; what he has done is to represent to a buyer in his shop that to be a pound of sugar, but nothing else—the sugar plus the weight of the bag in which it is carried. That being so, it is not necessary to consider anything else. Reference has been made to other cases which I do not think really help our decision in this case. There was no fault to be found with the machine which was used so as to bring it under sect. 25, but, the prosecution here being under sect. 26, the question is, Was there any fraud committed in the using of the machine? No machine was used before the purchaser at all. A fraud, in my opinion, in one sense is committed in spite of the finding in the case. I have no doubt this section, because it says so, requires fraud to be wilfully committed. I suppose this grocer justifies himself in doing it by the fact, as appears by another paragraph, that a great many other persons do the same thing. To my mind that does not make the thing any better; but still it does not mean that he was knowingly doing or that he expressly counselled it, although I think, myself, very often a person may more effectually do so by saying nothing about it at all, and when asked for a pound of tea, gives something which is not a pound of tea, but a pound of tea and paper. That seems to me very little different from concealment. I should not have much difficulty under that section in dealing with the case if the thing which was done by which the party buying was injured had been done in the using of the weight, measure, scale, balance, steelyard, or other weighing machine. It seems to me that the whole of this case, as Mr. Asquith has pointed out, fails entirely upon that point. The wrong or mischief, to use a milder word, that was done by giving to the buyer something else that was not sugar is not because the thing was untruly weighed, because it had been truly weighed, but it was in the giving or handing it over to the purchaser without letting the man know what it really was that was handed over.

RIDLEY, J.—I agree, and I have nothing to add.

Appeal allowed.

Solicitors: *Neve, Beck,* and *Kirby*; Sir *R. Nicholson.*

Friday, Nov. 4, 1904.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

HULL (app.) *v.* HORSNELL (resp.). (*a*)

Food and drugs — Preserved peas—Sulphate of copper — Injurious to health — Certificate of analyst — Sale of Food and Drugs Act 1875 (38 *&* 39 *Vict. c.* 63), *s.* 3.

Under sect. 3 *of the Sale of Food and Drugs Act* 1875 *the article of food must be rendered injurious to health by being mixed with some ingredient. It is not sufficient that the ingredient with which the food is mixed is injurious to health.*

The certificate of the analyst in the case of an alleged offence under this section is not insufficient, if it complies with the form in the schedule to the Act of 1875, *merely because it does not state that the ingredient so mixed "rendered the article injurious to health."*

CASE stated on an information preferred by the respondent against the appellant under the Food and Drugs Act 1875, charging that the appellant did, on the 19th Feb. 1904, unlawfully and wilfully sell to the respondent a certain article of food—to wit, bottled peas—which to the knowledge of the appellant was mixed with a certain ingredient called sulphate of copper, which ingredient was injurious to health, contrary to the Sale of Food and Drugs Acts 1875-1899.

The respondent, an inspector under the Sale of Food and Drugs Acts, purchased of the appellant, a greengrocer carrying on business at Bexhill, a bottle of preserved peas for the purpose of analysis.

The respondent divided the peas so purchased into three parts, and sent one part to the public analyst, who gave his certificate as follows:

I, the undersigned public analyst for the administrative county of East Sussex, do hereby certify that I received from yourself on the 20th Feb. (per registered parcel post) a sample of bottled peas No. 14 for analysis (which then weighed about 4½oz.), and have analysed the same, and declare the result of my analysis to be as follows:—I am of opinion that the said sample is adulterated with sulphate of copper to the extent of at least 1·87 grains per lb. Observations.—The copper salt has doubtless been added to improve the colour of the peas.

The respondent proved that the bottle containing the peas bore the following label: "English Garden Peas. . . . Colour preserved with a small portion of Sulphate of Copper. Finest English Marrowfat Peas. Preserved in Kent.—Petty, Wood, and Co, London."

The public analyst was called for the prosecution, and he proved—(*a*) That sulphate of copper was a poisonous substance and injurious to health; (*b*) that sulphate of copper was used to preserve the colour of the peas; (*c*) that he had never known anyone personally or heard of anyone injured by eating peas containing copper, but that he, the public analyst, suffered from colic if he ate coppered peas; (*d*) that out of eight samples examined by him during the previous quarter seven contained copper.

On behalf of the appellant it was contended that the information did not disclose any offence under the Sale of Food and Drugs Act 1875 because it did not allege that the admixture of the ingredient called sulphate of copper rendered the article of food—namely, the peas—injurious to health, but merely that the ingredient itself was injurious to health, and that, therefore, the information was bad in law, and the appellant could not be convicted upon it. It was also contended on behalf of the appellant that the certificate of the public analyst did not disclose any offence, and was insufficient and did not comply with the requirements of the Sale of Food and Drugs Act 1875.

On behalf of the respondent it was contended that the information did disclose an offence under

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

the Act; that it is sufficient to constitute an offence under the latter part of sect. 3 of the Sale of Food and Drugs Act 1875 if the ingredient itself which is mixed with the article of food is injurious to health, and it is not necessary to show that the ingredient renders the article of food injurious to health.

It was also contended that the analyst's certificate was sufficient, being in the form provided by the schedule to the Sale of Food and Drugs Act 1875, and that the certificate need not disclose any offence. It was contended also that the insufficiency (if any) was remedied by the public analyst being called as a witness to give evidence of the facts.

The justices were of opinion that sulphate of copper, which was an ingredient in the peas, was injurious to health, and they therefore convicted the appellant, being of opinion that the ingredient necessarily rendered the whole article sold injurious to health.

The questions for the opinion of the court were: (1) Whether the information disclosed an offence under the Sale of Food and Drugs Act 1875 and was valid in law. (2) Whether the public analyst's certificate was sufficient and valid in law.

The summons was as follows:

In the county of Sussex.—Petty sessional division of Hastings.—To James Hull, of Devonshire-road, in the parish of Bexhill, in the county of Sussex, fruiterer.—Information on oath has been laid before me this day, by Arthur Horsnell, of 67, Vale-road, in the parish of St. Matthew, Hastings, in the said county, inspector of weights and measures, for that you, on the 19th Feb. 1904, at the parish of Bexhill, in the borough of Bexhill, in the division and county aforesaid, unlawfully and wilfully did sell to him, the said Arthur Horsnell, a certain article of food—to wit, bottled peas—which to the knowledge of you, the said James Hull, was mixed with a certain ingredient called sulphate of copper, which said ingredient is injurious to health, contrary to the Sale of Food and Drugs Acts 1875 to 1899, the statute in such case made and provided. You are therefore hereby summoned to appear before the court of summary jurisdiction sitting at the sessions court, Bexhill, on Saturday, the 16th April 1904, at the hour of half-past eleven in the forenoon, to answer the said information.—Dated the 16th March 1904.—(Signed) H. L. M. DUNN, justice of the peace for the county aforesaid.

Avory, K.C. and *Bonsey* for the appellant.—The summons in this case was for unlawfully and wilfully selling a certain article of food which to the knowledge of the appellant was mixed with a certain ingredient, "which said ingredient" was injurious to health. But no offence is committed under sect. 3 of the Sale of Food and Drugs Act unless the food with which the ingredient is mixed becomes injurious to health. The justices here have not found that the article of food was injurious to health, but they find that because an ingredient which by itself would be injurious to health is mixed with an article of food, such article of food must of necessity be rendered injurious to health. That cannot be so, and whether or not an offence has been committed under sect. 3 must depend upon whether the article of food itself is in fact rendered injurious to health. Further, the certificate in this case is bad as it does not on its face show that any offence was committed under sect. 3. The certificate must be good enough to support a conviction by itself, and by sect. 20 of the Sale of Food and Drugs Act 1875 it is expressly enacted that from the certificate it must appear that an offence against some one of the provisions of the Act has been committed. On the face of the certificate there must be sufficient to show that the offence with which the person is charged has been committed. In *Goulder* v. *Rooke* (84 L. T. Rep. 719; (1901) 2 K. B. 290) Lord Alverstone, C.J. said at p. 295: "It is very important that the practice should be uniform, and we think it is clear, after the series of decisions to which we have been referred, that the certificate of the analyst must be a document in proper form, and that that certificate ought to contain in it sufficient materials to enable the magistrates to form a judgment on those materials whether the offence charged had been committed." [KENNEDY, J. referred to *Reg.* v. *Smith* (74 L. T. Rep. 348; 18 Cox C. C. 307; (1896) 1 Q. B. 596).]

Boxall, K.C. and *P. G. Henriques* were not called upon to argue as to the validity of the certificate. The justices by their finding clearly show that they have convicted the appellant of selling an article of food rendered injurious to health by the addition of an injurious ingredient. No objection has been taken to the conviction. No objection can be taken to the information for any variance between it and the evidence adduced; that appears from sect. 1 of the Summary Jurisdiction Act 1848, and, had the appellant suffered any injustice, he could have asked for an adjournment. The conviction here was right.

Lord ALVERSTONE, C.J.—If the justices had convicted the appellant of an offence under sect. 3 of the Sale of Food and Drugs Act 1875 on the ground that the ingredient which was mixed with the article of food—sulphate of copper—was injurious to health, and not on the ground that the peas, by reason of the addition of the sulphate of copper, were rendered injurious to health, I am clearly of opinion that the conviction would be wrong. I have no doubt that in order to constitute an offence under sect. 3 the article of food sold must be found to be injurious to health by the addition of some ingredient. We have seen the summons which recites the information, and, speaking for myself, I think that the justices have, in fact, found the article itself—namely, the peas—was injurious to health when they said that the ingredient necessarily rendered the whole article sold injurious to health. As, however, there may be some doubt as to whether they have so found, I think that the case ought to be sent back to them with directions that if they find the peas as sold were injurious to health the conviction should stand, but that if they find not that the peas were injurious to health, but that the sulphate of copper, the ingredient with which they were mixed, was, the conviction should not stand. Mr. Avory has taken a second point—namely, that the conviction cannot stand because the certificate of the analyst is insufficient. [His Lordship read the certificate, and continued:] It was contended that at the end of the finding the analyst should have added the words "which rendered the article injurious to health," since the certificate, as it stands, does not show on the face of it that any offence has been committed. I cannot agree with that contention. The analyst could not know with what offence the person

would be charged. In my opinion, a certificate is sufficient if it is one which is in accordance with the terms of the schedule, and sets out the description of the goods sent for analysis, the weight, and the other requirements of the schedule.

KENNEDY and RIDLEY, JJ. agreed.

Case remitted to the justices.

Solicitors: *Neve, Beck,* and *Kirby*; *F. Lawson Lewis*, Eastbourne.

Monday, Dec. 19, 1904.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.).

WESTHORPE (app.) *v.* POWLEY (resp.).

Navy—Royal Naval Reserve—Making false statement on entering—Liability to punishment as for false statement made on entering the "naval service"—Naval Enlistment Act 1853 (16 & 17 *Vict. c.* 69), *s.* 16—*Naval Volunteers Act* 1853 (16 *&* 17 *Vict. c.* 73), *s.* 17—*Royal Naval Reserve (Volunteer) Act* 1859 (22 *&* 23 *Vict. c.* 40), *ss.* 15, 16.

Sect. 16 *of the Naval Enlistment Act* 1853, *which makes it a criminal offence for a person on entering or offering himself to enter the naval service to make any false statement with intent to deceive any officer or person authorised to enter or enlist seamen or others for such naval service, does not apply to persons making a false statement on entering or offering to enter the Royal Naval Reserve, a force created by a later Act of Parliament.*

CASE stated by justices for the borough of Great Yarmouth, in the county of Norfolk.

On the 21st and 28th April 1904 the justices when sitting as a court of summary jurisdiction heard and determined an information which charged the respondent with making, on the 23rd Feb. 1904, a false statement in writing on offering himself to enter the naval service of His Majesty, contrary to sect. 16 of 16 & 17 Vict. c. 69 (the Naval Enlistment Act 1853).

The following facts were proved or admitted:—

The appellant, Leonard J. Westhorpe, was an officer in His Majesty's Customs, and was authorised by virtue of his appointment under the regulations hereinafter mentioned to enrol duly qualified applicants in the Royal Naval Reserve.

The Royal Naval Reserve was established by the statute 22 & 23 Vict. c. 40 (the Royal Naval Reserve (Volunteer) Act 1859), and is governed by regulations issued under that statute.

On the 23rd Feb. 1904 the respondent Powley applied in person to the appellant to be enrolled in the Royal Naval Reserve, and signed a printed form which was read over to him and which contained the statements:

(1) That the respondent had not already made application to be enrolled in the Royal Naval Reserve at that (Yarmouth) or any other port; and (2) that his age was thirty, both of which statements were false.

On behalf of the respondent it was contended upon the above facts that as at the date of the passing of the statute creating the offence (namely, 16 & 17 Vict. c. 69), there was no force of Naval Reserve in existence, the penal section (sect. 16) could not apply. Also it was contended that the expression "Naval service of Her Majesty," in 16 & 17 Vict. c. 69, referred to the Royal Navy only, and could not be held to include the Royal Naval Reserve on the grounds that the Royal Naval Reserve was not at the date of the earlier Act and is not now a part of the "Naval Service."

For the appellant it was contended that inasmuch as the Royal Naval Reserve was under the control of and paid by the Admiralty, and its members when under training were under the command of His Majesty's naval officers, the force must come within the description "Naval service"; that the very nature and objects of the force brought it within the words in question, and it was within the mischief intended to be met by the section, and that the words "Naval service" must be taken to mean the naval force of His Majesty as constituted for the time being.

The justices were of opinion that at the date of the Act 16 & 17 Vict. c. 69, there was no force of naval volunteers in existence, the first body coming under that description being constituted by 16 & 17 Vict. c. 73 (the Naval Volunteers Act 1853), and that sect. 16 interpreted as a penal section could not be construed to apply to a non-existent body without further words. That referring to 16 & 17 Vict. c. 73, which is entitled "An Act for the establishment of a body of Naval Coast Volunteers, and for the temporary transfer to the Navy, in case of need, of seafaring men employed in other public services," there is no reference to cap. 69, but sect. 17 extends the laws relating to the government of the Navy to volunteers on board ship or otherwise under instruction, training, or exercise.

That an Act 22 & 23 Vict. c. 40, referred to in the argument, appeared to be in many respects a repetition of cap. 73, giving the volunteers an additional name "Royal Naval Volunteers," but not apparently carrying the case further against the respondent, who not then being under instruction, training, or exercise, was charged with having attempted to re-enlist for a second period of service after the completion of the first without mentioning the latter, and not with the offence under sect. 16 of the Royal Naval Reserve (Volunteer) Act of 1859.

The justices accordingly held that sect. 16 of 16 & 17 Vict. c. 69, did not extend to persons applying to enter the Royal Naval Reserve and dismissed the information.

The question for the opinion of the court was whether the decision of the justices was right, and whether the words "Naval service" in that section included the Royal Naval Reserve or persons offering themselves for service in it.

Sect. 16 of the Naval Enlistment Act 1853 (16 & 17 Vict. c. 69)—an Act to make better provision concerning the entry and service of seamen, and otherwise to amend the laws concerning Her Majesty's Navy—provides:

Every person who, upon entering or offering himself to enter the naval service of Her Majesty, shall make or give any false statement, whether orally or in writing, with intent to deceive any officer or person authorised to enter or enlist seamen or others in or for such naval service, shall be deemed a rogue and vagabond within the intent and meaning of the Act of the fifth year of King George the Fourth, chapter eighty-three, and shall

(a) Reported by W. W. OAR, Esq., Barrister-at-Law.

upon conviction thereof be punished accordingly; and all the provisions of the said Act, and of any Act amending the same, shall take effect and apply as if a person so offending as aforesaid had, by the said Act of the fifth year of King George the Fourth, been declared a rogue and vagabond within the true intent and meaning of that Act.

On the same day—the 15th Aug. 1853—the Naval Volunteers Act 1853 (16 & 17 Vict. c. 73)—"an Act for the establishment of a body of naval coast volunteers, and for the temporary transfer to the navy, in case of need, of seafaring men employed in other public services"—was passed, and under it the "Royal Naval Coast Volunteers" were authorised to be raised "by voluntary entry (from among seafaring men and others who may be deemed suitable for the services in which such volunteers may be employed)."

Sect. 17 provides:

All the laws and customs for the time being in force for the government of Her Majesty's ships, vessels and forces by sea, and applicable to any person in or belonging to the fleet, or to any person being in actual service and full pay, and part of the crew of any of Her Majesty's ships or vessels, shall be applicable in like manner to every volunteer during such period as he shall be on board any ship or vessel for the purpose of instruction, training, and exercise, or shall be otherwise under instruction, training, and exercise, and to every such volunteer, and to every officer and man of the coast-guard, of Her Majesty's revenue cruisers, seaman-rigger, or other person required to serve in the navy under this Act during such time as he shall be in actual service either on board any ship or vessel or otherwise under this Act . . .

The Royal Naval Reserve (Volunteer) Act 1859 (22 & 23 Vict. c. 40)—"an Act for the establishment of a reserve volunteer force of seamen, and for the government of the same"—authorised the raising of "the Royal Naval Volunteers," consisting of "men to be raised by voluntary entry from among seafaring men and others who may be deemed suitable for the services in which such volunteers may be employed."

By sect. 15—similar in terms to sect. 17 of 16 & 17 Vict. c. 73—the laws relating to the government of the navy were extended to volunteers while on board ship for the purpose of, or while under, instruction, training, and exercise, and to such volunteers and others when in actual service; and by sect. 16:

If any person shall enter or attempt to enter the royal naval volunteers as a new volunteer more than once during the whole or any part of the same period of service, he shall for every such act forfeit and pay any sum not exceeding twenty pounds.

William Wills for the appellant.—The information was laid under sect. 16 of the Naval Enlistment Act 1853, and the justices were of opinion that that section did not apply, as the force called the Royal Naval Reserve, in respect of which the respondent was charged, did not exist at the time of the passing of that Act in 1853. It is submitted that the justices took too narrow a view of the meaning of the words "naval service" in sect 16, and that those words are to be taken in a wider sense than that placed upon them, though the respondent contended that those words "naval service" must be taken in their ordinary meaning. The Act deals principally with the terms of enlistment in the navy, and the preamble states that (amongst other objects) it was to amend the law concerning the "manning" of the navy, which is a very general term. Then sect. 16, which is the one in question, contains the words "in or for such naval service"—that is, to enter persons "in," or enlist them "for" the service, which are very wide words, and sect. 18 refers to "naval coast volunteers," showing that the Act was not confined to men in the ordinary service of the navy—that is, of the navy and marines. Then came the Act 16 & 17 Vict. c. 73, passed on the same day, which enabled this force of naval coast volunteers to be raised, and which made no provision as to the punishment of persons falsely entering into it, thus leaving such punishment to be dealt with under sect. 16 of the earlier Act. Sect. 3 relates to the training of volunteers, and sects. 4 and 5 contain the words "actual service," indicating that the antithesis of actual service is potential service. Then by sect. 8 a volunteer is to be protected from "service in the Royal Navy," and the fair inference from those words is that the Legislature regarded the volunteer as being, in a modified sense, in the service of the Royal Navy. The whole distinction is as to the liability to active service and the liability to be called upon to serve, which the volunteer is at all times under during the term (sects. 13, 14, 16, and 17). In that Act we have a force very similar to the one now in question authorised to be raised by an Act passed in the same year and on the same day, and it does not provide for the punishment of a man who makes a false statement in joining it, and it would be very expedient that it should do so if the matter were not provided for in the earlier Act. Then coming to the Act 22 & 23 Vict. c. 40, under which these naval reserve volunteer forces were raised, by sect. 4 the Crown can call these reserves into actual service, and for active duties. A man who is in the naval reserve is none the less in the "naval service" because he is not at the moment on actual duty. He is liable to be called out for actual duty, and the position of a man in that reserve is like that of a servant of a master who is going abroad, and who does not want the services of the servant for the time being, but who keeps the servant in his employment. The words "naval service" are quite capable of covering the service of these men, and there is no reason why the words should be restricted in the way adopted by the justices.

The respondent did not appear.

Lord ALVERSTONE, C.J.—Counsel for the appellant has most properly brought to our attention everything we ought to consider in dealing with this case. I have, however, come to the conclusion that the decision of the magistrates was right. The respondent was summoned under sect. 16 of the Naval Enlistment Act 1853 (16 & 17 Vict. c. 69), the opening words of which are, "Every person who, upon entering or offering himself to enter the naval service of Her Majesty shall make or give any false statement . . . with intent to deceive any officer," and so on, "shall be deemed a rogue and vagabond," and so on. I certainly think that the statement of the proposition as stated in the case, if it meant to say that nothing could be naval service of His Majesty within the meaning of this section which was not naval service at the time the Act was passed, and that therefore the section did not apply, would be going too far. It is quite possible

that subsequent legislation, and possibly something other than legislation, would make the service naval service of His Majesty. I myself am pressed with the fact that in the same year Parliament passed an Act for the establishment of naval coast volunteers, and counsel for the appellant was obliged to contend that if a person upon joining that body of naval volunteers established under the Act of 1853, c. 73, had made a misstatement, he would have been liable to penalties under sect. 16 of the Act of 1853, c. 69. I think that contention goes too far. I think that the Act of 1853, c. 73, by sect. 17, to which reference has been made, did apply all the law applicable to the navy during the time that the men were serving and did subject persons to certain penalties, but, inasmuch as we are dealing in this case with a criminal offence, I think it would have been extremely difficult to argue successfully that sect. 16 of 16 & 17 Vict. c. 69 applied to the force which was created or established under the Act passed in the same session on the ground that the persons entering that force were all to be regarded as in the naval service of His Majesty for the purpose of that section. Then when we come to the Act of 1859 (22 & 23 Vict. c. 40), under which was created this force of the Royal Naval Reserve, which the respondent offered to enter, the Act, in sect. 1, speaks of the force about to be created, as consisting of men to be raised by voluntary entry from among seafaring men. In sect. 15 it provides that all the laws and customs for the time being in force for the government of Her Majesty's ships, vessels, and forces by sea and applicable to persons in the navy, should be extended to volunteers under the Act during such period as they should be on board ship for the purpose of instruction, training, and exercise. There again we have a repetition of the provisions in sect. 17 of the Act of 1853 (16 & 17 Vict. c. 73), that all the laws and customs for the time being in force with respect to their serving in the navy should be applicable to the volunteers during such period as they should be on board ship. Sects. 16, 17 and 18 all impose penalties upon persons in respect of these matters; and sect. 16 does to a certain extent touch this very subject-matter, because, although counsel contended that it might possibly apply to other cases, it did impose a penalty upon a person entering or attempting to enter the Royal Naval Volunteers as a new volunteer more than once during the same period of service. I quite agree that it does not follow that that shows that exhaustive penalties were being enacted for certain breaches of what was thought to be right on the part of those entering the force. As we have in this section—sect. 16—to construe the words "naval service" and as the section creates a criminal offence, I think we must be satisfied, there being no express enactment, that by necessary implication the purview of this section has been extended to the case of a volunteer of the naval reserve. Without overlooking what counsel for the appellant has properly urged as to the importance of there being regulations and restrictions in regard to these matters, and quite feeling that regulations might be made which to a certain extent might and would prevent wrong persons from entering the service, and might even subject them to certain consequences, still I am of opinion that we ought not to hold that the effect of sect. 16 of the Naval Enlistment Act of 1853 (16 & 17 Vict. c. 69), which makes it a criminal offence to make a misstatement on entering the naval service of His Majesty, is to apply to a man who does not enter the naval service, but who only renders himself liable to be called in as a volunteer for that purpose. I think the decision of the justices was right, and that this appeal must be dismissed.

Kennedy, J.—I agree.

Ridley, J.—I agree.

Appeal dismissed.

Solicitor for the appellant, *Treasury Solicitor.*

Monday, Dec. 19, 1904.

(Before Lord Alverstone, C.J., Kennedy and Ridley, JJ.)

Rex *v.* Kettle and the London County Council; *Ex parte* Ellis. (*a*)

Summary jurisdiction—Justices—Statement of case — Recognisances — Recognisances entered into on application for case—Refusal to state case—Subsequent mandamus *to state case—Death of surety—Necessity for fresh recognisances—Summary Jurisdiction Act* 1857 (20 & 21 *Vict. c.* 43), *ss.* 3, 5.

Where on an application to a court of summary jurisdiction to state a case the appellant duly enters into the recognisances required by the justices under sect. 3 *of the Summary Jurisdiction Act* 1857, *and the justices afterwards refuse to state a case, but are by a rule absolute ordered by the High Court to state a case, the appellant is not bound under sect.* 5 *of that Act to enter into fresh recognisances, although his surety has died in the meantime, and in such case, the recognisances having been duly given under sect.* 3, *the magistrate is bound to deliver the case to the appellant without fresh recognisances being entered into.*

Rule calling on the metropolitan police magistrate sitting at the Woolwich Police-court, and the London County Council, to show cause why the magistrate should not forthwith deliver to Mr. James Ellis (the applicant) a certain case stated and signed by the magistrate in an information by the London County Council against Mr. Ellis.

The facts as stated in the affidavits were as follows:—

On the 1st Aug. 1903 an information in writing was preferred on behalf of the London County Council against Mr. Ellis, the applicant for the rule, for erecting a building in Cedar-grove, Charlton, beyond the general line of buildings, contrary to the London Building Act 1894, and upon that information he was convicted and ordered to demolish a part of the building and to pay a fine of 40*s.*

The applicant applied to the magistrate to state and sign a case for the opinion of the High Court, but the magistrate refused to state a case.

On the 17th Aug. 1903, some two or three days after the refusal of the magistrate to state the case, the applicant attended personally before the

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

magistrate and stated to him that he desired to enter into recognisances such as the magistrate should require.

The magistrate informed him that he should require his own recognisance and that of a surety for a sum of 50*l.*

The applicant thereupon on the same day entered into a recognisance for 50*l.* in the form and for the amount required by the magistrate for the prosecution of the special case to be stated by the magistrate, and on the 22nd Aug. 1903 the surety, one Mr. Leaver, duly entered into his recognisance as surety for the applicant for the amount of 50*l.* as required by the magistrate.

The magistrate having refused to state a case, the applicant, on the 20th Aug. 1903, obtained in chambers a rule for a *mandamus* to the magistrate to state a case, and this rule was made absolute on the 17th Dec. 1903. Meantime, on the 10th Sept. 1903, the surety, Mr. Leaver, died, and probate of his will was granted to his executrix, the estate of the surety being sworn at between 9000*l.* and 10,000*l.*; and on the 13th Oct. 1903 Mr. Ellis (the applicant) was adjudicated bankrupt.

When the order for a *mandamus* of the 17th Dec. 1903 was served upon the magistrate he intimated that fresh recognisances must be entered into on the ground that the surety was dead.

The case was then prepared by the magistrate, and on the 28th April 1904 the magistrate said that the case was ready, but that it could not be handed over until fresh recognisances were entered into, and he refused to deliver out the case.

The above rule for a *mandamus* was then obtained to compel the magistrate to deliver the case, which had been already stated and signed by him.

The affidavit of the magistrate filed in answer to the rule was as follows:

I have been served with notice of an order of this honourable court, dated the 22nd July 1904, giving me a day to show cause why I should not forthwith deliver to James Ellis the case stated and signed by me pursuant to a previous order of this honourable court dated the 17th Dec. 1903. . . . Two or three days after I had refused to state a case upon the information Mr. Ellis attended before me and stated that he desired to enter into a recognisance, and asked me what security I should require. I told him I should require a recognisance by himself and one surety in the sum of 50*l.* I further told him that he might enter into the recognisance for what it was worth. The recognisance of the said James Ellis was then taken, and a day or two afterwards the recognisance of Mr. Josiah Leaver was also taken. The said recognisances were then annexed to the security book kept at the Woolwich Police-court. If I had acceded to the application of the said James Ellis to me to state a case I should no doubt have been satisfied to accept the said Josiah Leaver as a sufficient security, but as I refused to state a case, it was not, in my view, necessary or proper that any recognisance should then be taken, and I did not apply myself to the question whether the said Josiah Leaver was a sufficient surety or accept him as a sufficient surety. Having regard to sect. 5 of the Act 20 & 21 Vict. c. 43, it appeared to me that before delivering the case which I had stated and signed pursuant to the said order of the 17th Dec. 1903, I must require a recognisance to be entered into upon that case and sufficient at the time of its delivery. I had also great doubt (1) whether the previous recognisance could be construed as applying to the costs of the case stated by order of this honourable court; (2) whether the said Josiah Leaver's estate could be made liable upon a recognisance which did not come into operation (if at all) until after his decease; (3) whether this kind of recognisance could be enforced against the estate of a deceased surety. I offered to deliver the said case to the appellant's solicitors upon a fresh recognisance in the sum of 50*l.* being entered into. As the said James Ellis has been adjudicated bankrupt I consider that such fresh recognisance ought to be entered into by two sureties in addition to the said James Ellis. The above are respectively submitted to the court as my reasons for refusing to deliver the said case to the said James Ellis.

The Summary Jurisdiction Act 1857 (20 & 21 Vict. c. 43) provides:

Sect. 3. The appellant, at the time of making such application—that is, the application under sect. 2 to the justice or justices to state a case—and before a case shall be stated and delivered to him by the justice or justices, shall in every instance enter into a recognisance before such justice or justices, or any one or more of them, or any other justice exercising the same jurisdiction, with or without surety or sureties, and in such sum as to the justice or justices shall seem meet, conditioned to prosecute without delay such appeal, and to submit to the judgment of the Superior Court, and pay such costs as may be awarded by the same. . . .

Sect. 5. Where the justice or justices shall refuse to state a case as aforesaid, it shall be lawful for the appellant to apply to the Court of Queen's Bench upon an affidavit of the facts, for a rule calling upon such justice or justices, and also upon the respondent to show cause why such case should not be stated; and the said court may make the same absolute or discharge it, with or without payment of costs, as to the court shall seem meet, and the justice or justices, upon being served with such rule absolute, shall state a case accordingly, upon the appellant entering into such recognisance as is hereinbefore provided.

Daldy, for the London County Council showed cause.—The magistrate was right in holding that fresh recognisances were necessary, and in refusing to deliver the case until such fresh recognisances were entered into. Two questions arise, first, upon the construction of the words at the end of sect. 5 of the Summary Jurisdiction Act 1857; and, secondly, whether the recognisance on the face of it can be held—having regard to the fact of the death of the surety—to bind the surety so as to apply to a different person than the surety himself. There are two ways of entering into recognisances on cases stated—namely, under sect. 3 and under sect. 5. It has been held that on a recognisance under sect. 3 the recognisance can be entered into at any time during the three days allowed for applying for a case. If the magistrate refuses to state a case, and if the court by *mandamus* orders him to state a case, then sect. 5 applies; and taking sects. 3 and 5 together it was not in any way contemplated that the magistrate on refusing to state a case should take a recognisance on the mere chance of the court ordering him to state a case. If the magistrate takes the recognisance and it afterturns out that it never ought to have been taken, then the recognisance comes to nothing. Sect. 5 deals with the case where the court orders the justices to state a case, and it provides that the justices, on being served with the rule absolute

shall state a case, "upon the appellant entering into such recognisance as is hereinbefore provided." The meaning of that is that when the court orders the justices to state a case they are really giving the justices a new jurisdiction, and, when a case is stated by order of the court the jurisdiction of the justices to take the recognisances only arises when the rule has been made absolute. In that case both the stating of the case and the entering into the recognisance are to be done after the rule is made absolute. The result is that, under sect. 5, the time when the recognisances are to be taken, and the event on which they are to be taken are distinct from what they are under sect. 3. The recognisances entered into before the magistrate was ordered to state a case were of no avail, and fresh recognisances were required under sect. 5.

Frank Gover for the applicant, in support of the rule.—[Lord Alverstone, C.J.—We wish you to deal with the point whether these recognisances were available to you under sect. 5.] It is submitted that the recognisances entered into under sect. 3 were sufficient. Sect. 5 ought not to be read as saying that the language of sect. 3 prevents the applicant for a case from entering into recognisances at the time of making the application though such application is refused. The concluding words of sect. 5 were intended to apply to the case where the magistrate had refused to state a case, and where no recognisances had been entered into; and if the words "upon the appellant entering into such recognisance as is hereinbefore provided" had not been inserted there would in such a case have been no recognisances at all entered into. It was to guard against a case being stated without any recognisances being entered into; but if recognisances have already been entered into under sect. 3, then it becomes unnecessary to have any further recognisances under sect. 5, and the section as to that point does not apply. By rule 15 of the Summary Jurisdiction Rules 1886, a security book is to be kept and the full particulars of the securities given are to be duly entered in this book. In the present case these recognisances, which the magistrate had duly taken, had been entered in the records of the court. (He was stopped).

Lord Alverstone, C.J.—In this case, which is certainly one of difficulty, it must be taken, in favour of the person who moved the rule, that security had been given in accordance with sect. 3 of the Act. I agree with what Mr. Daldy has said, and I can see how material it is, that the security is one which can be enforced. If counsel could have said either that no security was given under sect. 3, or that the magistrate had no power to take security at that stage because he had not made up his mind whether he would grant a case or not, or because he thought he was going to refuse a case, then I think he would have gone a long way to convince us that this rule should be discharged. It seems to me impossible to say that it was not within the power of the magistrate to take the recognisance at that time. Sect. 3 says that the appellant, at the time of making such application—that is, the application for a case—and before the case shall be stated and delivered to him by the magistrate, shall in every instance enter into recognisances. That being so, I think the later cases have put a construction on that section. In the case of *Chapman* v. *Robinson* (32 L. T. Rep. O. S. 89; 1 E. & E. 25) it was decided that the security was good if it were given within the three days allowed for applying for a case, although not entered into at the time of making the application. The second case, that of *Stanhope* v. *Thorsby* (14 L. T. Rep. 332; L. Rep. 1 C. P. 423) goes further and says that the security need not be given within the three days, but is good if given before the case is issued by the justices, if the application has been made within the three days. But none of those cases throws any doubt on the right and the jurisdiction of the magistrate to take the recognisances at the time of the making of the application. Therefore, as I have said, even taking the magistrate's very fair statement in his affidavit supplementing what the applicant has said, I think we must take it that there was an application made to the magistrate to take the recognisances at a time when it was within his jurisdiction to take them. The only other point is, aye or no, does the fact that the magistrate afterwards refused to state a case and that this court has since ordered on a rule absolute the case to be stated create any difference and necessitate further recognisances. I admit that sect. 5 affords some ground for the argument of counsel who opposed the rule, because it says: "The justice or justices upon being served with such rule absolute shall state a case accordingly upon the appellant entering into such recognisance as is hereinbefore provided." That provision was obviously necessary in order to prevent the applicant from claiming the case on the rule without having given security; and under the circumstances it seems to me that the words "as is hereinbefore provided" may well be satisfied, not only by the form and nature of the security, but also by saying that it is a security which is to be taken in the way contemplated by sect. 3. Upon that construction it would rather help the argument of counsel in support of the rule, because he says that sect. 5 is to be effective if the appellant has fulfilled what is the condition required by sect. 3. Therefore it seems to me, taking the facts now before us, that there was a security given in accordance with sect. 3, and that security is effective for whatever it may be worth against the persons who became either principal debtor or surety for the principal debtor, and the condition is the same—namely, to prosecute the appeal, and pay the costs of the application on a case being stated. In those circumstances it seems to me impossible for us to say that the magistrate was right in refusing to deliver out the case without a further security being given by the appellant, whatever might have happened assuming that there had been no security given under sect. 3. I think, therefore, that this rule should be made absolute.

Kennedy, J.—I am of the same opinion. Although it has been decided that it is sufficient if the recognisances are in fact entered into before the case is stated and delivered out, it seems to me to be clear—and I do not think counsel in opposition to the rule challenges the contention—that under sect. 3 it is perfectly correct to tender, and there is nothing in the section to prevent the magistrate from accepting the entering into recognisances at the time of

the application for a case. The application may or may not be granted at the time it is made. Indeed, the application is made within a certain time—three days—and in writing, so that the applicant may very well not know whether the case will be granted, but he has persons who are willing to enter into recognisances. When we look at the form of the recognisance it is conditioned to be liable as bail to a certain extent, and refers to a case that is to be stated. The magistrate, having in this case taken the recognisances, afterwards declines to state a case. The recognisance so taken was not taken in the slightest degree in contravention of the statute, but was offered and taken at the time of the application. Is not the recognisance so taken a valid recognisance, having regard to that case, although the magistrate declined to state it at that time, and this court has to be invoked to direct him to state the case in respect of which the recognisance had been offered and taken? When we come to look at sect. 5, I see nothing in that section which justifies the contrary contention. This court has power under sect. 5 to decide that the case must be stated. The court makes the rule absolute for the statement of the case, and the magistrate on being served with the rule absolute is to state the case "upon the appellant entering into such recognisance as is hereinbefore provided." That provision is, in my opinion, clearly inserted to meet the case, which is a common case, that where a magistrate has decided and has refused to state a case no one thinks of offering to enter into recognisances, nor is any recognisance taken; and, but, for those words at the end of sect. 5, it might be that there would be a rule absolute to state a case without any recognisance having ever been entered into at all before the case is delivered and dealt with. Therefore it was necessary to make that provision. Is there anything in this section, when fairly read, that practically vacates the value of the recognisance entered into at the time—or practically at the time—of making the application for the case, because the magistrate ultimately determines not to state a case, and the action of this court has to be invoked? I think there is not. If a recognisance is duly entered into to abide certain consequences in the event of a case terminating unfavourably to the appellant, it seems to me there is no jurisdiction for us to say that that is a recognisance which can only be treated as a nullity.

RIDLEY, J.—I am of the same opinion. I confess the case affords some difficulty, but I agree with the judgments of my learned brethren. It must be remembered that the recognisance that was entered into on the first occasion is as good now as it was then, not having any regard to objections that may arise as to the decease of a surety. As to that, I think it does not relieve the surety, but the surety is under the same obligations now as when the recognisance was entered into. The appellant is to prosecute without delay, to submit to the judgment of the court, and pay such costs as may be ordered. The mere lapse of time, the fact that before the magistrate does state a case an application has to be made to the Superior Court to obtain a rule to order him to do so does not relieve the surety who has entered into this recognisance, and the recognisance, therefore, is as good now as it was at the time when it was entered into. That observation may have some bearing on the merits of the decision. I agree that the rule should be made absolute.

Rule absolute, with costs against the County Council.

Solicitors in support of the rule, *Henry Gover and Son.*

Solicitor in opposition to the rule, *W. A. Blaxland.*

Monday, Dec. 19, 1904.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

MITCHELL BROTHERS (apps.) *v.* ASSESSMENT COMMITTEE OF WORKSOP UNION AND OTHERS. (resps.). (*a*).

Rating—Occupation—Wooden structures—Structures erected near works for workmen to live in—Structures easily removable from place to place—Rateability—Poor Relief Act 1601 (43 *Eliz. c.* 2), *s.* 1.

The appellants, who were contractors for the construction of a line of railway, desired for the purposes of their business that certain of the men whom they employed should live near the works, and for that purpose they had by agreement with the owners or occupiers of certain pieces of land, erected upon these pieces of land wooden huts or structures. The structures were capable of being removed as occasion required without damage to the ground, and they contained no sanitary arrangements. Each structure was divided into a sleeping room, where about twenty men slept, a living room, sleeping-rooms for a caretaker and his family, and a pantry; and the structures had been in their then situation for upwards of a year.

It was admitted that if the structures were rateable in law, the appellants were the proper persons to be rated in respect of them:

Held, that the structures were rateable in law, and that the appellants were properly rated in respect thereof.

CASE stated by the Court of Quarter Sessions for the West Riding of Yorkshire.

The appeal to the quarter sessions was an appeal against a rate made on the 11th May 1903. The appeal was tried at the quarter sessions for the West Riding, held on the 8th Jan. 1904, when the court allowed the appeal and discharged the rate subject to the opinion of the High Court on the following case.

The following facts were proved, or for the purpose of this case admitted:—

The appellants were contractors for the construction of a double line of railway, part of which passed through the respondents' district.

For the purposes of their business the appellants deemed it desirable that certain of the men whom they employed should live near the work upon which they were engaged, and to this end the appellants had by agreement with the owners or occupiers of four pieces of land at Brancliffe Bottoms, Dale, and South Anston respectively, and with the railway company on a fifth piece of land at Cramfit, the property of the railway com-

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

pany, within the boundaries of railway lines when the same should be completed, all five such pieces of land being within the respondents' district, erected upon a portion of each of the pieces of land a hut or structure of substantially the same nature. A plan of one of the structures was annexed to and formed part of this case.

The method of construction of the structures was as follows: Into the ground were driven wooden stakes about 5ft. apart; to these were nailed wooden sills or cross pieces, thus forming a foundation or platform; wooden uprights were nailed to the foundation and to the uprights boarding was nailed.

The fastening of the superstructure to the foundation or platform was of a degree sufficient to keep the superstructure unaffected by wind or storm.

The huts or structures were capable of being readily removed by the contractors during the progress of the works, or upon the completion of the works without damage to the ground, and contained no sanitary arrangements. There was a roof of corrugated iron, and the interior of the structure was lined with match boarding. The structures were heated by iron stoves with the exception of the structure at South Anston, which had brick chimney breasts.

Each of the structures (except the structure at South Anston) was divided internally into a sleeping-room, where on an average about twenty men slept, a living-room, two sleeping-rooms for a caretaker and his family, and a pantry; a wash-house of similar construction was erected near to each of the structures.

The structure at South Anston was similarly divided, but was used as to two rooms as offices for the officials of the railway company (exclusively), as to two other rooms as offices for the appellants, and as to the remainder for the accommodation of the timekeeper and his family.

The structures had been in their present situation for upwards of one year.

The respondents had described in the valuation list each of the aforesaid premises under the name of "section" (with the exception of the premises at South Anston, which were described as "section and offices," and in the demand note as "buildings and other hereditaments not being agricultural land") and had assessed the same at 10*l.* in respect of the gross estimated rental, and at 6*l.* 13*s.* 4*d.* as the net rateable value.

It was admitted by the appellants that for the purposes of this case if the premises were rateable in law, they were the persons in occupation of the same.

The assessments of the lands upon parts of which the structures were erected had not been reduced since the erection of the structures.

Upon the facts the justices in quarter sessions were of opinion that the structures in question were not "houses."

It was contended by the appellants that the premises were not rateable, first, because the structures were chattels; and, secondly, because the premises were merely part of the plant used by the appellants in the construction of the railway, and that in that sense only was the occupation beneficial.

It was also contended on behalf of the appellants that the rate in question should be discharged, because it involved a claim to rate the same land twice over, (*a*) to the owner or occupier, (*b*) to the appellants, and further it was contended that by virtue of sect. 133 of the Lands Clauses Consolidation Act 1845 the liability for the poor rate (particularly as to the huts on the railway ground at Cramfit) was transferred to the railway company. It was further contended that the huts being of an inflammable character, and entirely devoid of sanitary arrangements, were not "houses" under the Public Health Acts or otherwise, but were chattels only.

It was contended by the respondents that the premises were rateable, first, because buildings constructed in the manner set out in this case were not in law chattels; secondly, because the structures were houses within the meaning of 43 Eliz. c. 2; thirdly, because under the description "section," was included the land on which the structures were erected, and therefore occupied by the appellants; fourthly, because premises which were otherwise rateable were not any the less rateable merely by reason of their being used in connection with the construction of a railway; and, fifthly, because sect. 133 of the Lands Clauses Consolidation Act 1845 had not the effect contended for by the appellants.

If the court should be of opinion that the contention of the appellants with regard to any or all of the premises was correct, then the rate in respect of such premises was to be discharged, otherwise the rate and assessments were to stand.

T. E. Ellison (*H. W. W. Wilberforce* with him) for the assessment committee.—The decision of the quarter sessions in holding that these structures were not rateable was wrong. They were clearly rateable and were properly rated. [*C. A. Russell*, K.C. for the appellants agreed that sect. 133 of the Lands Clauses Act did not apply and was out of consideration in the case.] The points raised on behalf of the appellants (Mitchell Brothers) in the court below were, first, that these structures were chattels. It is impossible for anyone to say that buildings of this kind are in the nature of chattels. Even if not fixed to the soil at all they would be rateable; they enhance the value of the occupation of the land. Secondly, it was contended that they were merely railway plant, but no distinction of that kind can be based on the ground that these huts were used for the construction of the railway, as that ground of distinction would apply equally to any houses that might be erected during the execution of the works. Thirdly, it is said that this was an attempt to rate the land twice over. That seems to be based on the finding in the case that the assessments of the lands had not been reduced since the erection of the structures. The answer to that is that it is sought to impose a rate not in respect of the value of the occupation before these structures were erected, but in respect of an increased value caused by these structures. Then, the contention as to the liability to the rate being transferred to the railway company under sect. 133 of the Lands Clauses Act has been abandoned. Then, the last point made was that these wooden structures were not "houses" within the meaning of the Public Health Acts. That is immaterial, as they clearly come within sect. 1 of the Poor Relief Act of 1601 (43 Eliz. c. 2) as houses,

and that is sufficient. Mitchell Brothers were in exclusive occupation of the land and were not mere licensees, and they were therefore rateable in respect of the structures.

C. A. Russell, K.C. (*H. T. Waddy* with him) for the appellants (Messrs. Mitchell Brothers).—The appellants were not rateable in respect of these structures. The question is, Was the agreement referred to in the beginning of the case an agreement for the occupation of these portions of land by the appellants, or was it merely a licence to the appellants to use the land for a specified purpose? We submit that the appellants did not occupy at all, and when we are considering the question of occupation the character of the structures cannot be important. The facts as stated show that there was no demise of the land at all; there was only a licence, and the appellants were only licensees. The structures were buildings the whole purpose of which was that they should be shifted about as the purposes of the construction of the works required. No doubt they were not shifted about on wheels, but they were such, and their whole object was such that they should be easily moved about according to the requirements of the works. The case really comes within the same principle as that applied in *Willing* v. *St. Pancras Assessment Committee* (37 L. T. Rep. 126; 2 Q. B. Div. 581). The question must come back to this point, whether a structure of this kind is to be treated as a house. A structure of a merely temporary kind, such as these structures were, cannot be treated as a house, and that they were not houses is also shown by the fact that they were easily removable by the appellants without damage to the ground. There is no authority one way or the other on the point; but the whole question must come to this, aye or no, were Messrs. Mitchell Brothers in rateable occupation of this land. It is submitted that they were not in occupation of the land, and that the quarter sessions came to a correct decision in holding that the appellants were not rateable.

Lord Alverstone, C.J.—We have no doubt about this case, and I can only think from what is stated in the case that the quarter sessions had been confused by the number of absolutely unarguable points which appear to have been taken before them. The case states that by agreement with the owners or occupiers of four pieces of land the appellants erected huts or structures of a certain kind, and the case goes on to describe the nature of those structures, showing that there was a complete possession for the time being by the appellants of the land on which the houses stood. The structures were erected and remained in that position for more than a year. Therefore no question arises about the rateable time or period, and it was distinctly admitted by the appellants that, if the premises were rateable in law, they were the persons in occupation of the same. There could not have been a much more distinct admission of liability. That being the statement as to their liability it must have been that the appellants desired to raise the point as to the movability of the structures or some of the other points, admitting that if such structures occupying the land, as they did, for the period stated in the case, were rateable hereditaments, they were the persons liable to be rated in respect of them. I do not think that there is now any doubt about the law applicable in such cases. On the one side, if there is no occupation at all, or no exclusive occupation, but a mere licence to use a part of the premises which remained in the occupation of their owner or tenant, as in the case of *Willing* v. *St. Pancras Assessment Committee* (*ubi sup.*) as to the rateability of advertising hoardings, or as in the case of *London and North-Western Railway Company* v. *Buckmaster* (33 L. T. Rep. 329; L. Rep 10 Q. B. 70, 444), as to the rateability of stables at Clapham Junction, then there is no rateability. If there is exclusive possession or occupation of land for a sufficient time, then in whatever way it may be described in the agreement, there is rateability. That was the decision of the House of Lords in the case of *Holywell Union* v. *Halkyn Drainage Company* (71 L. T. Rep. 818; (1895) A. C. 117). In this case I am utterly unable to understand how, if a man goes on to land and erects a wooden structure upon it of this character, he is any the less occupier because he has the right to pull the structure down or move it on to another piece of land when it pleases him to do so, and if he has occupied it for a sufficient time he is rateable. I think the decision of the Court of Quarter Sessions ought to have been that these appellants, Messrs. Mitchell Brothers, were rateable in respect of these premises. No question of value arises here. I am now deciding that these appellants were rateable in respect of their occupation of this land, enhanced by the fact that they have put these structures on it, and have used the land for that purpose. I am of opinion that this appeal of the respondents to this court should be allowed.

Kennedy, J.—I am of the same opinion, and have nothing to add.

Ridley, J.—I agree.

Appeal of the respondent union to the Divisional Court allowed.

Solicitors: for the Worksop Union, *Tyrrell, Lewis, Lewis*, and *Broadbent*, for *J. S.* and *C. A. Whall, Worksop*; for the appellants, *Bell, Brodrick*, and *Gray*, for *Rodgers* and *Co.*, Sheffield.

CROWN CASES RESERVED.

Friday, Nov. 18, 1904.

(Before Lord Alverstone, C.J., Lawrance, Kennedy, Ridley, and Channell, JJ.)

Rex *v.* Bridgwater. (*a*)

Criminal law—Practice — Evidence — Prisoner's evidence—Cross-examination as to character—Nature and conduct of the defence—Criminal Evidence Act 1898 (61 *&* 62 *Vict. c.* 36).

A prisoner, by denying the truth of the evidence given by the witnesses for the prosecution, does not make an imputation on the character of the witnesses for the prosecution within the meaning of the Criminal Evidence Act 1898, *s.* 1. *Neither is setting up a defence which is inconsistent with the truth of the statements made by the witnesses for the prosecution setting up a defence the nature and conduct of which is such as to involve imputations on the character of the witnesses for the prosecution so as to make*

a) Reported by A. A. Bethune, Esq., Barrister-at-Law.

the prisoner liable to cross-examination as to character.

CASE stated by the Recorder of Birmingham. The prisoner Bridgwater was charged with stealing a quantity of copper wire. The wire was found by the police in a perambulator, wheeled by the prisoner's wife, close to the warehouse from which it had been stolen, the prisoner being with his wife at the time. It appeared from the facts stated that the prisoner, who was a dealer in metal, had from time to time given information to the police with regard to robberies of metal, and that, on being charged at the police-station with stealing the copper wire in question, he had stated that he was acting under the instructions of a certain Detective-sergeant Moss.

At the trial the detective-sergeant gave evidence, and contradicted the prisoner's statement. The prisoner, in giving evidence in his own behalf, repeated the statement as to his employment by the police with details.

Counsel for the Crown then proceeded to cross-examine the prisoner, and in cross-examination asked him whether he had not been previously convicted.

The counsel for the defence did not object to this question, but, on counsel for the Crown cross-examining as to the details of the convictions, objected, as the whole cross-examination was contrary to the Criminal Evidence Act 1898 (61 & 62 Vict. c. 36), s. 1 (*b*). Counsel for the Crown contended that the cross-examination was permissible on the ground that the prisoner by his evidence had made imputations on the character of the detective-sergeant.

The learned recorder permitted the cross-examination on the ground that the nature and conduct of the defence was such as to involve imputations on the detective-sergeant.

The jury convicted Bridgwater.

The question for the opinion of the court was whether under the circumstances of the case counsel for the Crown was entitled to put to Bridgwater questions relating to his previous conviction.

No counsel appeared.

Lord ALVERSTONE, C.J.—We think that the objection taken in this case must be held to be valid, and that the conviction is therefore bad. We have to consider whether the circumstances of the case were such as to justify the counsel for the prosecution questioning the prisoner as to previous convictions. The section says that when a person charged is called as a witness in pursuance of the Act, he shall not be asked, and if asked shall not be required to answer, any question tending to show that he has been convicted of any other offence unless (*inter alia*) the nature and conduct of the defence has been such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution. I must repeat what I have said before—namely, that raising a defence, even in forcible language, is not of necessity casting imputations on the character of the prosecutor or his witnesses. Of course, imputations may be cast on their character quite independently of the defence raised, either by direct evidence or by questions put to them in cross-examination. In this case it cannot be said that the recorder regarded what happened in the case as other than raising the defence. His direction to the jury shows that he dealt with the case on that view. He says: "I directed the jury that if they thought the prisoner was in point of fact acting under the directions of Moss, or had reasonable grounds for believing he was acting under the directions of Moss, they should acquit him." He therefore acted on the view that the defence raised was not such as to cast any imputation on Moss. It seems to me that, on the whole statement of what the prisoner's counsel was endeavouring to elicit from Moss, he was not doing more than developing his defence that the prisoner was acting under Moss' directions, and seeking to substantiate that defence by means of admissions from Moss. If the questions put to Moss had involved the imputation that he was guilty of misconduct independently of the defence, or of the necessity for developing the defence, different considerations might arise, for the questions might then perhaps be construed as an attack on the prosecutor's general character. In this case the question as to whether the prisoner had been convicted was answered without any objection from the prisoner's counsel, and he only objected to the further question as to the nature of the offence. It must not be thought that because counsel for a prisoner allows a question as to previous conviction to be put, he can afterwards impugn the conviction on the ground of the inadmissibility of such a question. He cannot stand aside and allow an improper question to be put and afterwards rely upon that question as a ground for quashing the conviction. In this case, and under the circumstances, if the learned recorder had told the jury that they were to disregard the prisoner's answer as to his having been previously convicted, this court would not, I think, have been inclined to interfere. But the recorder did not do anything of the kind, and therefore it was made to appear to the jury that the question was justified under the Act, because, in the words of the section, the nature or conduct of the defence was such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution. We can see no ground for any such suggestion, and think, therefore, the question ought not to have been put; and as it was put, and the jury were not cautioned to disregard the answer, the conviction cannot stand and must be quashed.

LAWRANCE, KENNEDY, RIDLEY, and CHANNELL, JJ. concurred. *Conviction quashed.*

No solicitors were instructed.

Friday, Nov. 18, 1904.

(Before Lord ALVERSTONE, C.J., LAWRANCE, KENNEDY, RIDLEY, and CHANNELL, JJ.)

REX *v.* HALE. (*a*).

Criminal law—Practice—Evidence—Cruelty to children—Presence of child at trial—When necessary—57 & 58 *Vict. c.* 41, *s.* 16.(*b*)

By sect. 16 *of the Prevention of Cruelty to Children*

(*a*) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

(*b*) The Prevention of Cruelty to Children Act 1894 is repealed by the Prevention of Cruelty to Children Act 1898, but sect. 16 is re-enacted by sect. 16 of the later Act.

Act 1894 *it is provided that where in any proceedings with relation to an offence of cruelty within the meaning of the Act, or of any of the offences mentioned in the schedule to the Act, the court is satisfied by the evidence of a registered medical practitioner that the attendance before the court in respect of any child of whom the offence is alleged to have been committed would involve serious danger to its life or health, and is further satisfied that the evidence of the child is not essential to the just hearing of the case, the case may be proceeded with and determined in the absence of the child.*

Held, that this enactment does not require the presence of the child in court in every case, but only when the evidence of the child is necessary.

THIS case, as stated by Kennedy, J., was as follows:—

At the Glamorgan Assizes Ellen Hale was tried before me on an indictment which in the first eight counts charged her with offences under the Prevention of Cruelty to Children Act 1894 (57 & 58 Vict. c. 41), s. 1, in regard to four children of the ages respectively of twelve, seven, five, and three years. The indictment comprised in these counts charges against the prisoner, in regard to each child, of wilfully neglecting the child in a manner likely to cause such child unnecessary suffering and injury to its health.

In regard to the second count, which was the count charging the prisoner with wilfully neglecting the eldest child in a manner likely to cause injury to his health, I held there was no evidence which could justify a conviction, and a ninth count against the prisoner under the Inebriates Act 1879 (42 & 43 Vict. c. 19) and 57 & 58 Vict., c. 4', s. 11, was not proceeded with.

The jury found the prisoner guilty, in respect of all the four children, of the offences charged against her in the first, third, fourth, fifth, sixth, and seventh counts.

None of the children were produced as witnesses for the prosecution, and none of them were present in court, and in the course of the trial I drew the attention of Mr. Arthur Lewis, the counsel for the prosecution, to the provisions of sect. 16 of the Prevention of Cruelty to Children Act 1894, and there was some discussion as to whether the effect of the said section is or is not, by necessary implication, that a case under the 1st section of the said Act cannot be "proceeded with and determined" in the absence of the child in respect of whom the offence is alleged to have been committed, except under two conditions specified in sect. 16—viz., (1) that the court is satisfied by the evidence of a registered medical practitioner that the attendance of the child before the court would involve serious danger to its life or health, and (2) the court is further satisfied that the evidence of the child is not essential to the just hearing of the case.

There was in the present case no such evidence of a registered medical practitioner as is mentioned in this section. This 16th section has never received judicial interpretation, and the meaning and application appeared to me to be so far open to argument that I have thought it right, according to the request of the counsel on behalf of the prisoner, to state a case for the opinion of the Court for Crown Cases Reserved upon the question, and I postponed judgment and released the prisoner on bail pending the decision of the court.

The question for the consideration of the court is whether or not, under the said sect. 16, at the trial of an indictment under 57 & 58 Vict. c. 41, s. 1, the attendance at the court of the child in respect of whom the offence is alleged to have been committed is, except under the circumstances of exception therein specified, requisite and necessary in order that the case may be proceeded with and determined.

If in the opinion of this court the case was one in which I ought to have held that, in the absence of the children and of any evidence of a registered medical practioner to justify their absence, no case had been presented by the prosecution upon which the accused could properly be convicted, the conviction is to be quashed, otherwise the conviction is to stand.

W. R. KENNEDY.

Clarke Hall, for the Crown, referred to

Reg. v. *Cox*, 77 L. T. Rep. 534; 18 Cox C. C. 672; (1898) 1 Q. B. 179.

The prisoner was not represented.

Lord ALVERSTONE, C.J.—I am glad that this case should have been stated in order that it may be judicially determined what is the meaning of the enactment in the section. But now that the matter has been discussed I have no doubt. The section cannot have meant that in every case the child must be in court, for that would be to make a condition in this class of offence which does not exist in any other offence. I think that the enactment was intended to provide for the appearance of the child when its evidence was necessary. It is quite true that it was within the power and authority of the judge to say that a child need not attend quite apart from the power given by this section. But framers of these Acts of Parliament, not having every incident of the criminal law before them, often insert provisions which are unnecessary. The section was, no doubt, inserted in the interest of the prisoner. If the child's evidence is essential, the child must be called; if the child's evidence is not essential, then it need not be present in court. In the case of proceedings before magistrates the conditions must be fulfilled. But in this case I have come to the conclusion that the presence of the children was not essential, and that the conviction must stand.

LAWRANCE, KENNEDY, RIDLEY, and CHANNELL, JJ. concurred. *Conviction affirmed.*

Solicitor: *Moreton Phillips.*

Supreme Court of Judicature.

COURT OF APPEAL.

Saturday, Dec. 3, 1904.

(Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.)

REX *v.* KENT JUSTICES. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Highway—Diversion—Notice to be affixed on the highway—Period for which notice is to remain affixed—Highway Act 1835 (5 *& 6 Will.* 4, *c.* 50), *s.* 85.

Under sect. 85 *of the Highway Act* 1835 *it is not a condition precedent to the power of the justices to certify as therein provided for, that the notice, which the section directs to be affixed on the highway, shall have remained there for four successive weeks.*

Decision of the Divisional Court (21 *Cox Mag. Cas.* 626; 91 *L. T. Rep.* 193; (1904) 2 *K. B.* 349) *reversed upon this point.*

APPEAL by the justices of Kent from a decision of the Divisional Court (Lord Alverstone, C.J., Wills and Kennedy, JJ.) making absolute a rule *nisi* for a *certiorari* to bring up and quash the certificate of two justices and an order of the quarter sessions directing the enrolment of the certificate for the purpose of diverting a certain highway at Tonbridge, in the county of Kent.

The facts are fully stated in the report of the case before the Divisional Court (21 Cox Mag. Cas. 626; 91 L. T. Rep. 193; (1904) 2 K. B. 349).

With regard to the point upon which the present appeal was brought, the facts were as follows:—

On the 11th Nov. 1903 two justices viewed the highway proposed to be diverted, and on the same day directed the urban district council and their surveyor to affix a notice in the form prescribed by the Highway Act 1835 at the place and by the side of each end of the highway from whence the same was proposed to be diverted.

On the 14th Nov. a notice in proper form and dated the 11th Nov. 1903 was duly affixed on the highway; and the same notice was inserted in a newspaper called the *Tonbridge Free Press* which was published on the 14th, 21st, and 28th Nov., and the 5th Dec. 1903; and a like notice was affixed on four successive Sundays—viz., the 15th, 22nd, and 29th Nov., and the 6th Dec.—at the principal door of the parish church of Tonbridge.

On the 7th Dec. 1903 the same two justices gave a certificate approving of the proposed diversion.

On the 23rd Dec. in the same year the Tonbridge Rural District Council gave notice of appeal to quarter sessions against the certificate, on the ground that the provisions of the Highway Act 1835 had not been complied with.

On the 7th Jan. 1904 the quarter sessions dismissed the appeal, and, on the application of the Tonbridge Urban District Council, made an order for the diversion of the highway in accordance with the certificate.

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

On the 11th March a rule *nisi* was obtained on behalf of the Tonbridge Rural District Council for a *certiorari* to remove into the King's Bench Division the certificate and the order of the quarter sessions for the purpose of having them quashed.

The Divisional Court (Lord Alverstone, C.J., Wills and Kennedy, JJ.) made the rule absolute, upon the ground that, as the notice affixed on the highway had not remained there for four successive weeks before the issue of the justices' certificate, the conditions prescribed by sect. 85 of the Highway Act 1835 had not been complied with, and the certificate was therefore bad. The court at the same time overruled two other objections made on behalf of the Tonbridge Rural District Council to the validity of the certificate, and held (1) that justices may view and give a certificate under sect. 85 who are not the same two justices who originally viewed the proposed diversion under a resolution of the district council; and (2) that the certificate need not recite the written consent of the owner of the land through which the proposed new highway is to pass.

The justices appealed from the decision of the Divisional Court that the notice affixed on the highway should have been there for four successive weeks before the justices gave their certificate.

The Highway Act 1835 (5 & 6 Will. 4, c. 50) provides as follows:

Sect. 84. When the inhabitants in vestry assembled [now the urban authority] shall deem it expedient that any highway should be stopped up, diverted, or turned . . . the chairman of such meeting shall by an order in writing direct the surveyor to apply to two justices to view the same. . . .

Sect. 85. When it shall appear upon such view of such two justices of the peace made at the request of the said surveyor as aforesaid that any public highway may be diverted and turned, either entirely or subject as aforesaid, so as to make the same nearer or more commodious to the public, and the owner of the lands or grounds through which such new highway so proposed to be made shall consent thereto by writing under his hand, or if it shall appear upon such view that any public highway is unnecessary, the said justices shall direct the surveyor to affix a notice in the form or to the effect of schedule (No. 19) to this Act annexed in legible characters at the place and by the side of each end of the said highway from whence the same is proposed to be turned, diverted, or stopped up, either entirely or subject as aforesaid, and also to insert the same notice in one newspaper published or generally circulated in the county where the highway so proposed to be diverted and turned or stopped up, either entirely or subject as aforesaid (as the case may be), shall lie for four successive weeks next after the said justices have viewed such public highway, and to affix a like notice on the door of the church of every parish in which such highway so proposed to be diverted, turned, or stopped up, either entirely or subject as aforesaid, or any part thereof, shall lie on four successive Sundays next after the making such view; and the said several notices having been so published, and proof thereof having been given to the satisfaction of the said justices, and a plan having been delivered to them at the same time particularly describing the old and the proposed new highway by metes, bounds, and admeasurement thereof, which plan shall be verified by some competent surveyor, the said justices shall proceed to certify under their hands the fact of their having viewed the said highway as aforesaid, and that the proposed new highway is nearer or more commodious to the public. . . .

Macmorran, K.C. (*R. Cunningham Glen* and *A. Bethune* with him) for the justices.—Sect. 85, according to the ordinary grammatical construction of the English language, cannot be construed to mean that the notice affixed on the highway is to remain there for four successive weeks. The words in the section "for four successive weeks" do not apply to the clause as to the notice affixed on the highway. The word "affix" is only applicable to the act of fastening up. It would be meaningless to speak of "affixing for four successive weeks." Moreover, it would be impracticable to require that a notice so affixed must be kept in its place all that time; for it would be very difficult to prevent its being pulled down by someone, if any one really desired to put a stop to the proposed diversion of the road. The other two conditions in sect. 85 are that the notice shall be inserted in a newspaper for four successive weeks, and that the notice shall be put up for four successive Sundays. Both those conditions can be complied with in a period less than twenty-eight days.

Danckwerts, K.C. and *Hohler* for the Tonbridge Rural District Council.—The object of the Legislature in directing the notice to be put up on the highway is to secure that everyone interested in the preservation of the highway should be aware of what is about to be done, before it is done:

Reg. v. *Surrey Justices*, L. Rep. 5 Q. B. 466.

It is the most reasonable construction to put upon this section that the notice so affixed should remain there for some considerable period. If it was a sufficient compliance with the requirement of the section merely to affix it, without any necessity for its being kept there, it might be pulled down the next moment after it was put up, and the object of the Legislature would be defeated. It is not a straining of the words of the section to read the words "for four successive weeks" into the provision for affixing the notice on the highway. As the provisions of this section were passed with the view of protecting the rights of the public, they should be construed strictly, and those persons whose desire is to deprive the public of a piece of highway should be bound to conform most fully with the conditions imposed on them.] They also repeated their arguments in the court below that, on the refusal to certify by the two justices that originally viewed the highway proposed to be diverted, the proceedings ought to have been begun again from the beginning; and that the consent of the owner of the land ought to have been recited in the certificate given by the justices.]

Macmorran, K.C. in reply.

COLLINS, M.R.—This is an appeal from a decision of the Divisional Court upon a very technical point arising upon the construction of sect. 85 of the Highway Act 1835. That section imposes certain conditions before an order can be made for diverting or stopping up a highway, and the question raised here is whether or not a certain one of those conditions has been performed so as to satisfy the requirements of the section. Now, sect. 85 is as follows: [His Lordship read it.] I will assume that all the conditions there mentioned have been fulfilled, with the exception of the one which the Divisional Court held had not been fulfilled. Certain objections with reference to those conditions were raised in the court below and were overruled. They have been raised again in this court, and as to them I think it is unnecessary I should say more than that on those points I agree with the decision of the Divisional Court. The condition which the Divisional Court held had not been fulfilled was that which had reference to the fixing a notice in proper form at each end of the highway which was proposed to be diverted. A notice was put up in the required places, but in the notice the day named as the day on which the justices' certificate would be given was less than four weeks distant. The certificate was afterwards given on the day named. In the court below it was contended that unless the notice is put up and remains affixed for four successive weeks—*i.e.*, for twenty-eight days—the certificate is bad, because the statutory condition has not been fulfilled. The question is whether it is necessary that the notice be maintained for the full period of twenty-eight days in the place where it was put up. The answer to that depends upon the words of sect. 85. The section says that the surveyor is to "affix" the notice; it does not say that he is to maintain it there. It contains no provision with regard to the time it is to remain affixed. The section then provides that the surveyor is to insert the same notice in a newspaper published or circulated in the county for four successive weeks next after the justices have viewed the highway. The Divisional Court found no difficulty on this part of the case, and were satisfied that the advertisement had appeared four times in a weekly newspaper. Then comes the provision that the surveyor is to affix a like notice on the church door on four successive Sundays next after the justices' view. That was duly done. Then the section says that "the said several notices having been so published," and proof thereof given, the justices shall proceed to certify. I can see no limit of time for the maintenance of the notice when affixed. There have been four affixings on the church door and four insertions in the newspaper. I cannot see any grammatical connection in the words of the section between the directions for the affixing of the notice on the highway and the "four successive weeks." The word "affix" does not of itself involve any idea of continuous duration. We ought not to read into the Act a condition which is not to be found there. For these reasons I feel obliged to differ from the conclusion arrived at by the Divisional Court with regard to this point. I do not think that sect. 85 makes it a condition that the notices affixed on the highway should subsist there for four successive weeks before the justices can give their certificate. The appeal must therefore be allowed.

STIRLING, L.J.—I am of the same opinion and for the same reasons, but, as we are differing from the judgment of the Divisional Court, I think it right to state my reasons shortly in my own words. The question is whether the procedure provided by sect. 85 for the diversion of a highway has been properly followed in the present case. Sect. 84 of the Highway Act 1835 directs that there must be a view by two justices, and sect. 85 then proceeds to say what is to be done after the view. If upon the view it appears to the justices that the highway may be diverted so as to make it nearer or more commodious to the

public, and the owner of the land through which the new highway is proposed to be made consents in writing, then the justices are to direct the surveyor to affix a notice in the form prescribed by the Act at the place and by the side of each end of the highway from whence the proposed diversion is to be made, and to insert the same notice in a newspaper published or circulated in the county for four successive weeks next after the justices have viewed the highway, and to affix a like notice on the church door on four successive Sundays next after the making such view. Then the section goes on to provide that "the said several notices having been so published, and proof thereof having been given to the satisfaction of the said justices," and a plan having been delivered, the justices shall proceed to certify the fact of their having viewed the highway, and that the proposed new highway is nearer or more commodious to the public. The question then arises, At what date after their view may the justices resume their consideration of the matter and proceed to give their certificate? A limit is imposed by sect. 85 which directs that the surveyor is, first, to affix a notice at each end of the highway proposed to be diverted; secondly, to insert the same notice in one newspaper for four successive weeks next after the justices have made their view; and, thirdly, to affix a like notice on the church door for four successive Sundays next after making the view. It is quite clear that the notice must be inserted in one newspaper published or generally circulated in the county, but the Act does not say whether the newspaper is to be a daily or a weekly one, and therefore it was open to the surveyor to insert the notice in a newspaper published once a week, and that insertion was to be for four successive weeks next after the justices had viewed the highway. The notice is also to be affixed on the church door on four successive Sundays next after making such view. So far as regards those two requirements, it appears to me that neither of them involves the suspension of proceedings for twenty-eight days. It was not necessary that the notice should be inserted in the newspaper for twenty-eight days. Nor had the notice to remain on the church door for twenty-eight days. But it was argued that the Act requires the notice which is to be affixed on the highway shall remain there for four successive weeks before the justices can proceed to certify. The question is, Does the Act impose any such obligation? I do not see that the grammatical construction of the Act requires it. The Act merely says that the surveyor shall affix the notice on the highway, shall insert the same notice in a newspaper for four successive weeks, and shall affix a like notice on the church door for four successive Sundays. It is said that the words "for four successive weeks" are to be read as applying to the direction for the affixing of the notice on the highway, but that does not seem to me the grammatical rendering of the section. You cannot speak of "affixing" a notice for four successive weeks. A notice is "affixed" once for all, and there it is left. But the Act says nothing about keeping the notice up for four successive weeks after it has been affixed. Therefore I come to the conclusion that all that the Act requires is that, after the view by the justices, their consideration of the matter is not to be resumed until after a period of time sufficient for the notice to be affixed on the highway, and for the insertion of the same notice in a newspaper, and the affixing of a like notice on the church doors as provided by sect. 85. No limit has been specified by the Act with regard to the time during which the notice is to remain affixed on the highway. It is assumed that the justices will satisfy themselves that the notice has been properly affixed, and that the other two requirements of the section have been complied with, before they proceed to give their certificate. I agree that the appeal must be allowed.

MATHEW, L.J.—I am of the same opinion. The objection taken on behalf of the district council is purely technical. It is said that in diverting a highway a public right is being taken away, and that therefore the Act should be construed strictly against those who are taking proceedings to bring about the diversion. But it seems to me that the object of the Act is to benefit the public by providing them with a better highway than they had before. Therefore it seems to me that that argument fails entirely. Then it is sought to read into sect. 85 a provision that the notice which has to be affixed on the highway is to remain there for four successive weeks before the justices can give their certificate. I cannot see such a provision in the Act, and I think that such a provision would be most unreasonable and unpractical. We are not now dealing with a case in which the person who put the notice deliberately pulled it down again. Such a case would give rise to other considerations. The other two requirements of the section with regard to the insertion of the notice in a newspaper and the affixing of it on the church door may each be complied with in a period of time less than four weeks. Yet it is argued that we ought to hold that the Act intends that the notice affixed on the highway is to be kept there for four successive weeks. I cannot gather that from the words of the section. I will not repeat what has been said by my Lord and Stirling, LJ., but I will only add that I entirely agree with them.

Appeal allowed.

Solicitors for the district council, *Collyer-Bristow*, *Hill*, and *Co*, agents for *Stone*, *Simpson*, and *Mason*, Tunbridge Wells.

Solicitors for the justices, *Neve*, *Beck*, and *Kirby*, agents for *Neve* and *Williams*, Tonbridge.

Dec. 13 *and* 14, 1904.

(Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.)

HEADLAND *v.* COSTER AND ANOTHER. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Distress — Poor rate—Costs and charges of distress—Distress for sum not exceeding 20*l.*—*Limitation of amount of costs and charges*—*Distress* (*Costs*) *Act* 1817 (57 *Geo.* 3, *c.* 93), *s.* 1, *schedule—Distress* (*Costs*) *Act* 1827 (7 *&* 8 *Geo.* 4, *c.* 17)—*Distress for Rates Act* 1849 (12 *&* 13 *Vict. c.* 14,), *s.* 1.

The provisions of the Distress (*Costs*) *Act* 1817, *as extended to a distress for poor rates for an*

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

amount not exceeding 20l. by the Distress (Costs) Act 1827, are still in force; and no costs or charges in respect of such a distress can be taken in excess of the amounts provided by those statutes.

Hill *v.* Pannifer (21 *Cox Mag. Cas.* 519; 90 *L. T. Rep.* 511; (1904) 1 *K. B.* 811) *overruled.*

APPEAL of the plaintiff from an order of the Divisional Court dismissing an appeal from the County Court at Bromley, in Kent.

The plaintiff brought this action in the County Court to recover the sum of 5*s.* 7*d.*, the alleged amount of an excessive charge made by the defendants in carrying out a distress for poor rates.

The plaintiff was a ratepayer, and he did not pay a sum of 5*s.* part of a poor rate which had been duly demanded of him.

An order was made against the plaintiff by justices for payment of that sum of 5*s.*, and a warrant of distress was issued against him.

Some of his goods were seized under the warrant of distress, and were sold for 1*l.* 0*s.* 9*d.* From that sum the defendants, who were police officers who carried out the distress and sale, deducted a sum for expenses of sale amounting to 7*s.* 9*d.*

The plaintiff alleged that the defendants were only entitled to deduct for the expenses of sale the amount prescribed in the schedule to the Distress (Costs) Act 1817, and that they had deducted 5*s.* 7*d.* more than that amount.

It was admitted for the purposes of this appeal that the charge made was 5*s.* 7*d.* in excess of the charge allowed by the schedule to the Act of 1847.

The County Court judge found that the amount charged was in the circumstances reasonable, and gave judgment for the defendants, holding that the Act of 1817 had been impliedly repealed by the Distress for Rates Act 1849.

The Act of 27 Geo. 2, c. 20, provides:

Sect. 1. Whereas by many Acts of Parliament justices of the peace are empowered to issue warrants for the distress and sale of goods and chattels, but the charges of distraining, keeping, and sale of such goods and chattels are not provided for in all the said Acts, nor is there a time in all cases limited for the sale thereof, whereby inconveniences have arisen. Therefore, for remedy thereof, be it enacted that in all cases where any justice or justices of the peace is or are, or shall be, required or empowered by any Act or Acts of Parliament now in force, or hereafter to be made, to issue a warrant of distress for the levying of any penalty inflicted or any sum of money directed to be paid, by or in consequence of such Act or Acts, it shall and may be lawful for the justice or justices granting such warrant therein to order and direct the goods and chattels to be distrained to be sold and disposed of within a certain time to be limited in such warrant, so as such time be not less than four days nor more than eight days, unless the penalty or sum of money for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, be sooner paid.

Sect. 2. The officer making such distress shall and is hereby empowered to deduct the reasonable charges of taking, keeping, and selling such distress out of the money arising by such sale; and the overplus (if any) after such charges, and also the said penalty or sum of money, shall be fully satisfied and paid, shall be returned on demand to the owner of the goods and chattels so distrained; and the officer executing such warrant, if required, shall show the same to the person whose goods and chattels are distrained, and shall suffer a copy thereof to be taken.

The Distress (Costs) Act 1817 (57 Geo. 3, c. 93) provides:

Sect. 1. Whereas divers persons acting as brokers, and distraining on the goods and chattels of others, or employed in the course of such distresses, have of late made excessive charges, to the great oppression of poor tenants and others; and it is expedient to check such practices. Be it therefore enacted, that from and after the passing of this Act no person whatsoever making any distress for rent, where the sum demanded and due shall not exceed the sum of twenty pounds for and in respect of such rent, nor any person whatsoever employed in any manner in making such distress, or doing any act whatsoever in the course of such distress or for carrying the same into effect, shall have, take, or receive out of the produce of the goods or chattels distrained upon and sold, or from the tenant distrained on, or from the landlord, or from any other person whatsoever, any other or more costs and charges for and in respect of such distress, or any matter or thing done therein, than such as are fixed and set forth in the schedule hereunto annexed and appropriated to each act which shall have been done in the course of such distress: and no person or persons whatsoever shall make any charge whatsoever for any act, matter, or thing mentioned in the said schedule, unless such act shall have been really done.

Schedule of the Limitation of Costs and Charges on Distresses for Small Rents.

Catalogues, sale and commission, and delivery of goods, one shilling in the pound on the net produce of the sale.

The Distress (Costs) Act 1827 (7 & 8 Geo. 4, c. 17) provides:

Whereas by an Act passed in the fifty-seventh year of the reign of His late Majesty King George the Third, intituled an Act to regulate the cost of distresses levied for payment of small rents, certain regulations are made with respect to the costs and charges of levying and disposing of such distresses where the sum demanded and due shall not exceed twenty pounds. And whereas it is expedient that the said Act should be amended by extending the same to distresses for other causes; be it therefore enacted that from and after the passing of this Act all the rules, regulations, clauses, provisions, penalties, matters, and things in the said Act contained shall extend and be construed to extend, and shall be applied and put in execution, so far as the same are applicable and capable of being put into execution, with respect to any distress or levy which shall be made for any land tax, assessed taxes, poor's rates, church rates, tithes, highways rates, sewer rates, or any other rates, taxes, impositions, or assessments whatever in all cases where the sum demanded and due for or in respect of such taxes, rates, tithes, assessments, or impositions shall not exceed the sum of twenty pounds, and in all cases where the whole of the several sums sought to be levied by distresses taken for different purposes at the same time shall not exceed the sum of twenty pounds; and that such costs and charges, and no other, shall be taken and payable as the costs and charges of the levy and disposition of such distresses; and that all such proceedings shall and may be had and taken against any and every person transgressing the regulations of the said Act in the levying or distraining for any such taxes, rates, impositions, or assessments, and all such persons shall be liable to and shall incur such and the like penalties as by the said Act are directed, required, and imposed with respect to persons making any distress for rent contrary to the directions of the said Act; and that in any order or judgment of any justices before whom any complaint shall be preferred in consequence

of this Act, such order shall be expressed to be made upon a complaint for the breach of the said recited Act as amended by this Act; and that the said recited Act and this Act shall be taken and construed together as one Act to all intents and purposes whatsoever.

The Distress for Rates Act 1849 (12 & 13 Vict. c. 14) provides:

Sect. 1. Whereas provision is already made by law for the recovery of the sum or sums at which any person is rated or assessed to the relief of the poor, or is rated or assessed in any rate for the highways, in England or Wales, by distress and sale of his goods and chattels, and in default of such distress by commitment to prison until the same shall be paid; but no provision is made for levying the costs and expenses incurred by the overseers of the poor or the surveyors of highways in the recovery of the same respectively: Be it therefore enacted that it shall be lawful hereafter for all justices of the peace, if in their discretion they shall so think fit, in any warrant of distress they shall make and issue for the levying of any sum or sums to which any person or persons is or are now or may hereafter be rated or assessed in or by any rate or assessment for the relief of the poor or for the highways in England or Wales, or in or by any other rate or assessment which by law now or hereafter is or shall be directed to be enforced or recovered in the same manner as a poor rate, or in any warrant for the levying of any arrears of the same to order that a sum, such as they deem reasonable, for the costs and expenses which such overseers or surveyors, or the persons applying for such warrant, shall have incurred in obtaining the same shall also be levied of the goods and chattels of the person or persons against whom such warrant shall be granted, together with the reasonable charges of the taking, keeping and selling of the said distress.

The plaintiff appealed, and the Divisional Court (Lord Alverstone, C.J., Kennedy and Channell, JJ.) dismissed the appeal upon the ground that the question was concluded by the decision in *Hill* v. *Pannifer* (21 Cox Mag. Cas. 519; 90 L. T. Rep. 511; (1904) 1 K. B. 811).

The plaintiff appealed with leave.

Montague Shearman, K.C. and *R. M. Montgomery*, for the appellant.—The Divisional Court in this case simply followed the previous decision of the Divisional Court in *Hill* v. *Pannifer* (21 Cox Mag. Cas. 519; 90 L. T. Rep. 511; (1904) 1 K. B. 811). The decision in that case was wrong and ought to be overruled. The provisions of sect. 1 and of the schedule to the Distress (Costs) Act 1817, as to the charges which can be made upon distresses for rent not exceeding 20*l.*, which were extended by the Distress (Costs) Act 1827 to distresses for poor rates not exceeding 20*l.*, are still in force, and are still applicable to all distresses for poor rates not exceeding 20*l.* Those provisions are not impliedly repealed by the provisions of the Distress for Rates Act 1849. Under the Act of 43 Eliz. c. 3, there was an implied power on a distress for poor rate to levy a reasonable sum for the expenses of making and selling the distress:

Moyse v. *Cocksedge*, Willes, 636; Barnes, 459.

Then the Act of 18 Geo. 3, c. 19, was passed for the purpose of enabling the overseers to recover the reasonable costs of obtaining the warrant of distress. That Act was repealed in 1848 and the provisions of the Act of 1849 were intended to provide for those costs. There is no inconsistency between the provisions of the Act of 1849 and those of the Act of 1817 as extended to distresses for poor rates. The earlier Acts apply only to distresses for amounts not exceeding 20*l.* and expressly limit the charges in those cases, whereas the Act of 1849 applies to distresses for amounts exceeding 20*l.* and provides that the charges in such cases shall be reasonable. Therefore the two enactments can perfectly well exist together. Further, it may be that the maximum charge provided by the earlier Acts will not in all cases be "reasonable," and the later Act will give power to reduce them to a reasonable sum:

Ex parte Arnison, L. Rep. 3 Ex. 56.

Although it may sometimes be held that there has been an implied repeal of an earlier statute by the provisions of a later statute, yet that will only be done under special conditions and circumstances and where it is impossible for the provisions of both statutes to exist at the same time:

Seward v. *The Vera Cruz*, 52 L. T. Rep. 474; 10 App. Cas. 59;
Millington v. *Harwood*, 66 L. T. Rep. 576; (1892) 2 Q. B. 166.

Danckwerts, K.C., *Stamford Hutton*, and *A. E. Gill* for the respondents.—The decision in *Hill* v. *Pannifer* (*ubi sup.*) was right and governs this case. In the case of *Moyse* v. *Cocksedge* (*ubi sup.*) the decision was only that the person distraining did not become a trespasser *ab initio* merely by reason of the fact that he levied for the expenses of the distress; and the opinion expressed, that there was an implied power under the statute of Elizabeth to levy for the reasonable expenses of making the distress, was merely *obiter*. There was no such power under the statute of Elizabeth; that power was expressly given by the statute of 27 Geo. 2, c. 20, which shows that there was not any such power before. The Acts of 1817 and 1827 only regulated the amount of charges which might be made in respect of distresses for poor rates, the power to levy for such charges having been given by the statute 27 Geo. 2, c. 20. The latter statute was repealed by the Act of 1848, and thereupon the Acts of 1817 and 1827 ceased to apply to distresses for poor rates, for there was then no power to levy for the expenses of such distresses. Then came the Act of 1849, which expressly recites that "no provision is made for levying the costs and expenses incurred by the overseers of the poor in the recovery of" poor rates, and then proceeds to enact that the overseers may levy for "the reasonable charges of the taking, keeping, and selling of the said distress." Therefore the recovery of those charges is now in all cases regulated solely by the Act of 1849. The recital in that Act shows that there was no implied power under the statute of Elizabeth to levy for charges, and that the dictum in *Moyse* v. *Cocksedge* (*ubi sup.*) was wrong. In any case, the provisions of the Act of 1849 are inconsistent with the provisions of the Acts of 1817 and 1827 as applied to distresses for poor rates, and therefore those provisions of the earlier Acts are impliedly repealed. They referred also to

Reg. v. *Price*, 42 L. T. Rep. 439; 5 Q. B. Div. 300;
Garnett v. *Bradley*, 39 L. T. Rep. 261; 3 App. Cas. 944;
Lumsden v. *Burnett*, 78 L. T. Rep. 778; (1898) 2 Q. B. 177;
Re Allen, (1894) 2 Q. B. 924.

Montague Shearman, K.C. in reply.—The repeal in the Act of 1848 includes a great number of statutes, which were repealed with a

view to consolidation and re-enactment, and the fact that the Acts of 1817 and 1827 are not referred to strongly goes to show that it was not intended to affect the provisions of those Acts.

Cur. adv. vult.

Dec. 14.—COLLINS, M.R.—This is an appeal from the decision of the Divisional Court in an action brought by a person, whose goods were distrained for a portion of the poor rate, to recover the small sum of 5*s*, which he alleged had been illegally levied in excess of the statutory charges provided under the schedule to the statute 57 Geo. 3, c. 93, sect. 1, as extended by 7 & 8 Geo. 4, c. 17, which he contended governed this case. The contention on behalf of the respondents was that this statutory schedule had ceased to exist with regard to poor rates, having been impliedly repealed by the Distress for Rates Act 1849 (12 & 13 Vict. c. 14), that the provisions of sect. 1 of the later Act were substituted and provide only for the charges being "reasonable"; and that, inasmuch as in this case the County Court judge found that the charge was in the circumstances reasonable, the plaintiff was not entitled to succeed. Before the Divisional Court this case was not argued, but was simply decided upon the authority of an earlier case, decided in the present year, upon exactly the same point, in favour of the defendants' contention. That case was *Hill* v. *Pannifer* (21 Cox Mag. Cas. 519; 90 L. T. Rep. 511; (1904) 1 K. B. 811), decided by a divisional court consisting of Lord Alverstone, C.J., Kennedy and Channell, JJ. Therefore the present case comes before us practically as an apppeal from the decision in *Hill* v. *Pannifer* (*ubi sup.*). As I have said, the claim in the present case is to recover the excess above the statutory maximum charge, and it is admitted for the purposes of this appeal that the amount now claimed was in excess of the statutory maximum. The point is, I think, a short one, although it involves the examination of several statutes. The short point is whether the statutory enactment which fixes specific maximum charges has been impliedly repealed by the statute of 1849. That makes it necessary to examine the statutes in question. The statutes which are said to be repealed are two, or in effect only one, for the later statute simply extends the provisions of the earlier one to any distress for poor rates. Those statutes are 57 Geo. 3, c. 93, and 7 & 8 Geo. 4, c. 17. The statute of 57 Geo. 3, c. 93, contains the standard of charges. It did not originally apply to a distress for poor rates, but it was so applied by the later Act of 7 & 8 Geo. 4, c. 17. The Act of 57 Geo. 3, c. 93, is in these terms:

> Whereas divers persons acting as brokers and distraining on the goods and chattels of others, or employed in the course of such distresses, have of late made excessive charges to the great oppression of poor tenants and others, and it is expedient to check such practices . . . No person whatsoever making any distress for rent where the sum demanded and due shall not exceed the sum of 20*l.* for and in respect of such rent . . . shall have, take, or receive out of the produce of the goods or chattels distrained upon and sold . . . any other or more costs and charges for and in respect of such distress or any matter or thing done therein than such as are fixed and set forth in the schedule hereunto annexed and appropriated to each act which shall have been done in the course of such distress.

Then follows the list of costs and charges in the schedule, the only material words of which are: "Catalogues, sale and commission, and delivery of goods, one shilling in the pound on the net produce of the sale." In this case the sum demanded and due did not exceed 20*l.*, and that scale would apply if not repealed. By a later Act of 7 & 8 Geo. 4, c. 17, that statute was made to apply to the case of a distress for poor rates. That later Act is intituled, "An Act to extend the provisions of an Act made in the fifty-seventh year of King George the Third for regulating the costs of certain distresses," and it enacts that:

> Whereas by an Act passed in the fifty-seventh year of the reign of His late Majesty King George the Third . . . certain regulations are made with respect to the costs and charges of levying and disposing of such distresses where the sum demanded and due shall not exceed 20*l.*, and whereas it is expedient that the same should be extended to distresses for other causes . . . all the rules, regulations, clauses, provisions, penalties, matters, and things in the said Act contained shall extend and be construed to extend, and shall be applied and put in execution, so far as the same are applicable and capable of being put in execution, with respect to any distress or levy which shall be made for any . . . poor's rates . . . in all cases where the sum demanded and due for or in respect of such rates shall not exceed the sum of 20*l.*

Therefore we have this legislation made applicable to a distress for poor rates where the sum due does not exceed 20*l.*, and it is still applicable unless it has been repealed. In the Divisional Court this case was decided entirely upon the ground that the subsequent statute of 1849 (12 & 13 Vict. c. 14) had impliedly repealed the special enactment contained in the schedule to the Act of 1817. Before us, however, the case has assumed a somewhat different aspect, and another point has been more relied on, though the point upon which the court below decided has not been abandoned. The Act which is said to have impliedly repealed the enactments to which I have referred is the Distress for Rates Act 1849. That Act is intituled "An Act to enable overseers of the poor and surveyors of the highways to recover the costs of distraining for rates." It recites that:

> Whereas provision is already made by law for the recovery of the sum or sums at which any person is rated or assessed to the relief of the poor . . . by distress and sale of his goods and chattels . . . but no provision is made for levying the costs and expenses incurred by the overseers of the poor . . . in the recovery of the same . . . be it therefore enacted that it shall be lawful hereafter for all justices of the peace . . . in any warrant of distress . . . to order that a sum such as they may deem reasonable for the costs and expenses which such overseers . . . shall have incurred in obtaining the same shall also be levied of the goods and chattels of the person . . . against whom such warrant shall be granted, together with the reasonable charges of the taking, keeping, and selling of the said distress.

The court below treated that as an implied repeal of the earlier Act, and gave judgment in favour of the defendants. Now the matter has come before us on appeal. It has been forcibly argued before us on behalf of the appellant that the basis of the judgment of the Divisional Court was wrong, and there is no such inconsistency between the later and the earlier statute as to lead to the inference that the later statute has

repealed the earlier statute. The point was also made that the earlier Act of 1848 (11 & 12 Vict. c. 43) was preliminary and ancilliary to the Act of the next year, and that there was therein an elaborate repeal of previous statutes before the legislation of the next year was introduced, and that, although several statutes passed before and after the Acts of 1817 and 1827 were repealed, yet the two statutes of 1817 and 1827 were neither of them referred to at all. That is a remarkable fact, if it was intended, as the respondents contend, that those two statutes were intended to be repealed by the Act of 1849. There was an express repeal of various statutes before the passing of the later Act of 1849, and yet it is contended that the two statutes, which were not referred to at all, were impliedly repealed. A statute may sometimes be held to be impliedly repealed, but it is only under special conditions and circumstances that a later Act is held to impliedly repeal an earlier Act. Upon this question the passage from the judgment of Lord Selborne, in *Seward* v. *The Vera Cruz* (52 L. T. Rep. 474; 10 App. Cas. 59, 68) is very much in point. Lord Selborne there said: "Now, if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of general words, without any indication of a particular intention to do so." It was pointed out on behalf of the appellant that these two Acts of 1817 and 1827, and the subsequent Act of 1849, may well coexist, because the later Act may apply to all distresses for sums above 20*l.*, whereas the earlier Acts applied only to distresses for sums not exceeding 20*l.*; and it was further said that there was no incompatibility between the provisions for a fixed limit in the earlier statutes, and the provisions in the later statute that the charges must be reasonable. It may well be that the Legislature thought that in some cases the statutory maximum would be really too large and unreasonable, and, therefore, the statute fixing a maximum charge may not be incompatible with the other statute which says that the charges must be reasonable. Therefore, even as the matter stood in the Divisional Court, the inclination of my opinion is that the earlier legislation was not repealed by the later general legislation. But the case, as it has been argued before us, has been made even more clear than it was in the Divisional Court by the argument which was put forward on behalf of the respondents. The point made before us was that the appellant had entirely misconceived the foundation of the right which he rested upon the two statutes of 1817 and 1827. It was argued that these two statutes merely quantified the amount of the charges which might be taken, but did not give any right to levy those charges, and that that right must be found in some earlier statute. It was said that the earlier statute was an Act of 1754 (27 Geo. 2. c. 20). [His Lordship read sects. 1 and 2 as above set out.] The point made on behalf of the respondents upon that statute was, that that was the statute which created the right to deduct charges, and that the subsequent statutes of 1817 and 1827 merely quantified the amounts; and that, as the Act of 1754 was repealed by the Act of 1848, therefore the foundation of the right to take any charges at all was swept away, and consequently now the whole matter rested upon the Act of 1849 alone. On the other hand, it was contended on behalf of the appellant that no statute was required to give the right to levy charges and expenses; and that it had been so decided in the case of *Moyse* v. *Cocksedge* (Willes, 636). In that case it was decided that a right to levy for charges and expenses must be implied out of the statute of Elizabeth (43 Eliz. c. 2), as incident to the right to levy a distress for the poor rate. It was said that, therefore, having that right under the statute of Elizabeth, no other statutory basis was required for the right to levy for charges, and that consequently the repeal of the statute of 1754 did not affect the question at all. Counsel for the appellant, relied, therefore, upon the broad ground of the decision in *Moyse* v. *Cocksedge* (*ubi sup.*). In that case the action was one of trespass, and the two questions seem to have been discussed; one question was whether there was a right to levy a certain sum for the expenses of a distress for poor rate, and the other was whether, if there was not that right, the defendant was a trespasser *ab initio*. From the report of the case, both points appear to have been decided; it seems to have been decided that there was a right to levy the charge in question, and further that, even if there was not that right, the defendant would not be a trespasser *ab initio*. Counsel for the respondents impugned that decision or opinion upon the first question, and said that the action was only one of trespass and that all that was said as to the right to levy for expenses was merely *obiter*. Now, I have never before heard of the authority of that case being impugned. It has been cited in all the text books without comment or disapprobation, and, in my opinion, that case stands good and affirms the right to levy for charges and expenses. Then, the argument on behalf of the respondents was that the whole basis of the appellant's case must rest upon the statute of 1754, and that, there being no other foundation for his contention, as that statute was repealed in 1848, the respondents were not bound by any standard of charges except that contained in the statute of 1849, which was that the charges must be reasonable. That argument depends upon whether the statute of 1754 was the foundation of the right to levy for charges. Certainly it was not so. That right did not require that statute to confer it, as appears from the authority of *Moyse* v. *Cocksedge* (*ubi sup.*), and there is nothing to impugn the authority of that case. Therefore, the repeal of the statute of 1754 certainly cannot affect the position of the appellant in this case. That statute contained the provision about reasonable charges of taking, keeping, and selling the distress; it was passed in 1754 and coexisted with the Acts of 1817 and 1827, and it was never suggested that there was any incompatibility between them; and we find that the repeated provisions of the Act of 1754 are repealed *verbatim et literatim* in the Act of 1849, which is said to have produced the incompatibility upon which the respondents have relied. What difference can it make that the earlier statute of 1754 has been repealed and a later Act enacted in the same terms? It seems to me that the strongest argu-

ment on behalf of the appellant is to be deduced therefrom. We have, then, before us, in addition to the arguments used before the Divisional Court, this argument derived from what was done with respect to the Act of 1754 in the Act of 1849. Upon that view of the case, I feel bound to differ from the decision of the Divisional Court. There is one point which does, indeed, create some difficulty, and that is the recital to the Act of 1849, which seems at first sight to be not quite compatible with the view which I have expressed. I will read that recital, which is as follows: "Whereas provision is already made by law for the recovery of" rates, "but no provision is made for levying the costs and expenses incurred by the overseers of the poor or the surveyors of highways in the recovery of the same respectively." In a sense that is true; but it is not true for all purposes, because there was the implied provision in the statute of Elizabeth, as established in *Moyse* v. *Cocksedge* (*ubi sup.*). But, inasmuch as in 1849 the statute of 1754 had been repealed in the previous year, that fact may have justified the Legislature in the recital that there was no express statutory enactment existing at that moment providing for the levying of costs and charges. Perhaps in that sense the recital may be correct; or it may be a mis-recital, which is a thing not unknown. However that may be, it seems to me that the arguments in favour of the appellant are so overwhelming that, if it were necessary to hold that that was a mis-recital, I should be prepared to do so. Therefore, I think that we must differ from the decision of the Divisional Court, and that this appeal must be allowed.

STIRLING, L.J.—I am of the same opinion, and, as we are differing from the decision of the King's Bench Division, I will shortly state my reasons. For that purpose I will shortly deal with the history of the legislation upon the subject. Legislation began with the well-known statute of Elizabeth, which authorised justices of the peace to issue warrants to distrain and sell the goods of defaulters. That statute contained no express provision as to how the charges for taking, keeping, and selling the goods distrained are to be levied. In 1754 was passed the statute of 27 Geo. 2, c. 20, which has been read, which was passed to remedy the inconveniences which had arisen because the charges of distraining, keeping, and sale of goods distrained were not provided for in the statutes there referred to. Sect. 2 of that statute provides that "the officer making such distress shall and is hereby empowered to deduct the reasonable charges of taking, keeping, and selling such distress." That being so, the next statute which we have to consider is one which deals, not with distresses for poor rates, but with distresses for rent. That Act was the 57 Geo. 3, c. 93, passed in 1817, to remedy the grievances which arose from the making of excessive charges by persons employed in making distresses, and especially the "great oppression of poor tenants." That statute provides a scale of charges which were to be obligatory in cases of distress for rent not exceeding 20*l.* A question has been raised whether those charges are fixed so as to be eligible in all cases, or whether only maximum charges were defined. It is not, however, necessary to say now which is the right view. Ten years later, in 1827, the statute of 7 & 8 Geo. 4, c. 17, was passed, which extends the provisions of the Act of 1817 to distresses for poor rates and other rates. The preamble to that Act recites that "it is expedient that the said Act should be amended by extending the same to distresses for other causes," and then provides that "all the rules, regulations, clauses, provisions, penalties, matters, and things in the said Act contained shall extend . . . to any distress or levy which shall be made for any . . . poor's rates," not exceeding 20*l.* Therefore the state of things then was this, that as to poor rates there was a statute which enabled reasonable charges to be levied, and there was the statute of 1817 which limited the charges to the charges prescribed by that Act, where the distress was for a sum not exceeding 20*l.* Then we come to the Act of 1848. In that year it seems to have been contemplated to amend and consolidate the law with reference to summary proceedings before justices, and accordingly the statute 11 & 12 Vict. c. 43 was passed, which was a consolidating and amending Act. There is nothing in that Act specifically dealing with poor rates, but by sect. 36 it was provided that certain statutes, from 18 Eliz. down to 6 & 7 Will. 4, should be repealed, among which was the statute 27 Geo. 2, c. 20. The important fact to observe is that, although the Act of 1754 was expressly repealed, nothing was said as to the Acts of 1817 and 1827, which therefore still remained in force. In 1849 the statute 12 & 13 Vict. c. 14 was passed, dealing specifically with poor rates and highway rates, and making provision, with respect to the matter with which we are now dealing, that justices may with respect to warrants of distress for poor rates order a sum for expenses to be levied upon the goods distrained "together with the reasonable charges of the taking, keeping, and selling of the said distress," the language being the same as in the Act of 1754. It is also to be observed that sect. 7 of the Act of 1849 provides that "in all cases where such costs and expenses as aforesaid shall have been paid and received, or any proceedings taken or imprisonment had for nonpayment of the same, such payment and receipt, and such proceedings or imprisonment shall be deemed legal to all intents and purposes, and no action or other proceeding shall be had or proceeded in for or in respect of the same." Looking at the simple construction of that Act, I would say that its object with regard to charges was to restore the state of things existing before the repeal of the Act of 1754. For the respondents it was contended that, after the Act of 1848, the provisions of the Acts of 1817 and 1827 ceased to be applicable because, except by virtue of the Act of 1754, there was no power to take charges out of the proceeds of distress. But the Acts of 1817 and 1827 were not repealed; they remained ready to be applied as soon as provision was made for levying these charges and expenses. The Act of 1849 restored the old provisions. In my opinion it did not impliedly repeal the Acts of 1817 and 1827. It seems to me that the provisions of the Acts of 1817 and 1827 as to these charges, where the amount distrained for does not exceed 20*l.*, were a determination by the Legislature as to what were reasonable charges in such cases. Down to the year 1848 the two provisions, one providing for reasonable charges

and the other providing for specified charges in cases not exceeding 20*l*., stood together; and it seems to me that they can equally well stand together since the Acts of 1848 and 1849. The Act of 1827 was a general statute dealing with other rates as well as poor rates, and the schedule of charges must still exist as to the other rates; and the Act of 1817 must still exist with respect to distresses for rent not exceeding 20*l*. It seems to me, therefore, that the true view of the Acts is that the charges allowed by the Act of 1817 in cases not exceeding 20*l*. are the reasonable charges in those cases, and that those Acts are still in force. This appeal must, therefore, be allowed.

MATHEW, L.J. read the following judgment:—I am of the same opinion. In accordance with the statutes of 43 Eliz. and 27 Geo. 3, c. 20, and the decision in the case of *Moyse* v. *Cocksedge* (*ubi sup.*), the reasonable charges for making the distress and for holding and selling the goods seized might be recovered under a warrant of distress for poor rates. By the statutes of 1817 and 1827 there was enacted what amounted to a description of the charges which were to be deemed reasonable where the levy was for a sum not exceeding 20*l*. This legislation was of a most important character. It was intended to protect people of small means from the exorbitant charges of those to whom the execution of warrants was intrusted. It applied generally to the different kinds of distress warrants mentioned in both Acts. It was legislation intended to secure the the rights of the class specified in the statutes. The Act of Geo. 2 was repealed by the 11 & 12 Vict. c. 43, with a view to its re-enactment with certain amendments, and in the next session the new statute 12 & 13 Vict. c. 14 became law. It is said that this Act impliedly repealed the statutes of 1817 and 1827 so far as they related to warrants of distress for poor rates. But I think the three statutes may be, and ought to be, construed together. There is no inconsistency which forbids this method of interpretation. I see no indication of an intention that the general words of the Act of 12 & 13 Vict. c. 14 should derogate from the rights conferred upon them by the earlier statutes. The class protected ought not to be deprived of the rights conferred upon them by general words which do not clearly show that any such result was intended. This rule of interpretation is indicated in the cases cited in the course of the argument. The reasons for passing the Acts of 1817 and 1827 would seem to be no less cogent in 1849; and without express words I do not think that we are at liberty to infer a repeal by implication. The appeal must be allowed.

Appeal allowed.

Solicitors for the appellant, *Lloyd-George, Roberts*, and *Co.*

Solicitors for the respondents, *Wontner* and *Sons.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Nov. 21, 22, 23, 24, *and Dec.* 3, 1904.

(Before BUCKLEY, J.)

EARL OF HARRINGTON *v.* CORPORATION OF DERBY. (*a*)

Local government—Sewage—Pollution of river—Riparian owner—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 15, 17, 19, 299—*Rivers Pollution Prevention Act* 1876 (39 *&* 40 *Vict. c.* 75), *s.* 3—*Rivers Pollution Prevention Act* 1893 (56 *&* 57 *Vict. c.* 31), *s.* 1—*Public Authorities Protection Act* 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1 (*a*)—*Local Government Act* 1888 (51 *&* 52 *Vict. c.* 41), *s.* 14 (1).

Where a corporation acting as the local sanitary authority has for many years discharged the sewage from its borough in a crude state into a river and the pollution of the water perceptibly increased as new houses were built and contributed their sewage to the existing volume, in an action by a landowner whose estate was situated along the course of the river some distance below the town, and on whose land was an ornamental lake, fed by an intake from the river, at the outfall of the lake there being a water-wheel from which power was obtained to pump water from an adjacent well up to the plaintiff's castle, asking, firstly, for an injunction to restrain the corporation from polluting the river in such a way as to prevent him using the water for the purpose of his lake and water-wheel, and so as to be a nuisance to the castle and estate; secondly, for a mandatory order to compel them to do certain works of cleansing and removal of foul matter from the plaintiff's land; and, thirdly, for damages for injuries done by the pollution of which they complain:

Held, firstly, that persons who have discharged their sewage for more than twenty years into the sewers had obtained a prescriptive right, and that it would be impossible to grant an injunction which would interfere with those prescriptive rights; also that, as regards sewers not twenty years old, the county council had obtained an order under the Rivers Pollution Prevention Acts 1876 *and* 1893 *compelling the corporation to abstain from polluting the river after a certain date; and, as the corporation were carrying out works for the purpose of complying with that order, an injunction was unnecessary.*

Held, secondly, that a mandatory order was impossible, and that the proper remedy was in damages.

Held, thirdly, that the plaintiffs were entitled to damages for the injury they had sustained.

WITNESS ACTION.

The plaintiffs, the Earl of Harrington and Arthur Robert Peat, were the legal owners, and the plaintiff the Earl of Harrington was also equitable tenant for life of Elvaston Castle and the estate lying by the course of the river Derwent, some five and a half miles below Derby.

The defendants, the urban sanitary authority for the borough of Derby, discharged for many

(*a*) Reported by W. HUNTER BOND, Esq., Barrister-at-Law.

years the sewage of that borough in a crude state into the river Derwent.

On the 6th Dec. 1898 an order was made by the County Court of the county of Derby in an action in which the Derbyshire County Council, under sect. 14 (1) of the Local Government Act 1888, were the plaintiffs, that the corporation should abstain from polluting the river Derwent contrary to the provisions of sect. 3 of the Rivers Pollution Prevention Act 1876 and sect. 1 of the Rivers Pollution Prevention Act 1893.

The Local Government Act 1888 (51 & 52 Vict. c. 41) provides:

Sect. 14 (1). On and after the appointed day a county council shall have power, in addition to any other authority, to enforce the provisions of the Rivers Pollution Act 1876 . . . in relation to so much of any stream as is situate within, or passes through or by, any part of their county, and for that purpose they shall have the same powers and duties as if they were a sanitary authority within the meaning of that Act, or any other authority having power to enforce the provisions of that Act, and the county were their district.

The Rivers Pollution Prevention Act 1876 (39 & 40 Vict. c. 75) provides:

Sect. 3. Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any solid or liquid sewage matter shall (subject as in this Act mentioned) be deemed to have committed an offence against the Act.

The Rivers Pollution Prevention Act 1893 (56 & 57 Vict. c. 75) provides:

Sect. 1. Where any sewage matter falls or flows or is carried into any stream after passing through or along a channel which is vested in a sanitary authority, the sanitary authority shall for the purposes of sect. 3 of the Rivers Pollution Prevention Act 1876 be deemed to knowingly permit the sewage matter so to fall, flow, or be carried.

In the castle grounds there was an ornamental lake, which was supplied with water from the river through an intake and short channel; the overflow from the lake passed along another channel into the river some distance below. At the outlet from the lake was a water-wheel, which was used to pump water from an adjacent well up to the castle.

In July 1902 the Earl of Harrington found it necessary, from the fact that sewage was coming into the lake, to close the sluice at the mouth of the intake.

By the Derby Corporation Act 1901 powers were conferred upon the corporation to construct sewage works, and at the time of this action they were constructing sewage works for the treatment of all the sewage of the borough.

By an order dated the 18th Feb. 1903 made in the County Court the time limited by the order of the 6th Dec. 1898 for the completion of the works was extended until the 1st Jan. 1906. The plaintiffs by their statement of claim alleged that the corporation had polluted the river and asked for an injunction to restrain the defendants from polluting the river so as to cause it to be a nuisance or injurious to the occupiers of the castle and its appurtenances and so as to cause foul matters to be deposited upon the lands and that the defendants might be ordered to remove from the lands the deposit of foul matter caused by the pollution of the river by the defendants, and to cleanse the lake and watercourse.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

Sect. 15. Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act.

Sect. 17. Nothing in this Act shall authorise any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or water course, or into any canal, pond, or lake until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would effect or deteriorate the purity and quality of the water in such stream or watercourse or in such canal, pond, or lake.

Sect. 19. Every local authority shall cause the sewers belonging to them to be constructed, carried, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied.

Sect. 299. Where complaint is made to the Local Government Board that a local authority has made default in providing their district with sufficient sewers, or in the maintenance of existing sewers, or in providing their district with a supply of water, in cases where danger arises to the health of the inhabitants from the insufficiency or unwholesomeness of the existing supply of water, and a proper supply can be got at a reasonable cost, or that a local authority has made default in enforcing any provisions of this Act, which it is their duty to enforce, the Local Government Board, if satisfied, after due inquiry, that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of their duty in the matter of such complaint. If such duty is not performed by the time limited in the order, such order may be enforced by writ of mandamus, or the Local Government may appoint some person to perform such duty and shall by order direct that the expenses of performing the same together with a reasonable remuneration to the person appointed for superintending such performance, and amounting to a sum specified in the order, together with the costs of the proceedings, shall be paid by the authority in default; and any order made for the payment of such expenses and costs may be removed into the Court of Queen's Bench and be enforced in the same manner as if the same were an order of such court.

The Public Authorities Protection Act 1893 (56 & 57 Vict. c. 61) provides:

Sect. 1. When, after the commencement of this Act, any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect: (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.

Macmorran, K.C. and *R. Cunningham Glen* for the plaintiff.—Sec. 17 of the Public Health Act 1875, which re-enacts sect. 4 of the Local Government Act Amendment Act 1861 prohibits the discharge of sewage or filthy water into any natural stream or watercourse. Sect. 1 (*a*) of the Public Authorities Protection Act 1893 does not protect the defendants, as this is a case of continuance of injury or damage. The plaintiff cut off his water supply in July 1902, and this action was commenced in December of that year

Sect. 19 of the Public Health Act 1875 enacts that every local authority shall cause their sewers to be kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied. The corporation are guilty of some neglect to comply with the duty imposed upon them by this section, and they are therefore liable in damages.

Danckwerts, K.C. and *R. J. Parker* for the defendants.—The claim is for a mandatory injunction. The plaintiff cannot now claim damages. The river is to a certain extent polluted, but the outfalls which cause the pollution do not all belong to the corporation. They have constructed none of the ones that do belong to them. They have inherited them. If the plaintiffs allowed the river to go on to their land they must bear the consequences. Their remedy was not to take the water. A riparian owner is entitled to take water, but if it is, at the time he first takes it, to his knowledge polluted, he takes it at his peril, and his remedy is to sue for damages arising from the fact that he cannot use the water. The corporation is not responsible for anything in the nature of a nonfeasance. Something in the nature of a misfeasance must be proved. I submit there is nothing of the sort here. The corporation have a right to emit sewage through any outfall more than twenty years old. The increase of the volume of the sewage is due to, firstly, the growth of the population of Derby; secondly, fresh connections made by the population; thirdly, fresh connections made by the corporation. For the first two of these the corporation is not responsible. The corporation became the sanitary authority for the borough under the Public Health Act 1872, and they have made no outfalls since. A local authority has power to discharge surface water into a river or natural stream, even though it carries down sand and silt:

Durant v. *Branksome Urban District Council*, 76 L. T. Rep. 739; (1897), 2 Ch. 291.

The duty of a local authority under sect. 15 of the Public Health Act 1875 to make such sewers as may be necessary for effectually draining their district cannot be enforced by an action for *mandamus* brought by a private person. The only remedy for neglect is that given by sect. 299 of the Act:

Pasmore v. *Oswaldtwistle Urban District Council*, 78 L. T. Rep. 569; (1898) A. C. 387;
Robinson v. *The Mayor and Corporation of the Borough of Workington*, 75 L. T. Rep. 674; (1897) 1 Q. B. 619.

The corporation have only a qualified ownership in their sewers, and cannot prevent persons who have acquired a prescriptive right from using them unless they provide new sewers:

Reg. v. *Staines Local Board*, 60 L. T. Rep. 261.

The corporation are bound to give facilities to manufacturers to carry liquids from their factories into their sewers by sect. 7 of the Rivers Pollution Protection Act 1876. The corporation have a right by prescription as against the plaintiffs to pollute the river with sewage from the sewers which are more than twenty years old so long as they maintain the same flow. As regards drains joined to the old sewers by private persons, the corporation are not responsible for any increase in the pollution caused by them, and as regards new sewers the defendants must prove that the additional pollution is the cause of the mischief:

Attorney-General v. *Guardians of Poor of Union of Dorking*, 46 L. T. Rep. 573; (1882) 20 Ch. Div. 595;
Brown v. *Mayor, Aldermen, and Burgesses of the Borough of Dunstable*, 80 L. T. Rep. 650; (1899) 2 Ch. 378;
Attorney-General v. *Acton Local Board*, 47 L. T. Rep. 510; (1882) 22 Ch. Div. 221;
Attorney-General v. *Clerkenwell Vestry*, 65 L. T. Rep. 312; (1891) 3 Ch. 527.

If we are entitled to send down sewage which does mischief the plaintiffs cannot recover as regards new pollution unless they prove extra damage, which they have not done. They also cited:

The Mayor, &c., of Tunbridge Wells v. *Baird*, 74 L. T. Rep. 385; (1896) A. C. 434;
Cowley v. *Newmarket Local Board*, 67 L. T. Rep. 486; (1892) A. C. 345;
Russell v. *Men of Devon*, 2 T. R. 667;
Lloyd v. *Wigney*, 6 Bing. 489;
Darley Main Colliery Company v. *Mitchell*, 54 L. T. Rep. 882; 11 App. Cas. 127;
Chapman, Morsons, and Co. v. *The Guardians of the Auckland Union*, 61 L. T. Rep. 446; 23 Q. B. Div. 294;
Markey v. *Tolworth Joint Isolation Hospital District Board*, 83 L. T. Rep. 28; (1900) 2 Q. B. 454;
Gee v. *Metropolitan Railway Company*, 28 L. T. Rep. 282; L. Rep. 8 Q. B. 161;
Adams v. *Lancashire and Yorkshire Railway Company*, 20 L. T. Rep. 850; L. Rep. 4 C. P. 739;
The Mayor, &c., of Tunbridge Wells v. *Baird*, 74 L. T. Rep. 385; (1896) A. C. 434;
Carey v. *Mayor of Bermondsey*, 67 J. P. 111.

[BUCKLEY, J.—I am satisfied that the river is polluted, and that the pollution comes from Derby.]

Macmorran, K.C., in reply.—Sect. 19 of the Public Health Act 1875 imposes a duty upon a local authority, but, unlike that created by sect. 15, it is not one in respect of which complaint may be made to the Local Government Board under sect. 299:

Baron v. *Portslade-by-Sea Urban District Council*, 83 L. T. Rep. 363; (1900) 2 Q. B. 588.

There is no remedy for infringement of sect. 15 except under sect. 299, but that is not the case for a breach of sect. 19. The corporation ought for the purposes of sect. 19 to have constructed works under sect. 27. Cotton, L.J., in *Glossop* v. *Heston and Isleworth Local Board* (40 L. T. Rep. 736; 12 Ch. Div. 102), at page 124 of the report says: "It is not said that they have done any act the consequence of which has been to bring the sewage down to the river Crane. If that were so unless they could show that in doing that act, and so causing a nuisance to the plaintiff, they are protected by the Act of Parliament, it would be the duty of this court, as it has done in many cases already, to restrain the defendants from creating a nuisance, and although they are a public body having public duties and powers to perform those duties that would not exempt them from legal liability in consequence of a nuisance caused by them." The corporation are not justified in so carrying on their operations for draining the town as to drive away fish and prevent cattle from drinking the water of the river:

Attorney-General v. *Birmingham Borough Council*, 4 Kay & J. 528.

An injunction has been granted where the pollution of the water perceptibly increased as new houses contributed their sewage to the stream:

Goldsmid v. *Tunbridge Wells Improvement Commissioners*, 13 L. T. Rep. 332; L. Rep. 1 Eq. 161, affirmed on appeal, 14 L. T. Rep. 154; L. Rep. 1 Ch. 349.

Lord Romilly, M.R., says at page 169: "My opinion is that any person who has a watercourse flowing through his land and sewage which is perceptible is brought into that watercourse, has a right to come here and stop it; and that when the pollution is increasing and gradually increasing from time to time by the additional quantity of sewage poured into it, the persons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription against him." The corporation have used the outfalls, and have themselves greatly added to the bulk of sewage matter passing through them; all they can claim on the authority of the *Dorking* case is to continue to use the sewers in the same way as when they succeeded to them, they may not increase the volume. He also cited

Beckenham v. *Wood*, 60 J. P. 490.

Cur. adv. vult.

Dec. 3.—BUCKLEY, J.—For many years past, and for aught I know since sewers were first laid, the sewage of the borough of Derby, as that borough existed before 1877, and as extended in that year and as again extended in 1901, has been discharged in a crude state, without purification or treatment of any kind, into the river Derwent. The discharge is by certain outfalls of which I may dismiss two with but few words. The one is the Midland Railway outfall, which is not vested in the corporation, and is the outlet of drains which come only from the premises of the Midland Railway Company. This outfall to some extent no doubt, but exactly to what extent I am unable to say, contributes to the pollution of the river. The other, the Markeaton brook, is of little importance; it seems to be a brook rather than a sewer, and brings down no sewage at all, or at most the drainage of a very few houses. By the remaining outfalls the whole sewage of the borough is discharged as I have said into the river. These outfalls were all made more than twenty years ago, and the sewage thus discharged has for many years polluted the river. The pollution has been from at least the year 1872 a continually increasing pollution. As the population of the borough has increased; as new connections have been made to previously existing sewers; as new sewers have from time to time been laid; and as privies have from time to time been converted into water-closets, the volume of the sewage and the pollution of the river have continually increased. The plaintiffs are the legal owners, and the plaintiff Lord Harrington is the equitable tenant for life, of the Elvaston Castle and estate lying by the course of the river some five and a half miles below Derby. The estate extends in places along both banks, and in other places along one bank only of the river. There has existed for many years an intake from the river, a short distance above the castle, which, after a short course, brought water from the river into an ornamental lake lying at a short distance from the castle. The outfall from the lake passed along another channel again into the river some distance below. At the outlet from the lake, Lord Harrington and his predecessors in title have for many years had a water-wheel for which the power was obtained from the water which came in at the intake and flowed out at the lower end of the lake. It was used to pump water from an adjacent well into a tower at the castle and I believe another receptacle. This water was used for all purposes of water supply to the castle stables, gardens, and appurtenances. The plaintiffs say that the corporation have polluted the river, and ask, first, an injunction to restrain them from polluting the river, so as to cause a nuisance to the castle and estate; secondly, a mandatory injunction to compel them to do certain works of cleansing and removal of foul matter from the plaintiffs' lands; and, thirdly, damages for injuries done by the pollution of which they complain. As regards the pollution, the evidence is that it exists in a very gross degree. The defendants say that the river when it reaches Derby is already in a polluted condition. I need say no more about this, for the evidence of their own witnesses is that this pollution, so far as it exists, will have become innocuous and have disappeared altogether before the stream reaches the plaintiffs' lands. The pollution of which the plaintiffs complain is not attributable to anything done above the borough of Derby. The results of the pollution, quite shortly stated, have been that in the latter half of the decennial period ending in 1890 the pollution in the river and in the lake became so great that the fish in the river below Derby and in the lake died and were found floating in the water covered with slime, and in or about 1893 to 1897 Lord Harrington was removing cart-loads of fish killed by the pollution, that about 1895 the water weeds in Lord Harrington's intake from the river died and the weeds in the lake died (for while water-weeds may flourish upon a small amount they are killed by a large amount of sewage pollution), and that about the same time the water in the lake became so fetid and foul that residence at the castle became not only unpleasant, but to a large extent dangerous. Dr. Barnise, medical officer for the county, who has been subpœnaed in this action by both sides, and has given no proof to either, has proved what he found to be the state of facts in October 1903, and I can best give it in his own words. He says: "In consequence of a complaint from Lord Harrington, I paid a visit to Elvaston Castle and obtained samples of the water used for domestic purposes. The water is obtained from the lake in front of the castle, which in its turn is supplied by a feeder from the river Derwent. At the time of my visit the water being pumped up to the castle positively stank. There were hundreds of dead fish (chiefly tench) floating on the lake; in fact, there were so many close to the pumping station that there was a most offensive smell for twenty yards around. The sides of the lake and its feeder were covered with black stinking mud, and the water was bubbling with putrefaction. I followed the feeder up to the Derwent and saw pieces of excreta floating by. There is no other water available for drinking purposes, and, owing to the presence of a case of cholera in Derby, and the castle being only one hundred yards from the lake, in reply to the question put to me I could only

give the opinion that it was not under the circumstances safe to live there." That report is dated the 20th Oct. 1893. The state of pollution at the present day, taking the evidence of Mr. Hehner and of Dr. Howarth, who were both called for the defendants, is that the water at the intake is seriously polluted with sewage, with the result that the lake has become in a filthy and most dangerous state, to which the sewage has contributed, and according to Dr. Howarth at times of low river and of the first flood water the pollution at the intake is gross—meaning by that not merely that it is not fit to drink, but that it is so foul as not to be fit for impounding in a lake. Mr. Hehner, as regards the condition of impurity of the water at the intake, says that it is seriously polluted with sewage. At normal times he put it as being with few exceptions of such purity, or rather impurity, as the Thames Conservators will treat as being sufficiently good for the admission of a sewage effluent into the Thames. In other words, it does not approach at all to a proper condition of purity for a flowing river, but at most to such a condition as may be accepted from an effluent sewage discharge into a flowing river for the purpose of being mixed with a much larger volume of water and thus rendered innocuous. The lake, he says, was in a filthy, almost putrid, state. In 1898 the county council obtained from the County Court, under the Rivers Pollution Prevention Acts of 1876 and 1893, an order which I need not read at length, but which ordered the corporation to abstain from polluting the river. As regards obtaining that order, Lord Harrington says he thinks he most likely instigated the county council in the matter, and that he would have taken action if they had not. That order gave the corporation until the 31st Dec. 1902 to do what was required. That time has since been twice extended, and the second extension will expire on the 1st Jan. 1906. As long ago as the year 1872 the then Earl of Harrington, father of the present earl, commenced, and the present earl, upon succeeding in 1881, continued, to make repeated complaints and protests to the defendants against the grievous state of things which existed in the river. From the long correspondence which has been read in the case I extract the following by way of summary sufficient for my purpose, and taken roughly at successive intervals of ten years. On the 10th June 1872 the mayor stated in answer to a request that the subject of the sewage of Derby would receive attentive consideration, and asked that the matter might be permitted to remain in abeyance for the present. That request was repeated upon several occasions. On the 18th Dec. 1873 the local authority stated that they were awaiting reports, and the results of proposed legislation with a view of taking advantage of them. On the 1st June 1883 they stated that attention was being given to a comprehensive scheme of drainage for the borough, and on the 17th Dec. 1883 that no time would be lost in bringing before the corporation a scheme for adoption. On the 9th April 1892 the town clerk wrote that the corporation were making experiments and had retained Sir Frederick Bramwell and Mr. Harris and were acting under their advice. On the 11th Aug. 1892 the town clerk refused to give Lord Harrington any definite assurance in the matter, but stated that no definite time could be fixed until the Lockwood process had been tested, and so on. On the 4th Oct. 1894 he wrote that the committee had received the report of Sir Frederick Bramwell and Mr. Harris, and had it under consideration. Shortly stated, the effect of the correspondence is that the repeated complaints made and great forbearance shown by Lord Harrington and his father were met with repeated promises or assurances that something would be done, but that nothing, in fact, was done by the defendants to remedy the state of things which existed. Ultimately, in 1898, the order of the County Court was obtained. In 1901 the corporation obtained an Act giving them certain statutory powers to deal with the sewage. The intended works under the order of 1898 had not been, and probably could not be, constructed and finished by 1902, and in July of that year Lord Harrington found it necessary to close, and did close, the source by which the water of the river flowed into the intake of his lake. The result was that the water power which was employed to pump water for his house was destroyed. He had therefore to supply power for that purpose, and built an engine-house and put in an engine and a new pump, which, upon the evidence, was the most reasonable and cheapest way of meeting the difficulty of the destruction of the water power which he had previously enjoyed. On the 29th July 1902, in view of the closing of the sluice and the cutting off of the water, Lord Harrington's solicitors wrote that he would hold the corporation responsible for the expense to which he was put in connection with the new pumping apparatus and making new watering places for his tenants' cattle. To this, on the 16th Aug. 1902 the town clerk replied that the corporation "cannot accept any liability in the matter." In the result the writ in this action was issued on the 18th Dec. 1902. I will first deal with the question whether the plaintiffs can obtain the injunction which they ask to restrain the defendants from polluting the river so as to cause it to be a nuisance to them. For this purpose it is necessary to bear in mind that the sewage which is now polluting the river may come from any one of four sources of origin, viz.: (1) From sewers constructed many years ago, into which householders have for more than twenty years discharged their sewage; (2) from sewers not laid by the corporation, but which became vested in the corporation when they became the sanitary authority, into which householders have, by virtue of their statutory rights, made connections; (3) from sewers laid by the corporation; and (4) from additional sewage arising from the conversion of privies into water-closets under directions given by the corporation for that purpose. As regards the first class, it is, I think, settled by authority that persons who have discharged their sewage for more than twenty years have obtained a prescriptive right: (*Glossop* v. *Heston and Isleworth Local Board*, 40 L. T. Rep. 736; 12 Ch. Div. 102, at p. 111; *Attorney-General* v. *Dorking Guardians*, 46 L. T. Rep. 573; 20 Ch. Div. 595, at p. 601; *Reg.* v. *Staines Local Board*, 60 L. T. Rep. 261; *Brown* v. *Dunstable* (1899) 2 Ch. 378). It is true that this prescriptive right is not that of the defendants, but of persons who use the sewers of the defendants; but it would be impossible, I think, to grant an injunction which

would interfere with those prescriptive rights. The corporation have, in fact, as was decided in *Attorney-General* v. *Dorking Guardians* only a limited ownership in the sewers, and are not in the same position as a private individual would be, because they have in many cases no power to prevent householders from using them, and when they have power a landowner cannot obtain an injunction against them by reason of the fact that they in turn could obtain an injunction against the householder. It would, therefore, be impossible to grant an injunction which should extend to sewers of the first class, for the court will never enjoin a defendant unless it is satisfied that the party enjoined can obey the order. Similar considerations apply to sewers of the second class. The sewers of the first and second classes are a constituent, contributing to the total volume of sewage which is discharged through the outfalls, and if an injunction cannot be granted as regards the first and second classes, it is, I think, physically impossible and practically impossible for the defendants to comply with an injunction if an injunction were granted as to the sewers of the other two classes. This seems to be a first ground why an injunction cannot be granted. But, further, as regards the last two classes, as soon as the corporation have made new sewers or have permitted or directed connections into them or conversions of privies into water-closets, with consequent discharge of further sewage, there have arisen, as it seems to me, rights in individual under the statute to continue to discharge through the sewers which in fact have been constructed. An injunction could no doubt be granted to restrain the corporation constructing further sewers so as to pollute or increase the pollution, but it is not shown that they are doing so. Neither the rights of the parties nor the circumstances of the case seem to me to allow of an injunction which shall restrain the defendants as regards any sewers which have been constructed. These reasons are sufficient, I think, to show that the plaintiffs cannot obtain an injunction. But there are further grounds upon which I should be of opinion that an injunction ought not to be granted, supposing that it were possible to grant it. First, under the Rivers Pollution Acts, the plaintiff, Lord Harrington, as a person aggrieved, could obtain protection not only as regards sewage which the defendants cause to fall or flow or knowingly permit to fall or flow into the river, but also under the Act of 1893, as regards sewage which in fact falls or flows or is carried into the river after passing through the sewers of the corporation so that a larger protection than otherwise might be possible is afforded under those Acts; and in point of fact, by the order of 1898, which was obtained with the knowledge and at the instigation of the plaintiff, he has obtained such protection, and that protection is on its way to be given by the construction of works as to whose efficiency I have not to inquire in this action. Under these circumstances I should be slow to grant an injunction which would or might give him protection a second time, but a protection less, it may be, than has already been obtained under the order of 1898. Further, as a third ground, I think that in the exercise of its discretion the court would not grant an injunction upon the footing that the defendants are threatening and intending to continue the pollution when in fact they stand in a position in which by the statutes which govern them they are precluded from closing the sewers and are in fact taking steps to remove the cause of the pollution. For these reasons I think no injunction against pollution should be granted. Secondly, as regards the mandatory injunction which is asked, it seems to me that, and I think the plaintiffs' counsel conceded that, such a mandatory order is impossible. It is an order upon the defendants to go on the plaintiffs' land and do certain things there by way of removing an injury. The proper remedy (if any) in respect of this matter is in damages. It remains then to consider as regards the subject-matter of this mandatory injunction and the other matters in respect of which damages are sought whether the plaintiffs can obtain, and under which of the heads on which they rely, damages against these defendants. The defendants are liable, they say, generally for causing sewage to be discharged into the river and for not keeping their sewers so as not to be a nuisance—liable not for misfeasance only, but for nonfeasance also, and say that to throw sewage into the river so as to cause a nuisance is an illegal act, and that the defendants are consequently liable in damages for all the pollution which is caused by the total volume of sewage that is discharged into the river. They rely for the purpose of this argument upon sects. 15, 17, and 19 of the Public Health Act 1875. It was decided, however, in *Robinson* v. *Corporation of Workington* (75 L. T. Rep. 674; (1897) 1 Q. B. 619) and *Pasmore* v. *Oswaldtwistle Urban District Council* (78 L. T. Rep. 569; (1897) 1 Q. B. 625; (1898) A. C. 387) that the remedy for neglect of the duty imposed by sect. 15 of the Act is that given by sect. 299, that the neglect of this duty does not give a right of action to an individual whose property has been injured. The plaintiffs contend, however, that sects. 17 and 19 of the Act of 1875 create rights in respect of which they are entitled to a remedy against the corporation in respect of all the sewers belonging to the corporation or which the corporation use, and that sect. 299 does not apply to that case. But first, as regards sect. 17, it was decided in *Glossop* v. *Heston and Isleworth Local Board* (*ubi sup.*) and *Attorney-General* v. *Dorking Guardians* (*ubi sup.*) that sect. 17 is to be read simply as a proviso and that its effect, in the words of Cotton, L.J., is only this, that if the local authority want for the purpose of doing anything to rely upon authority given by the Act they must do that thing so as not to commit a nuisance. The section, says Cotton, L.J., does not mean that the local authority are to be considered as themselves using either by themselves conveying or by granting permission for sewage to be conveyed into the stream by means of the sewer which they did not construct; it has only the effect which I have stated. As regards sect. 19, it was decided in *Baron* v. *Portslade-by-Sea Urban District Council* (83 L. T. Rep. 363; (1900) 2 Q. B. 588) that sect. 299 does not apply to cases within sect. 19, but my observation upon that case and upon sect. 19 itself is this, that what was there dealt with was the physical construction or condition of the sewer as such. The plaintiff's complaint in this action is not that the sewers are foul (by which I mean that the sewer as a sewer is not

clean or not properly ventilated, or the like), but is that from the user of the sewer, whether the sewer itself be clean or unclean, properly or improperly ventilated, there is discharged an effluent which so pollutes the river as that he suffers injury five miles below. In my opinion sect. 19 is not addressed to that case. Mr. Macmorran relies upon the words, "that the sewers shall be kept so as not to be a nuisance." This does not, I think, mean or include the case where the matter complained of is that the sewer is so used as that a filthy discharge in excess of the purifying influences of the volume of the water in the river causes pollution at a point lower down the river. It has further been decided that damages cannot in such a case be recovered upon the ground of nonfeasance as distinguished from misfeasance. Thus, in *Glossop* v. *Heston and Isleworth Local Board* (40 L. T. Rep. 736; 12 Ch. Div. 102, at p. 117), James, L.J. says: "The only case the plaintiff has alleged or attempted to prove is that he has not been relieved from a damage to which he was subject before this body were called into existence in the way he hoped to be, and as he would be if they had done their work in draining this district." And in *Attorney-General* v. *Guardians of Poor of Union of Dorking* (46 L. T. Rep. 573; 20 Ch. Div. 595, at p. 609) Cotton, L.J. says: "Here they are doing nothing. They are not constructing a new system of sewers. It was said that they are in fact using this sewer by allowing it to be used as part of the existing system of drainage which is vested in them. That is, they are not substituting a new system of sewage, and, in my opinion, the mere fact that they have not substituted a new system of sewage cannot make this the using of the sewer by them when it is used, without any leave granted by them, under the rights which are granted by the Act to householders." And in *Cowley* v. *Newmarket Local Board* (67 L. T. Rep. 486; (1892) A. C. 345, at p. 352) Lord Herschell says that he doubts whether the broad general proposition can be supported that whenever a statutory duty is created any person who can show that he has sustained injury from the non-performance of that duty can maintain an action for damages against the person on whom the duty is imposed. In my judgment, the defendants are liable in damages only for such acts as they have done, and which have occasioned the pollution by which the plaintiffs are injured. They are liable in damages for that which they have done, but not for that which they ought to have done but have failed to do. This being so, I must confine my attention to cases in which either (1) the corporation has laid new sewers, or (2) has invited or permitted householders to make new connections with the sewers of the corporation, or (3) has permitted or required the conversion of privies into water-closets so as to increase the volume of sewage. No exact evidence has been adduced to show what proportion of the total discharge of sewage into the river is attributable to these causes; but both parties agree that they have put before the court such evidence as there is, and that it would be practically impossible to ascertain what is the exact amount of new sewers, new connections, and so on, which would lead to the answer to the above question. Minutes have been referred to by which I am satisfied that the corporation have to a very large extent within the last twenty years laid new sewers and required conversion of privies into water-closets, and procured new connections to be made. I have also the evidence of Mr. Ward that in the period to which he can speak—viz., from 1898 to 1902—the corporation laid about a mile or a little more of new sewers, made up of many different lengths, although some of those were replacement of old sewers. I have, further, the fact that the population of Derby in 1881 was 81,470, being an increase of, say, about 50 per cent. Upon these materials both parties concur in asking me to act as being the best materials for assessing the damages so far as this point is concerned. The several heads of damage are as follows: First, the plaintiffs say the pollution of the water of the river flowing by the intake into the lake has so fouled the lake that it must be cleaned out, and they measure their damage by the cost of cleaning out the lake. I think this is wrong. In the first place, the silting up of the lake is due very largely to the deposit of suspended matter which is brought down by the Derwent, which comes from the higher parts of Derbyshire and in times of flood rises rapidly and brings down a large quantity of suspended matter. The corporation are not responsible for this. It is due, further, in part to vegetable matter from the leaves of the trees and hedges which have fallen into the water, and to the decay of the water weeds, and so on, in the lake. To a comparatively small extent the silting up is due to the deposit of sewage pollution. No doubt the sewage pollution has acted so as to render more acute a fetid condition which would have resulted in a less degree from the gradual accumulation of decaying vegetable matter mixed with the deposit brought down by the river in flood. The lake was last cleaned out in 1867. It is now very much silted up, and requires to be cleaned out again. To say that the whole of the expense of so doing is damage caused by the pollution of the river is, to my mind, extravagant. Further, the plaintiffs are entitled to the inflow at their intake of pure water, but if, as the fact was, they knew that the water was impure, their remedy was to exclude it and to claim damages for the loss which they sustained by not enjoying the supply. They cannot have as legal damages the expense to which they have been put by taking water which they knew to be impure. They can have as legal damage the expense to which they have been put by procuring by other means a supply of pure water in the place of that of which this wrongful act of the defendants has deprived them. But, secondly, when the plaintiffs were, by reason of the pollution, driven to close the intake in 1902, they lost the water power which enabled them to pump the water for the supply of the house. Such loss as has resulted therefrom is, in my judgment, recoverable as good legal damages. The plaintiffs were entitled to the flow of pure water. Had they had it they would have enjoyed the water power. The defendants' act rendered it necessary for them to cut off that intake. The loss which they have thus sustained is, in my judgment, attributable to the defendants' wrong. Thirdly, the water of the river was used for watering cattle and horses belonging to the earl or his tenants in the meadows adjoining the river. The pollution of the river has rendered it necessary to take other means for watering them. This

is, I think, good ground for damages. Fourthly, the riverside house situate at Borrowash on the river has depreciated. There is a contest of fact upon this as to whether the depreciation of rental value was due, in part at least, to the defective water supply (which was taken from the adjacent canal) or to the bad state of repair of the premises, or whether it was due to the foul state of the river, or to what extent it was due to any or which of these causes. I think the result of the evidence is that the condition of the river has played a large part in the depreciation of the value of that property. As regards the want of repair, the house was offered to a tenant upon the terms that the lessor would put it in repair, and, at any rate, some damages, I think, are recoverable in respect of this house. Fifthly, the plaintiffs claim damages in respect of injury to the amenities of the castle by the fouling of the lake. There is no legal damage under this head. The earl has never wished to let the place, and no pecuniary damage is attributed to the fact that the castle by loss of the lake became disagreeable as a residence. Sixthly, damages are recoverable, I think—to the proper figure, whatever it is—in respect of the injury to the fishing in the river and the lake. I think I have now travelled through the principal heads of the damage. The defendants contend that, having regard to sect. 1 of the Public Authorities Protection Act 1893, the plaintiffs can recover damages for no longer period than six months before the issue of the writ. To determine this point it is necessary to ascertain the meaning of the words in the section—"in case of a continuance of injury or damage." It cannot be disputed that for one cause of action all damages incident to it must be recovered once and once only, so that, for instance, if by the removal of the soil the defendant causes the walls of the plaintiff's house to crack, the plaintiff's course of action is one and one only, and that none the less because the house does not at once show all the damage done to it, but manifests subsequently by degrees that the damage has been done. Upon this *Lloyd* v. *Wigney* (6 Bing. 489) was cited, being a case upon the words of an Act which provided that an action must be brought within six calendar months "after the thing done." But if the result of the act is that one damage is done to-day and another subsequently, there is nothing to prevent a fresh action *toties quoties* fresh damage is inflicted: (*Darley Main Colliery Company* v. *Mitchell*, 54 L. T. Rep. 882; (1886) 11 A. C. 127). If as the result of an act done to-day damage results a year later, the cause of action arises, not at the date of the act, but a year later when damage results. No cause of action arises from the act if it at that date created no damage. The right of action arises, not from the act, but from the resulting of damage from the act. *Backhouse* v. *Bonomi* (9 H. L. Cas. 503) established that proposition. There is, however, a further case with which this action is particularly concerned—viz., a continuing act which produces subsequently from day to day a recurrent damage. There is thus created within the principle which I have stated a fresh cause of action every day, and this, I conceive, is what is referred to in the section by the words, "in case of a continuance of injury or damage." The words do not mean or refer to a damage inflicted once and for all which continues unrepaired, but a new damage recurring day by day in respect of an act done, it may be for once and for all at some prior time, or repeated, it may be, from day to day. In such case there is what Channell, J. in *Carey* v. *Mayor of Bermondsey* (67 J. P. 111) calls a continuing cause of action. Where this is the case I think that, within sect. 1 of the Public Authorities Protection Act, an action will lie when instituted six months next after the ceasing of the continuing injury or damage. That is, I think, the present case. These plaintiffs are, therefore, I think, entitled to recover for a greater period than six months, and up to the period of six years limited by the Statute of Limitations. The damage which the plaintiffs have in fact sustained is, under the circumstances which I have stated, attributable partly to acts for which the defendants are not, and partly to acts for which the defendants are, responsible; it is also attributable partly to the Alvaston outfall, which is not complained of in this action, and partly to the Midland Railway outfall, for which the defendants are not responsible. In assessing the damages recoverable against them I have borne these points in mind. I am conscious that without a more exact knowledge of the extent to which the defendants have by acts of their own as distinguished from acts of nonfeasance contributed to the pollution the question of the proper amount of damages is not capable of any exact solution. Both parties, however, have concurred in asking me to assess the damages upon the materials before me, being, as they say, the best which, in fact, can be obtained. After giving the best consideration I can to the evidence before me and all the circumstances of the case, I think the plaintiffs are entitled to substantial damages, and I assess them at 500*l*. I have considered whether the fact that the plaintiffs have not succeeded in obtaining the injunction which they have asked ought to affect the costs of the action. I think not. I give judgment against the defendants for 500*l*. and the costs of the action.

Solicitors for the plaintiffs, *Walfords*.

Solicitors for the corporation, *Sharpe, Parker, Pritchards, Barham*, and *Lawford*, agents for *G. Trevelyan Lee*, Town Clerk, Derby.

Nov. 11 *and* 15, 1904.

(Before WARRINGTON, J.)

PARRY *v.* METROPOLITAN BOROUGH OF HAMMERSMITH. (*a*)

*Metropolis—Street widening—Compulsory purchase — Borough council — London County Council—*57 *Geo.* 3, *c. xxix.* (*Michael Angelo Taylor's Act*), *s.* 80.

The metropolitan borough of H. had formally adjudged certain land to be an obstruction to the widening of a street, within sect. 80 *of* 57 *Geo.* 3, *c. xxix., and had served notice to treat for this land on the owners, the vicar and churchwardens of St. P.'s, H. This "adjudication" had been made in pursuance of an agreement to assist the London County Council in a scheme for constructing electric tramways*

(*a*) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

in the street. It was argued for the vicar and churchwardens, who had brought an action against the borough council, and now applied for an interim injunction to restrain them from enforcing their compulsory powers under the Act, that this was not a bonâ fide *exercise of their statutory powers by the borough council, and that they ought to be restrained from acquiring the land in this way.*

Held that, upon the facts, this was a bonâ fide *adjudication by the borough council, even though the necessity for widening the street was brought about by the action of the London County Council in proposing to run a tramway down it, and that the motion must be refused.*

APPLICATION by the plaintiffs in the action, the vicar and churchwardens of St. Paul's Church, Hammersmith, for an injunction restraining the defendants, the metropolitan borough of Hammersmith, from proceeding under a notice given by them in accordance with the provisions of Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.), enabling local authorities to obtain possession of land necessary for widening streets.

The matter arose in the following way: In the year 1902 the London County Council applied for an Act enabling them, amongst other things, to construct a tramway which should pass down Queen-street, Hammersmith, which was bounded on one side by the Church of St. Paul and a disused graveyard belonging to that church. The Bill of 1902 did not contain any provisions which would enable the county council to take the land compulsorily under the Lands Clauses Consolidation Act.

The borough council of Hammersmith presented a petition against the Bill, with the object (as the court held) of obtaining, as a condition of the authority to construct the tramways, the widening of Queen-street.

The petition so presented was withdrawn on certain terms which were expressed in an agreement dated the 30th July 1902, made between the London County Council of the one part and the borough council of the other part. It recited the introduction of the Bill, and it stated the fact that the borough council had deposited a petition in Parliament against the Bill, and had agreed to withdraw its opposition upon the terms expressed in the agreement. Clause 1 of the agreement provided that before constructing the tramway in question the county council would, at its own expense, widen the roadway of Queen-street in a part lying immediately to the north of that now in question. Clause 2 provided that:

> The county council will, provided it can obtain the necessary consents, widen the road of Queen-street aforesaid between the points C and D on the said plan and will set back the church railings and kerbs to the new lines respectively indicated by red and dotted red lines on the said plan. The borough council will assist the county council in obtaining the consents aforesaid, and will contribute one-third of the expense of the said widening between the points C and D [the widening now in question].

There followed other provisions in the agreement with respect to alterations to a cab shelter, a drinking trough, and as to paving the street.

The piece of land between the points C and D on that plan was the piece of land now in question.

Subsequently to the making of that agreement negotiations were entered into between the county council and the vicar and churchwardens of St. Paul's for the purpose of the acquisition by purchase by the county council from the vicar and churchwardens of the piece of land necessary for the proposed widening. Those negotiations came to an end in the month of June 1904.

On the 27th July 1904 in this year a meeting of the borough council was held at which a report was presented by their law and parliamentary committee, and the part of that report material for the present purpose was headed "Queen-street improvement," and was as follows:

> A letter has been received from the London County Council stating that when the council's Bill for the widening of the Fulham Palace-road was before the committee of Parliament an agreement was entered into between the council and the borough council to the effect that the county council would arrange for the widening of Queen-street by the acquisition of a portion of St. Paul's churchyard, that it has accordingly been in negotiation with the vicar of Hammersmith for the acquisition of the necessary property and it is now found that it will considerably assist the negotiations if the borough council will grant its aid by putting in force on behalf of the London County Council its statutory powers under the Act of 57 Geo. 3, c. xxix. That there have been many cases where compulsory powers of acquisition of property had been exercised by local authorities in London on behalf of the council, and it has been the general practice for the local authority to appoint the council's solicitor and valuer to act in the matter; no charge being made for the services of the council's officials so acting; and enclosing copies of the formal resolution which is usually passed in similar cases and asking to be supplied with two sealed copies thereof after it has been passed by the borough council and also inclosing three copies of the plan prepared by the council's valuer and referred to in the resolution and asking that these might be sealed and two copies thereof returned to the council; we recommend that the following resolution be adopted.

The resolution, which was afterwards passed by the council, was as follows:

> That for the improvement of the street or public place known as Queen-street in the parish of Hammersmith within the metropolitan borough of Hammersmith and for the public advantage and under and in pursuance of the powers vested in them by the Act of 57 Geo. 3, c. xxix., this council do alter, widen, and extend the said street or public place and do hereby adjudge that so much of the lands, tenements, hereditaments, and premises of the said street or public place as is coloured red on the plan in duplicate produced to the council and signed by the mayor and hereinafter referred to as the signed plan projects into obstructs or prevents the council from so altering widening or extending the said street or public place and that the possession occupation and purchase of so much of the said lands, tenements, hereditaments, and premises as is shown by the red colour on the signed plan will be necessary for that purpose.

There was a second resolution appointing Mr. Blaxland, solicitor, and Mr. Andrew Young, the valuer of the London County Council, solicitor and agent of the borough council, to serve the requisite notices and take the necessary steps.

In pursuance of that resolution the borough council on the 8th Sept. served upon the vicar and churchwardens of St. Paul's a notice under the Act to the effect that for the improvement of the streets and public places within the borough and

for the public advantage the council, under the powers of the Act, had resolved to alter, widen, and extend Queen-street and had adjudged:

That as much of the lands, tenements, hereditaments, and premises, of the said street or public place as was coloured red on the plan . . . projected into obstructed or prevented the council from so altering widening or extending the said street or public place and that the possession occupation and purchase of so much of the said lands tenements, hereditaments, and premises as was shown by the red colour on the plan would be necessary for that purpose. [Then followed a common notice to treat under the provisions of 57 Geo. 3, c. xxix.]

E. F. Spence for the plaintiffs.—All the cases show that there must be a *bonâ fide* determination by the borough council that it is expedient to widen the street in question, and it must adjudge that the land in question is required for such a purpose. Here it has not in fact done so, but has only acted with a view to assisting the county council. Landowners are thus indirectly deprived of the right of opposing such schemes before Parliament.

Norton, K.C. and *Method* for the defendants were not called upon.

WARRINGTON, J. having stated the facts as above, continued:—The Act in question is a local and personal Act of 57 Geo. 3. It is entitled "An Act for better paving improving and regulating the streets of the metropolis and removing and preventing nuisances and obstructions therein;" and then sect. 80 provides—I will read it shortly—"that, for the improvement of streets in the parochial or other districts within the jurisdiction of this Act for the public advantage, it shall be lawful for the local authority from time to time to alter, widen, turn, or extend any of the streets," and to do other things, which I need not mention, and that "if any house, walls, buildings, lands, tenements and hereditaments, or any part thereof, shall be adjudged by the local authority to project into, obstruct, or prevent them from so widening the streets, and that the possession, occupation, and purchase of such lands will be necessary for that purpose, it shall be lawful for the commissioners to treat with the owner or owners, occupier or occupiers, of the land for the purposes aforesaid;" and then are contained powers for throwing the land so acquired into the streets, and with that I need not trouble. There have been many cases coming before the courts in which the exercise by local authorities of these powers has been questioned, and I think it is agreed on all hands here, and assented to by Mr. Spence, that the principle which is to be deduced from those authorities is this, that a local authority desiring to put the Act into operation must *bonâ fide* come to the conclusion that it is expedient to widen (I am only dealing with widening) the street in question, and, having come to that conclusion, must further *bonâ fide* adjudge that the land in question prevents such widening, and for that purpose ought to be acquired. I think that is the true result of all the authorities that have been cited. Now, it is contended here that the local authority had not *bonâ fide* determined that the street ought to be widened. It cannot be said that if they had come to that determination, they have not *bonâ fide* adjudged that the land in question would prevent it, because obviously it would. But it is contended that they have not *bonâ fide* determined that the street ought to be widened. It is said that they had come to the resolution which is questioned here, not because they want the street widened, but because the county council have requested them to help them in constructing the tramway. That is the argument. Is that argument borne out by the facts? In my opinion it is not. It is true the widening of the street is brought about by the fact that the county council wanted to bring a tramway down the street. The borough council, I think I am entitled to infer, thought that the tramway would be an advantage to the borough, but thought that that advantage could not properly be obtained unless the street were widened, but the desire to widen the street came not from the county council, who would no doubt be very glad to construct their tramway without the expense of widening it if they could have done so, but from the borough council, and it seems to me therefore that I find on the facts which I have mentioned an honest and *bonâ fide* determination on the part of the borough council that it is expedient to widen the street, and that resolution seems to me to be an honest *bonâ fide* resolution, and none the less so that the immediate occasion for it was the proposal of the London County Council to lay the tramway, and certainly none the less so that by reason of that desire of the London County Council the borough council have been able to obtain a contribution to the expense of widening—of course for the benefit of their ratepayers—which they would not otherwise have been able to obtain. The only circumstance that seems to me to give any ground whatever for the present application is the terms of the letter of the county council and the terms of the report of the parliamentary committee which I have read. I must say I think the letter was most unfortunate, not because it has really made otherwise than *bonâ fide* that which I have come to the conclusion is a *bonâ fide* determination on the part of the borough council, but I think it was unfortunately worded on the part of whoever it was wrote it when it requested the borough council to exercise its powers on behalf of the county council. In my view, though that was the form which the letter took, the borough council did not exercise its powers on behalf of the county council at all; they are exercising a power on their own behalf, no doubt thereby facilitating an improvement desired both by themselves and by the London County Council, but not in any other respect on behalf of the London County Council. I think the letter was unfortunate, and I think the report of the committee for the same reason was somewhat unfortunate, because I cannot help thinking that it is those two documents which have given rise to the present action. But the conclusion I come to is that the borough council are entitled to proceed with their notice to treat, and I must therefore refuse the motion.

Motion refused.

Solicitors for the plaintiffs, *Bull* and *Bull*.
Solicitor for the defendants, *W. A. Blaxland*.

KING'S BENCH DIVISION.

Nov. 18, 21, *and Dec.* 19, 1904.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

WOLFE AND OTHERS (apps.) *v.* CLERK OF THE SURREY COUNTY COUNCIL AND ANOTHER (resps.).

REEVE AND OTHERS (apps.) *v.* SAME (resps.). (a)

Registration of voters—Parliament—County vote—Pew rents—Vicar of church in Parliamentary borough—Receipt by vicar of pew rents of 10*l. a year and upwards—"Occupation" of church by vicar—Right of vicar to claim county vote in respect of pew rents—Representation of the People Act* 1832 (2 *& 3 Will.* 4, *c.* 45), *s.* 24.

The vicar of a district church, which had been built pursuant to the Church Building Acts on land granted for that purpose, and which had been duly consecrated, annually received, as such vicar, from the churchwardens for his own use and benefit the proceeds of pews which had been let by them to the amount of 40*l. The church was situated in a Parliamentary borough in which the vicar resided. The vicar claimed a Parliamentary vote for the county in respect of his freehold in the land on which the church stood by reason of his receipt of the pew rents to an amount exceeding* 40*s. a year. Objection having been taken that the vicar "occupied" within the meaning of sect.* 24 *of the Representation of the People Act* 1832 *the land on which the church stood, and that as his "occupation" was sufficient to confer on him the right to have a vote for the borough, he was thereby debarred from claiming a county vote:*

Held, that the receipt by the vicar of the pew rents did not, either by itself or taken in connection with the fact of the vicar's legal possession of the land and of the church upon the land, constitute an "occupation" of the land within sect. 24; *that he was not "occupier" within the meaning of that section, and was therefore not prohibited by the section from being registered as a voter for the county; and, further, that the receipt of the pew rents, as the amount exceeded* 40*s. a year, was sufficient to entitle him to a county vote in respect of his freehold.*

WOLFE AND OTHERS (apps.) *v.* CLERK OF THE SURREY COUNTY COUNCIL AND ANOTHER (resps.).

CASE stated by the revising barrister for the Wimbledon Division of the county of Surrey.

At a court held before the revising barrister, the Rev. Edward John Wolfe, 17, Thornton-avenue, Streatham Hill, claimed a county Parliamentary vote for the Wimbledon Division of the county of Surrey in respect of his freehold benefice, St. Thomas, Telford Park, Streatham. His claim was duly objected to and the revising barrister disallowed the claim. Due notice of appeal was given, and the revising barrister gave leave to appeal.

The facts were as follows:—

The vicarage of St. Thomas was a new district parish or chapelry cut out of the new parish of Christchurch, in the ancient parish of Streatham, in the Streatham ward of the metropolitan borough of Wandsworth and the Clapham division of the Parliamentary borough of Battersea and Clapham.

The claimant lived in his dwelling-house in the parish of St. Thomas, in the above-mentioned Parliamentary borough.

The deed of consecration, dated the 21st Dec. 1902, recited

That whereas the minister, churchwardens, and certain inhabitants of the parish of Christchurch have represented to the bishop that by deed dated the 30th March 1899 made between Lees Knowles of the one part and the Ecclesiastical Commissioners of the other part a piece of land was conveyed to the Ecclesiastical Commissioners and their successors to be held for the purposes of certain of the Acts of Parliament for building churches and to be appropriated as the site of the then intended new church of St. Thomas with the surrounding yard and inclosure thereto belonging.

That a commodious building was erected thereon and completed and fit for Divine service.

That it was intended that the said church should be enlarged as soon as practicable, and that when so enlarged it would contain 850 sittings, of which 300 sittings should remain for ever free and unappropriated.

And further recited

That by deed dated the 1st Nov. 1899 the right of patronage and nomination of the said intended new church of St. Thomas should be vested for ever in certain trustees parties to the said last-mentioned deed.

That the said minister, churchwardens, and inhabitants of Christchurch have besought the bishop to consecrate the said building as and for a church. And the consecration deed declares the said building duly consecrated.

The said consecration deed contains no reference to sittings or pews save as hereinbefore stated.

The claimant was duly inducted into the vicarage by deed dated the 29th Dec. 1903, which recited that the vicarage of St. Thomas, Telford Park, was constituted by an Order of His Majesty in Council dated the 9th July 1903, gazetted the 17th July 1903. The revising barrister had informed himself of the contents of this Order in Council by referring to the *Gazette*.

The Order in Council stated that the Ecclesiastical Commissioners, acting in pursuance of the Church Building Acts 59 Geo. 3, c. 134, 2 & 3 Vict. c. 49, 3 & 4 Vict. c. 60, and 19 & 20 Vict. c. 55, assigned a district chapelry to the consecrated church of St. Thomas in the new parish (sometime chapelry district) of Christchurch.

The boundaries of the "district chapelry" of St Thomas were defined by the Order. The Order assigned to the minister of the chapelry all the fees for marriages, baptisms, churchings, and burials. This constituted St. Thomas a parish by statute. The revising barrister saw in the Order in Council no reference to churchwardens or to sittings or pews.

The freehold of the piece of ground constituting the site of the church and the surrounding yard and the inclosure thereto belonging vested in the claimant on induction as vicar of the new parish.

The church had not been enlarged since the date of consecration.

The church was fitted with sittings or "pews," consisting of rows of benches open at the ends and fixed on the floor, each bench was numbered and had room for several sitters. Sittings were let, one or more, to any person applying for the same. They were let for half a year and not longer. No pew or seat was sold outright. The

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

sittings were let in writing specifying the number of the pew or sitting and the price. No such writing or copy thereof was produced to the revising barrister.

The sittings were let for use during the ordinary public services only and not for additional or special or semi-private services, and if the seat-holders were not in their places at the commencement of divine service the claimant, or those acting for him, could put strangers into the seats that were let but not occupied.

The letting of sittings was actually done by the churchwardens. The claimant's churchwarden collects the seat money and hands it over to the claimant, less cost of collection, for the claimant's own use and benefit. The amounts collected from the letting of seats did not appear in any of the accounts of the parish of St. Thomas. All the sittings were lettable, but in fact many were untaken, though to be let.

There were no declared free places in the church of Thomas at present. The scale of rents for sittings was fixed by the claimant in consultation with the churchwardens. The receipts for "pew rents" had been so far at the rate of 40*l.* a year.

Before the claimant was instituted or inducted into the living a number of questions were put to him in print or writing and he answered them, returning the paper to the registry of the diocese. Some of the questions related to the sources from which the claimant's income might come, and the claimant made it plain by his answers to the questions that he should look to seat-letting for part of his income.

Income derived from letting of sittings was uncertain and fluctuating, and greatly depended on the circumstances of the people and the character and ability of the vicar.

There was no residence attached to the living or benefice; there was no glebe or tithe; there was no income from land unless as or save as hereinbefore appears.

The hearing was twice adjourned for purposes of further evidence.

No documents were produced in court save copies of the consecration and induction deeds hereinbefore mentioned, and a copy of the forms of declarations and oaths usually made or taken before institution.

No evidence or proof of right to charge for sittings or of an assignment of pew rents save as above was given.

The revising barrister found as a fact that there had been no assignment of pew rents whatsoever to the new church or vicarage or benefice, and he was of opinion that neither the churchwardens nor the claimant had any legal right to reserve for money to be paid to the claimant any seats in the church, and that the price could not be recovered in an action.

The churchwardens were under the circumstances aforesaid the claimant's agents. The claimant and the churchwardens were acting in good faith, and the letting was under the circumstances not unreasonable.

Similar letting of seats outside the law was practised in several churches of new parishes in South London to the knowledge of the bishop and other ecclesiastical authorities. In the greater number of new parish churches in South London there was no letting of seats.

The parishioners of the claimant's parish did not contest or dispute the aforesaid letting of seats by the claimant.

The letting was likely to continue in the near future in the claimant's parish, and income of over 10*l.* would continue to the claimant from this source.

The claimant occupied as owner the said freehold land and the land and the church building, and also occupied as tenant or owner a house in which he lived in the parish (all within a Parliamentary borough) of such value as would confer on him the right of voting at Parliamentary and other elections for the borough in respect of the 10*l.* tenement qualification.

The claimant's case was based solely on the pew rents.

It was contended by the objector that the pew rents were unlawful, as there was no statutory or other proper authority or sanction for charging for the pews or sittings; that the income was in its nature too fluctuating and uncertain, and that under the circumstances there was no income or receipt, or no income or receipt sufficient in law, from land within the parish such as to entitle the claimant to a county Parliamentary vote in respect thereof.

Further, in the alternative, that the claimant was in occupation of land alone, or land and building of sufficient value to confer on him the borough vote, and that under the 24th section of the Representation of the People Act 1832 he could not successfully claim the county Parliamentary vote; that the subsequent statute exempting ecclesiastical buildings from rating did not affect the question, and that the claimant could not sever the property occupied by him as owner or tenant so as to get the two votes.

The revising barrister held:

(*a*) That the claimant's freehold land was of the value of 10*l.* a year and upwards, and that he had a yearly income of that amount from the land, and that the income derived as aforesaid was sufficient in law to confer the freehold vote. (*b*) That he occupied the land within the meaning of the 24th section of the Representation of the People Act 1832, and he disallowed the claim.

The names of seven other persons who were in the list of owners in the same division, and whose names were set out in a schedule hereto, were duly objected to for the same reasons and under similar circumstances. Due notice of appeal was given in each case, and the revising barrister gave leave to appeal, and the appeals were consolidated.

The revising barrister struck out the name of the claimant and the names of the seven other persons.

The question for the decision of the court was whether the decision of the revising barrister was correct. If the court should be of opinion that his decision was wrong then the register was to be amended by inserting therein the name of the claimant and the names of the seven other persons.

REEVE AND OTHERS (apps.) *v.* CLERK OF THE SURREY COUNTY COUNCIL AND ANOTHER (resps.).

CASE stated by the revising barrister for the Wimbledon Division of the county of Surrey.

At a court held before the revising barrister the Rev. Arthur Reeve, of 11, Nottingham-road, Croydon, claimed a county vote for Wimbledon division in respect of his freehold benefice, St. Peter's, Peter's-road, in the Parliamentary and county borough of Croydon. His name was duly objected to, and the revising barrister disallowed the claim, giving leave to appeal.

The facts were as follows:—

The claimant was vicar of St. Peter's, a new parish cut out of the ancient parish of Croydon, pursuant to the Church Building Acts. The freehold of the church and vestry site and the surrounding yard and the church caretaker's house were vested in the claimant under the statute.

The church caretaker's house was occupied rent free by the caretaker of the church. This house was rated at 16*l.*, and the rates were paid by the churchwardens. There was no residence for the vicar attached to the living. The caretaker's house was detached from the church and adjoined the churchyard.

There were no burial fees in respect of burials within the parish. The vicar lived in a house in the parish. The church and vestry buildings and the yard surrounding the same were used solely for the purposes of religious worship.

The vicar's income was in part 50*l.*, a money grant from the Ecclesiastical Commissioners, and part from "pew rents" amounting to over 600*l.* a year, but subject to a charge or payment of 170*l.* a year to the previous vicar, and subject also to paying one curate.

The pews are inclosed; single sittings are let, and the letting is done by the churchwardens, who receive the money. The pew rents fluctuate. Before the present vicar was appointed not long ago the pew rents fell to 300*l.* a year.

The parish of St. Peter's was constituted under the Church Building or New Parishes Acts, about the year 1854. The Ecclesiastical Commissioners settled a scale of pew rents, and assigned pews to be let by the churchwardens, and directed the churchwardens how the pew rents should be dealt with. They collected the money and paid the vicar.

The objector contended that the pew rents were vested in or given to the churchwardens; that under the Church Building or New Parishes Acts the pew rents could not be vested in the vicar of a new parish; and that outside the Ecclesiastical Commissioners and the persons referred to in 1 & 2 Will. 4, c. 38, s. 4, there was no person or authority who could create or assign pew rents in a new parish.

Further, the objector contended that the income from pews was fluctuating; that it did not arise out of the freehold; that pew rents in this case were not ancient or customary income from a freehold such as would qualify for a vote.

Further objection was taken that the vicar occupied his freehold land and could not, under sect. 24 of the Representation of the People Act 1832 get a vote for the county in respect of the land which he occupied in the borough although it might not be rateable.

The claimant could not attend the court at the first hearing on the 29th Sept., or at the adjourned hearing on the 4th Oct., but he was represented by the party agent.

No documents or copies of or extracts from any documents were produced to the revising barrister.

The revising barrister was of opinion that the pews or sittings at St. Peter's were let by the churchwardens, and the "rents" were collected and expended by them as public parish officials pursuant to statutory authority; and he held that in this case and in connection with the pew letting, rent collecting, and expending, the churchwardens were not the agents or servants of the vicar.

The amount they were able to hand to the vicar yearly out of pew rents was not less than 200*l.* a year.

The freehold land owned and occupied by the claimant—namely, the site of the church and the yard surrounding the church—brought him an income of over 10*l.* from pew rents yearly, and that land was of that value clear of all outgoings.

The revising barrister held that the freehold land was of value sufficient in law to qualify him for the county vote.

He also held that the claimant occupied his said freehold land within the meaning of sect. 24 of the Representation of the People Act 1832, and that it was of value sufficient to confer the borough vote in the Parliamentary borough of Croydon.

He disallowed the claim.

The names of three other persons who were on the lists of owners in the division of Wimbledon and whose names were set out in the schedule to the case were duly objected to for the same reasons and under similar circumstances.

The revising barrister struck out the name of the claimant, the Rev. Arthur Reeve, and the names of the three other persons.

Notice of appeal was given in each case; leave to appeal was given and, at the request of the appellants and of the objector, the revising barrister ordered the appeals to be consolidated, and the party agents on both sides undertook, so far as they might properly do so, that technical points should not be raised on this appeal, but this understanding was not to be taken as in any way binding on the clerk of the county council, who was, pursuant to the statute, named as respondent.

The question for the opinion of the court was whether the decision of the revising barrister was correct. If the court should be of opinion that his decision was wrong, the register was to be amended by inserting the name of Arthur Reeve and the names of the three other persons named in the schedule.

The three persons named in the schedule were:

Rev. John Jenkins, St. John the Evangelist, Angel Town, S.E.; Rev. William R. Mowll, Christchurch, Brixton-road, S.E.; Rev. John B. Clark, St. Saviour's, Herne Hill-road.

Sect. 24 of the Representation of the People Act 1832 (2 & 3 Will. 4, c. 45) provides:

Notwithstanding anything hereinbefore contained no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament in respect of his estate or interest as a freeholder in any house, warehouse, counting-house, shop, or other building occupied by himself, or in any land occupied by himself, together with any house, warehouse, counting-house, shop, or other building, such house, warehouse, counting-house, shop, or other building

being, either separately or jointly with the land so occupied therewith, of such value as would, according to the provisions hereinafter contained, confer on him the right of voting for any city or borough, whether he shall or shall not have actually acquired the right to vote for such city or borough in respect thereof.

Daldy (*J. E. G. de Montmorency* with him) for the appellant in each case.—The revising barrister was wrong in disallowing the vote. The occupation referred to in sect. 24 of the Act of 1832 as disqualifying for a county vote must be the same kind of occupation as that required for a borough vote: (*Capell* v. *Aston Overseers*, 8 C. B. 1; and *Burton* v. *Aston Overseers*, 8 C. B. 7), in which Wilde, C.J., who delivered the considered judgment of the court, said (at p. 11): "The object of the 24th section is to exclude freehold estate occupied by the owner within the borough, which, by reason of its occupation, may confer the borough franchise, from also conferring a vote for the county within which it is situate." If the revising barrister is right, every vicar of a church who has an income from pew rents of the requisite amount would be entitled to a borough vote as an occupier of the church. In the case of a building like a church neither the vicar nor in fact anybody comes into the position in which he can be said to occupy the church. The pews belong to the churchwardens and not to the vicar, and the churchwardens have the duty of repairing the church. In Rogers on Ecclesiastical Law it is said (at p. 169): "The possession of the church is in the minister and churchwardens, and no person has a right to enter it when not open for Divine ervice, except by their permission." So, in *Griffin* v. *Deighton* (9 L. T. Rep. 814; 5 B. & S. 93, at p. 114), the right of the vicar in the church was considered, and Erle, C.J. quotes with approval the language of Sir John Nicholl in *Jarratt* v. *Steele* (3 Phillim. at pp. 169, 170) that the possession of the church is in the minister and the churchwardens, and that no person has a right to enter it when it is not open for Divine service except with their permission and under their authority; and he says that that is a perfectly sound exposition of the law in the temporal as well as in the ecclesiastical courts. Therefore the legal possession of the church is in the vicar and the churchwardens, and not, as is contended by the respondents, in the vicar alone. There may in some sense be a right to occupy the church, but, if so, that right is in the vicar and the churchwardens. The meaning of the word "occupy" was considered in *Rex* v. *Inhabitants of Ditcheat* (9 B. & C., at p. 183), where Littledale, J. said that a tenant of a freehold does not necessarily occupy, and that "in order to occupy, a party must be personally resident by himself or his family." That shows that personal residence is necessary, though that case no doubt dealt with the settlement of a pauper and not with the occupation of the church. In *Reg.* v. *St. Pancras Assessment Committee* (2 Q. B. Div. 581, at p. 588; s.c. *Willing* v. *St. Pancras Assessment Committee* 37 L. T. Rep. at p. 129), which was a rating case, Lush, J. said: "Occupation includes possession as its primary element, but it also includes something more. Legal possession does not of itself constitute an occupation." Applying that here, the possession of the church is not that of the vicar, but of the vicar and churchwardens. In *Beswick* v. *Alker* (27 L. T. Rep. 423; L. Rep. 8 C. P. 265), where a similar question was raised, Bovill, C.J. said: "There is nothing to show that the respondent was in the occupation of any land. A right to receive pew rents is not an occupation of land;" and during the argument he pointed out that sect. 24 related only to land occupied with a house or other building. So far as possession is concerned it is in the vicar and churchwardens, and so far as occupation is concerned there is not a qualifying occupation for a borough vote or a disqualifying occupation for a county vote. There can be no occupation of a thing like a church, or, if there can, the vicar cannot occupy it. But, assuming that he does occupy it, his claim here is in respect—not of the land—but of profits arising from his benefice, and as it has been decided that a person cannot occupy a rent-charge, so the vicar cannot be said to occupy these pew rents. If there is any occupation here by the vicar it is not an occupation of that thing which must be relied upon as giving a 40*s.* qualification as a freeholder, namely, the land. The appellant, as the freeholder of the church, was entitled by the receipt of these pew rents to a county vote (*Vickers* v. *Selwyn*, 21 Cox Mag. Cas. 374; 89 L. T. Rep. 747), and he had not such an occupation as would disentitle him under sect. 24 to that county vote. [He referred to the Church Building Acts to show that this chapelry was in the same position as a parish church.]

Roskill, K.C. (*William A. Casson* with him) for the respondents in each case.—The revising barrister was right in holding that the vicar "occupied" within the meaning of sect. 24. In Prideaux's Churchwardens (16th edit.), it is said (at p. 91): "As regards the fabric of the church and churchyard, the churchwardens are not a corporation in respect thereof, nor have they any property therein, for the freehold is in the parson and not in the parishioners or in the churchwardens in trust for them." And again (at p. 332) it is said: "But the possession of the church being in the minister, he is entitled to the possession of the key, and the churchwardens have only the custody of the church under him." The freehold and possession of the church are therefore in the vicar, and it cannot be admitted that the possession is in the vicar and churchwardens in the sense contended for on behalf of the appellants. The possession is in one sense in the vicar and churchwardens, but they are not in the same position as regards that possession. The vicar has such a possession as makes him rateable for the profits arising from the letting of pews. In *Robson* v. *Hyde* (Cald. 310), where the question arose as to the rateability to the relief of the poor, of a private building always used as a chapel, Buller, J. said: "I am very far from being satisfied that a member of the established church, a parson or vicar, who has the profits of the pews given him by the parish in increase of his benefice, is not rateable for such profits." So, in *Rex* v. *Agar* (14 East, 256), it was held that the trustees of a Methodist chapel, who annually received the pew rents for the seats in the chapel, were rateable to the poor rate in respect of these profits, on the ground that they were occupiers of the property, and that they were therefore rateable for the profits. In this case the vicar had no absolute right to these pew rents, and he would not have had them if he had not been occupier. There is therefore no distinction between those two cases

and the present case. It is said that the possession of the land is not in the vicar, but in the vicar and churchwardens. That this is not so appears from Phillimore's Ecclesiastical Law (2nd edit., p. 1463 *et seq.*), where the rights and duties of churchwardens are dealt with; and it is there said (p. 1464) "Churchwardens have only the custody of the church under the minister; if he refuses access to the church on fitting occasions, complaint must be made to higher authorities." The vicar has a sufficient possession of the church to enable him to maintain trespass against the churchwardens for breaking and entering the church (*Jones* v. *Ellis*, 2 Y. & J. 265), and the churchwardens have not, as against him, a joint possession of it with him (*ib.*, per Alexander, C.B., at pp. 274-5). The case referred to of *Griffin* v. *Deighton* (*ubi sup.*) does not affect this position. The freehold was admittedly in the vicar, and the above authorities show that he has a sufficient possession to create an occupation within the meaning of the section, and that therefore he was not entitled to claim a county vote in respect thereof. [He also referred to the judgment of Littledale, J. in *Rex* v. *Inhabitants of Ditcheat* (*ubi sup.*), and to the cases of *Nunn* v. *Denton* (1 Lutw. 178) and *Daniel* v. *Coulsting* (*ib.*, p. 230), and to *Beswick* v. *Alker* (*ubi sup.*) and *Vickers* v. *Selwyn* (*ubi sup.*).] With regard to the point as to the assignment of the pew rents to the vicarage, there was no evidence of assignment; in fact the evidence was all the other way. The claim to a county vote was therefore properly disallowed under sect. 24.

Daldy in reply.—The vicar has not such an "occupation" of the property as was contemplated by sect. 24. The occupation contemplated by that section is an occupation of property in respect of which the occupier could be rated to the relief of the poor. Since the passing of the Poor Rate Exemption Act 1833 (3 & 4 Will. 4, c. 30), which in sects. 1 and 2 exempted from rating churches which were exclusively appropriated to public religious worship, this church was exempt from the liability to be rated for the relief of the poor, and therefore, as this church is not such property as could be rated, there cannot be an "occupation" of it by the vicar within the meaning of sect. 24; and, moreover, the vicar could not have let the pew rents. The occupation franchise was given by the Act of 1832, and by sect. 27 it is conferred on every person who occupies "as owner or tenant" any house, &c. The vicar cannot be said to occupy the church either as owner or tenant. He clearly does not occupy as tenant, and the case of *Griffin* v. *Deighton* (*ubi sup.*) shows that he cannot occupy as owner, as it shows that both the vicar and the churchwardens occupy jointly. Reference was also made to *Ritchings* v. *Cordingley* (19 L. T. Rep. 26; L. Rep. 3 A. & E. 113, and to sect. 29 of the Act of 1832.

Cur. adv. vult.

Dec. 19.—KENNEDY, J. read the following judgment of the Court (Lord Alverstone, C.J., Kennedy and Ridley, JJ.):—The question for our consideration in the first case is whether the revising barrister was right in holding that the appellant (Mr. Wolfe) "occupied" within the meaning of the Reform Act 1832 (2 & 3 Will. 4, c. 45), s. 24, the land situate within the parliamentary borough of Wandsworth, in respect of which, as a freehold of the requisite yearly value, the appellant has claimed to be placed upon the list of voters for the Wimbledon division of the county of Surrey. The facts which are really relevant appear to us to be few. The appellant is the vicar of St. Thomas, Telford Park, Streatham. The vicarage was constituted by Order in Council dated the 9th July 1903. The deed of consecration of the church is dated the 21st Dec. 1902. It recites the earlier deed bearing date the 30th March 1899, whereby the land on which the church was afterwards built was conveyed by the donor to the Ecclesiastical Commissioners for the purposes of the Church Building Acts, and as the site appropriated to the then intended church; the building of the church, its intended enlargement, and the intended provision in the church, when enlarged, of 850 sittings, of which 300 should ever remain free and unappropriated. The appellant, as vicar, annually receives from the churchwardens for his own use and benefit the proceeds of pews which have been appropriated and let by them, to the amount of 40*l.* The churchwardens collect the pew rents and deduct the cost of collection before making the payment of the receipts to the appellant. The case states the finding of the revising barrister that the churchwardens are the appellant's agents. The learned revising barrister appears to think that the collection of pew rents in this church is illegal. We are not prepared to adopt this view. The Church Building Acts, beginning with 58 Geo. 3, c. 45, makes provision for the letting of the pews and the employment of funds so raised in the payment of the incumbent (see Cripps's Law Relating to the Church and Clergy, 6th edit., pp. 412-419). The letting of sittings in this church, which was built under those Acts, was contemplated at the time of the deed of consecration, as appears by the recitals in that deed. It is true that neither in that deed nor in the Order in Council creating the parish do we find the special provisions relating to pew rents (the settlement of a scale of pew rents, the assignment of pews, and the application of the pew rents) intended by the legislation of the Church Building Acts (*cf.* 58 Geo. 3, c. 45, ss. 77, 78). But, if the point were material, we should not find ourselves able on this account to hold that the collection of pew rents in this church was contrary to law. The real question, however, which the case is intended to raise for our decision is whether or not the revising barrister was justified in disallowing the vicar's claim to a vote for the county on the ground that, within the meaning of the Reform Act 1832, s. 24, he "occupied" the land—the land on which the church stands and the graveyard adjoining. As to this, the finding of the revising barrister as to the agency of the churchwardens for the appellants in regard to the collection and application of pew rents does not appear to us to be material. We are of opinion that the decision of the revising barrister should be reversed. The vicar has, no doubt, the legal possession of the freehold. He has, even as against the churchwardens, the right to the keys of the church: (*Ritchings* v. *Cordingley*, 19 L. T. Rep. 26; L. Rep. 3 A. & E. 113). But to create an occupation there must be an actual as well as a legal possession. "Occupation includes possession as its primary element; but it also includes something more. Legal possession does

not of itself constitute an occupation. The owner of a vacant house is in possession and may maintain trespass against anyone who invades it; but as long as he leaves it vacant he is not rateable for it as occupier. If, however, he furnishes it and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year": (per Lush, J. in *Reg.* v. *St. Pancras* (2 Q. B. Div. 588). "Legal possession is not enough to make the appellant an occupier assessable to the poor rate": (per Lord Esher, M.R. in *Crowther-Smith* v. *New Forest Union* (Ryde's Rating Appeals, 1886-1890, 311). Is the legal possession of the freehold in such a case as the present coupled with the receipt of pew rents sufficient to create an occupation? No case has been cited to us which so decides. In *Berwick* v. *Alker* (27 L. T. Rep. 423; L. Rep. 8 C. P. 265; 2 Hop. & C. 36), which was, in regard to the material facts, practically identical with the present case, there are dicta which tend the other way. Bovill, C.J. (L. Rep. 8 C. P., 268) said: "There is nothing to show that the respondent was in the occupation of any land. A right to receive pew rents is not an occupation of land." We do not think that the judgment can be claimed by the present appellant as a direct authority in his favour, because, according to the view of all the judges who heard the argument, they felt themselves somewhat cramped by the meagre statement of the case. "With the scanty information we have," said Brett, J., "it must be taken that the claimant has such a freehold interest in these pew rents as would entitle him to a vote for the county, but for the objection put forward by the appellant. . . . There is no statement here that the respondent occupies the church." Still the dictum of Bovill, C.J. that the clergyman's right to receive pew rents — an interest which, in *Re Leverson; Ex parte Arrowsmith* (8 Ch. Div. 96) James, L.J. described as "a profit arising from the use of the freehold," and Thesiger, L.J. as "a profit derived from the benefice"—does not constitute an occupation of land is a weighty authority in the appellant's favour. For, unless such receipt of pew rents constitutes occupation, it is difficult to see in what respect a person in the position of the appellant can be said to occupy the land on which his church stands, or to be more than merely its legal possessor. The respondent naturally relies upon the cases of *Robson* v. *Hyde* (Cald. 310) and *Rex* v. *Agar* (14 East, 256). On the facts these cases are distinguishable from the present case. In neither did the land consist of the parson's freehold, but the question of rateability arose in regard to the interest coupled with the receipt of pew rents in a non-parochial chapel; in the earlier, a building leased to trustees and used for services of the Church of England, in the latter, a Methodist chapel. The respondent relied mainly upon the dictum of Buller, J. in the earlier of the two cases, which was decided in the year 1783. "His case does not resemble that of a clergyman. But, if it did, I am very far from being satisfied that a member of the Established Church, a parson or vicar, who has the profits of the pews given him by the parish in increase of his benefice, is not rateable for such profits." The language of the learned judge clearly shows that he was not intending to express a confident opinion; and we are by no means sure that rightly understood the dictum is really relevant to the matter we are considering. Clergy have always been rated for their tithes, and the learned judge may have meant that he was far from satisfied that if a parish gave to the parson the pew rents in addition to the tithe (or other payments or endowment in lieu of tithes), the amount upon which he should be assessed for rating purposes should not be correspondingly increased. In our view, the recept of the pew rents in the present case shows, as its amount exceeds 40*s.* a year, a value in the freehold from which the pew rents arise, sufficient to entitle the appellant to a county vote in respect of his freehold, as was held by this court recently in *Vickers* v. *Selwyn* (21 Cox Mag. Cas. 374; 89 L. T. Rep. 747; 52 W. R. 153), but does not, either by itself, or taken in connection with the fact of the appellant's legal possession of the land and of the church which stands upon the land, constitute an "occupation" of land within sect. 24 of the Reform Act 1832. Holding this view of the case, we do not think it necessary to express any opinion upon the point, which has been suggested, that the occupation mentioned in the section must be taken to mean an occupation of the property in respect of which a person is liable to the payment of rates, and that, inasmuch as since the passing of the Poor Rate Exemption Act 1833 (3 & 4 Will. 4, c. 30, ss. 1, 2,) a church such as the one in question is not such property, there cannot be an "occupation" of a church by the parson within the meaning of the Reform Act 1832, s. 24. With regard to the second case before us, this also is an appeal from the decision of the revising barrister who has disallowed the appellant's vote. The circumstances, as appearing in the case stated by the revising barrister, are not in any substantial matter distinguishable from the circumstances of the first case in which judgment has just been given, unless a distinction can be based upon the finding in the second case, that the pews were let and the rents collected by the churchwardens and expended by them as public parish officials pursuant to statutory authority, and not as agents or servants of the appellant. In our view this matter is not really material, and in reversing the decision of the revising barrister in this case also we have nothing to add to that which has been set forth in our judgment in the preceding case.

Appeals allowed with costs in both cases. Leave to appeal.

Solicitors for the appellants, *Ayrton, Biscoe,* and *Barclay.*

Solicitors for the respondents, *Russell Cooke* and *Co.*

Tuesday, Dec. 20, 1904.

(Before Lord Alverstone, C.J., Kennedy and Ridley, JJ.)

London County Council (apps.) *v.* Payne and Co. Limited (No. 2) (resps.). (*a*)

Weights and measures — Weighing machine — Beam scale—Paper bag placed under goods scoop—Bag removed after each weighing operation — "False or unjust" scale — Offence — Weights and Measures Act 1878 (41 *&* 42 *Vict. c.* 49), *s.* 25.

The respondents, who were wholesale tea merchants, had in their possession for use in weighing out tea, a beam scale, which at the time an inspector visited their shop had a paper bag under the scoop in which the tea was to be placed, and in that condition the scale would turn with a less weight of tea than the weight in the other scale, but without the paper bag the scale was correct. It was proved that tea was weighed out in packets of any given denomination only for those customers who requested to have it so weighed, and in bags supplied by such customers, and the usual practice was that after each weighing of a quantity of tea with the bag underneath the scoop the assistant did not remove the bag but placed the scale on a shelf, where it remained until a forewoman came, when the scale was taken down and the bag removed by the forewoman, and until that was done no person was allowed to use the scale. The paper bag was given by the forewoman for each operation before it commenced, and was always removed by her when it was finished. No two weighings out with the bag underneath were allowed to be consecutive, a full weight order being interposed.

Held, that the scale was false or unjust within the meaning of sect. 25 *of the Weights and Measures Act* 1878, *and that the respondents ought to have been convicted under that section, there being no substantial difference between the case and the previous case of* London County Council *v.* Payne and Co. (21 Cox Mag. Cas. 350; 89 *L. T. Rep.* 632; (1904) 1 *K. B.* 194).

Case stated by the metropolitan police magistrate sitting at Southwark Police-court.

On the 17th May 1904 the respondents (George Payne and Co. Limited) appeared before the magistrate at the Southwark Police-court to answer an information laid on behalf of the London County Council (the appellants), which charged that the respondents on the 21st March 1904 at Boss-street, Tooley-street, in the metropolitan borough of Bermondsey, in the county of London, did use for trade a weighing instrument, to wit, a beam scale, which was false or unjust (that is to say, underneath the goods scoop of the beam scale was placed a paper bag), contrary to sect. 25 of the Weights and Measures Act 1878.

By sect. 25 of the Weights and Measures Act 1878 (41 & 42 Vict. c. 49), it is provided as follows:

Every person who uses or has in his possession for use for trade any weight, measure, scale, balance, steelyard or weighing machine which is false or unjust shall be liable to a fine not exceeding five pounds, or in the case of a second offence ten pounds, and any contract, bargain, sale, or dealing made by the same shall be void, and the weight, measure, scale, balance or steelyard shall be liable to be forfeited.

Upon the hearing of the information the following facts were either proved or admitted by both parties:—

(*a*) The respondents were solely wholesale tea merchants, and occupied for the purposes of their business a warehouse in Boss-street. Two adjoining rooms in this warehouse were used by the respondents for weighing out tea, and about eighty girls were employed in these two rooms under the superintendence of a forewoman and under the general supervision of the respondents' manager.

The forewoman had an assistant, and such rooms had an opening between them.

(*b*) On the 21st March 1904, at about 10.30 a.m., an inspector of weights and measures visited the premises and was taken round the two rooms by the manager and inspected the weights and scales there. In the course of this inspection one of the girls handed down to the inspector from a shelf above her a beam scale, which had a folded paper bag under the scoop in which the tea to be weighed was placed. In that condition the scale would turn with 2¼drs. of tea less than the weight on the other side. The scale without the piece of paper was correct. The scale had been used that morning in that condition by the girl to weigh out for a customer 50lb. of tea into quarter-pound packets—that is to say, rather over 200 parcels of tea had been weighed out with it. When the inspector came up the girl had recently finished weighing out the 50lb., and was sweeping her counter so as to be ready for another order.

(*c*) Tea was weighed out by the respondents in the manner and by the means above described for three or four of their customers, of whom one, being the customer above referred to, was a customer for considerable quantities of tea, and the others for comparatively small quantities. Tea was never so weighed out by the respondents unless at the request of the customer for whom it was intended, and only in bags supplied by the customer and of the kind exhibited.

The bag exhibited contained in print the name of the customer by whom it was supplied and to whom the tea was sold, and it contained also in print at the bottom the following statement: "This packet of tea weighs ¼lb., including wrapper."

On some days of the week no such weighing took place, but on other days several chests or bags were so weighed out.

(*d*) The girl who handed the scale down to the inspector was not called, but the respondents' manager and forewoman were both called, and they described the practice followed at the respondents' warehouse. From the description it appeared that a chest or bag containing, say, 50lb. of tea would be put down by the girl's counter, and she would be given an order and directed by the forewoman to weigh it out into packets of some given denomination, say quarter pounds, and one of the above-mentioned bags, which were supplied by the customer, would be given to the girl to fold up and place under the scoop of the scales. Having placed this bag under the scoop she would proceed to weigh out the tea, and when she had finished this she would place the scales on the shelf above her without

(*a*) Reported by W. W. Orr, Esq. Barrister-at-Law.

removing the bag from under the scoop and report to the forewoman that the weighing out was finished. Shortly afterwards—that is to say, usually within three or four minutes and always within ten or fifteen minutes—the forewoman would come round; the girl would then hand down the scales and the forewoman would remove the bag and annex to it a paper tag having certain memoranda written upon it. No one would be allowed to, nor was it suggested that they did in fact, make use of the scale between the time of its being put up on the shelf and the time of its being handed down to the forewoman. The forewoman would afterwards place the bag and tag upon her desk, where it would probably remain for three or four days and then be thrown away. One of these tags was produced before the magistrate, and he initialled it for the purpose of identification. Each bench had its own set of scales. No two weighings out with a bag were allowed to be consecutive, a full weight order being always interposed.

(*e*) The practice above described was followed in this and all cases. The substantial difference between this practice and the practice obtaining in the respondents' warehouse in Nov. 1902, as described in the special case in *London County Council* v. *Payne and Co.* (21 Cox Mag. Cas. 350; 89 L. T. Rep. 632; (1904) 1 K. B. 194), was that under the present practice the paper bag was given for each operation by the forewoman before it commenced, and was always removed by the forewoman when it was finished, whereas formerly it was left to the girl to remove it. The change was not made for commercial reasons, but with the object of complying with the requirements of the Weights and Measures Acts.

(*f*) The respondents used the beam scale with the bag under the scoop for trade as and to the extent above described.

The appellants contended that the beam scale was false or unjust within the meaning of sect. 25 of the Weights and Measures Act 1878, and they relied upon the case of *Lane* v. *Randall* (81 L. T. Rep. 445; (1899) 2 Q. B. 673), and the respective judgments of Lawrance and Kennedy, JJ. in the case of *London County Council* v. *Payne and Co.* (*ubi sup.*).

The respondents contended that the weighing out of the chest or sack of tea in the manner and by the means above described was a "particular weighing operation" within the meaning of the judgment of Lord Alverstone, C.J. in the case above referred to, and that the beam scale was therefore not false or unjust.

Inasmuch as the bag was temporarily placed under the scoop for a particular customer, and the condition of the scale was temporary and not permanent, and special pains were taken to prevent the scale in that condition from being used for any other customer, the magistrate was of opinion that the respondents had kept within the law as laid down by the Lord Chief Justice in the case of *London County Council* v. *Payne and Co.* (*ubi sup.*), and that the beam scale was therefore not false or unjust within the meaning of sect. 25 of the Weights and Measures Act 1878. He accordingly dismissed the information subject to this case.

The question of law for the opinion of the court was whether upon the facts above stated the beam scale was false or unjust within the meaning of sect. 25 of the Weights and Measures Act 1878.

Dickens, K.C. (*Daldy* with him) for the appellants.—Upon the facts as stated the magistrate ought to have convicted, as there is really no substantial distinction between the facts in the present case and the facts in the previous case against the same respondents of *London County Council* v. *Payne and Co.* (21 Cox Mag. Cas. 350; 89 L. T. Rep. 632; (1904) 1 K. B. 194), in which it was held that the respondents ought to have been convicted under sect. 25. The substantial difference between the practice followed in this case and the practice followed in the previous case is set out in clause (*e*) of the case, and it is submitted that that difference is not sufficient to take this case out of sect. 25. In the previous case the court laid great stress on this, that the scales must be in fact accurate and just, and not that they should be capable of being made accurate and just. They must not be left in such a condition as that they require supervision to make them accurate. The only difference in the present case is to shift the supervision from one person to another—namely, to the forewoman. In the former case the responsibility of removing the bag from under the scoop was left to the girl who did the weighing, whereas in this case it was left to the forewoman to remove it. That is the only distinction between the two cases. This machine was not a just machine within sect. 25, and the case is distinguishable from *Withall* v. *Francis* (42 J. P. 612), where something was put on one scale and a weight to compensate for this was put on the other scale. It makes a very great difference if a thing is made part of the scale—as in this case—or is merely put into the scale for a temporary purpose, as in *Withall* v. *Francis* (*ubi sup.*); and in all such cases to keep a case from falling within sect. 25 there must be a temporary use of a just scale and not the use of an unjust scale. The only real distinction between this case and the previous case is that here there is added supervision, which is a distinction without a difference. [He referred to the judgments in the previous case.]

Avory, K.C. (*George Elliott* with him) for the respondents.—What has been done in this case by the respondents was not an attempt by them to evade the law or the provisions of sect. 25 of the Act, but was a *bonâ fide* attempt on their part to conform to what was said in the judgment of Lord Alverstone, C.J. in the previous case as to "a particular weighing operation." That was the view adopted by the magistrate, and it is submitted that the magistrate was right. If some such system as this is not allowed it would be impossible for wholesale traders to carry out these operations. The weight of the paper bag is about 2½drs., and, as there is no weight of that denomination, if this system is not allowed it would be impossible for these wholesale dealers to get through the operation of weighing out a chest of tea in these small parcels. It is admitted that if the paper bag had been placed in the goods scoop in presence of the purchaser there would have been no offence, and the question is whether if the bag, instead of being placed within the goods scoop, is placed underneath that scoop, it is an offence. That cannot make the difference

between what is an offence and what is not. It is said that there is in this case only the difference of added supervision, and that there are some eighty persons who might use this scale; but the facts in clause (*d*) show that this could not be so, and the magistrate in his finding says that the condition of the scale was temporary and not permanent, and that special pains were taken to prevent the scale in that condition from being used for any other customer. It is not correct to say that the only substantial difference between the former case and this case is that in this case the supervision of the forewoman is substituted for that of the girl. The essential difference between the two cases is this: In the former case the scale in its normal condition as kept was held to be unjust; in other words it was normally unjust, as having in its normal state the paper bag attached to it; whereas in this case it is found that the scale was kept normally without the bag attached to it, and that, as soon as it ceased to be used for that particular weighing operation, the bag was removed from it. There is that substantial difference between the two cases. In the previous case Lord Alverstone, C.J. said: "While there may be a temporary use of scales so as to make them carry out a particular weighing operation which is honest in itself, . . . the instrument in its normal condition as kept for use must be in a condition to weigh justly, by which I mean accurately, that which is put in it to be weighed." Here the instrument in its normal condition is just, and it cannot be said that the scales were regularly kept in the condition to which objection is taken—namely, with the bag underneath. The position is precisely the same as if the bag were put in the scoop the moment the inspector comes in, because in each case as soon as the weighing operation is over the bag is removed from underneath the scoop. In the judgment of Kennedy, J. in the previous case, the test was applied whether the adjustment was a part of the machine itself; if it was a part of the machine itself, then an offence would be committed. Here the adjustment was not a part of the machine itself, and that was the test and the ground of the decision in *Lane* v. *Rendall* (81 L. T. Rep. 445; (1899) 2 Q. B. 673). Applying that test here, the instrument was not kept with the bag underneath it in its normal condition, and that bag did not become a part of the machine itself; and the scale is no more unjust than if an inspector happened to come in when the bag was in the scoop.

Dickens, K.C. in reply.

Lord Alverstone, C.J.—The effect of the argument in this case has been rather to bring me to the conclusion that in the previous case of *London County Council* v. *Payne* (*ubi sup.*) I was over-anxious not to strain the statute, and that perhaps I have, by what I intended to express and I hope expressed very carefully, led persons quite innocently to believe that the statute had a less wide effect and operation than I now think it has. I do not see any reason to qualify or depart from anything I said on the previous occasion. We have to apply the statute to the particular set of facts existing in this case, and that the line must be drawn at some time or other is perfectly plain. If the scales themselves are right and something is put into one dish to make them weigh a particular weight as against the weight on the other side, that shows that there may be what we have all called a temporary use of lawful scales to weigh a particular thing in a particular way. I think, however, that the Legislature may have been led to use the language of this section having regard to the necessity for the protection of the public and to the knowledge that these packets, which really only represent a certain weight of paper and tea, when they get into the hands of other persons may possibly be used so that persons who buy from them may be misled by not getting what they think they are buying; and I think that sect. 25, which is the section on which we have to decide this point, in using the language "Every person who uses . . . any scale . . . which is false or unjust," means the using for the weighing operation of a scale which, as a scale, is false or unjust. It may be, and it probably is, a safer view to say that what the statute means is this: As the inspector only goes to the shop from time to time, when he goes there and sees the scale empty and tests it as an empty scale, then it shall be a just balance—that is, it shall hang, so to speak, true; and if, to test the weights, he puts a pound weight in one pan and a pound weight of the goods to be weighed in the other pan, and if the pound weight will weigh down the goods in the other pan in the sense of balancing the scale, then the balance is a just balance; but if the scale when used is a scale which will not fulfil the test which I endeavoured to lay down, and which my brother Kennedy laid down, perhaps in better language than I did—namely, that it will not weigh truly what is put into the goods pan to be weighed, then it is an unjust balance. In this case it is not disputed, and in fact it is very fairly and properly admitted, and an argument is based upon it, that the paper bag was put underneath the goods scoop of the scale for the purpose of weighing tea less paper on some 400 or 500 occasions. Now, admitting that the judgment of this court in the previous case of *London County Council* v. *Payne* (*ubi sup.*) would have held that that was a breach of the statute if the paper bag were not taken out from underneath the scale until the scale was used again for the same purpose—that the scale was kept on a shelf in the condition that it would only truly weigh so much tea and paper—then in that state of things the decision in this case must follow the decision in *London County Council* v. *Payne* (*ubi sup.*). It certainly does seem to me, after weighing as carefully as I can the arguments so forcibly and clearly put before us by counsel for the respondents, that that ought not to be a sufficient distinction to make this an offence in one case and not an offence in the other case. I am not able satisfactorily in my own mind to exclude from the operation of sect. 25 a case in which the scales are rendered for the time being unjust, because a lawful operation is desired to be carried out. If those scales are kept in that condition for that purpose and with that object and if that comes within the statute, then it seems almost impossible to say it would be outside the statute if the only distinction is that between the time of the two weighings the paper is temporarily removed. Therefore, while I agree with the respondents' counsel that it may be taken as a fact—and to my mind rather a strange fact—that, in order

to secure the paper bag being taken out from underneath the scoop, the respondents always have the true weight of tea without the paper weighed in between the other weighings, yet it seems to me quite possible that unless there be some supervision in that particular operation the weighing might take place with the paper underneath. In my opinion, therefore, it is safer to give the natural meaning to the language of the statute and to say that if the person has used in the operation of weighing, and is found by the inspector to be using in the operation of weighing, an unjust balance in the sense that we have already described in the former case of *London County Council* v. *Payne* (*ubi sup.*), then the case comes within the statute. Although I fully recognise the difficulty, and regret that perhaps this difficulty has been to a certain extent accentuated by my endeavouring not to strain the statute beyond that to which I thought it ought to apply, nevertheless I have come to the conclusion that the statute does intend to prevent the using, in weighing, of a balance which is at the time, as a balance, unjust—a balance which will not hang true when there is nothing in either dish, and which will not hang true when an equal weight is put into the goods dish on the one side and the weight dish on the other. I therefore think, although for myself I feel the difficulty of the case very much, that the magistrate was not justified in differentiating, as he thought he could differentiate, this case from that of *London County Council* v. *Payne* (*ubi sup.*), and that, consequently, this appeal must be allowed.

KENNEDY, J.—The facts in this case do not appear to me to differ essentially from the facts with which this court had to deal in the prior case against this company, and therefore I do not wish to add anything to the judgment which my Lord has just delivered.

RIDLEY, J.—I agree with the judgments which have been given, and I wish to add a few words only. I do not think that this case is distinguishable from the former decision of this court in the case of *London County Council* v. *Payne* (*ubi sup.*) in regard to this section of the Weights and Measures Act. There are, no doubt, some differences in the facts, which, however, seem to me to be immaterial. The paper bag was placed underneath the scale in order to weigh out the requisite number of bags of tea, and it was left there until the forewoman came round after a short interval of time and removed it. That difference between the two cases does not appear to me to be a material distinction for the purpose of this Act. I recognise the fact that it may be thought by some person that the court errs by giving too full a meaning to this statute; but I do not shrink from saying that when the statute uses these words, "uses or has in his possession for use for trade any weight, measure, scale . . . or weighing machine, which is false or unjust," it means that he ought not to have in his possession for use for trade any measure or scale which can be called at the time false or unjust. It is not necessary, in order to bring him within the statute, that he should actually be found to use the scale for any particular operation, for the inspector who comes round may probably come at a moment when it is not being so used. If the inspector finds that it is not being used at the time, but that it is in the condition which I have described, then it is in possession for use. Under one or other of those expressions comes, as I think, this case—that is to say, although the inspector does not find the scale being used—and he may not do so—still he finds it in possession for use. I cannot myself recognise the distinction founded on the intention of the respondents in the orders which are issued by them that the forewoman is to come round within a short interval of time and remove the paper bag from underneath the scale. It is, no doubt, a thing which goes in the direction which has been pointed out by the Lord Chief Justice, but it is not sufficient, as it seems to me, to establish that what has been done in this case is outside the purview of the Act of Parliament. I agree with the judgments which have been pronounced.

Appeal allowed. Case remitted to the magistrate with a direction to convict.

Solicitor for the appellants, *W. A. Blaxland.*

Solicitors for the respondents, *Lamb, Son,* and *Prance.*

Dec. 15 *and* 21, 1904.

(Before BRAY, J.)

Re AN ARBITRATION BETWEEN THE LONDON, DEPTFORD, AND GREENWICH TRAMWAYS COMPANY AND THE LONDON COUNTY COUNCIL. (*a*)

Tramways—Purchase by local authority—Basis of value—Widening of streets—Liability of tramways company at date of purchase to contribute to cost of widening—Compensation for exemption from liability after purchase—"The then value of the tramway"—Tramways Act 1870 (33 *&* 34 *Vict. c.* 78), *s.* 43.

A local authority gave notices under sect. 43 *of the Tramways Act* 1870 *to purchase from a tramways company certain tramways which were then purchasable by them.*

At the date of such notices some of the streets through which the tramways were laid would have been required to be widened, and in accordance with the usual practice at the time of such notices—though it did not exist at the time the company obtained their powers to construct the tramways—the promoters of a tramway would have been required to contribute one-third of the cost of the widening of streets as a condition of obtaining their powers.

No widenings of the streets and no contribution by the company in respect thereof had in fact been made.

Upon a reference under the section to fix the value of the tramways, the company claimed an additional sum upon the ground that "the then value" of the tramways was to be determined by the cost of constructing them at the date of the purchase which, according to the practice then prevailing, would have included a contribution for street widening, and they claimed that sum by reason of the tramways being freed from the liability to pay that contribution:

Held, that the tramways company were not entitled to claim as part of "the then value" of the

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

tramways any additional sum in respect of a contribution for street widenings which had in fact never been made.

AWARD stated as to part thereof in the form of a special case for the opinion of the court, pursuant to sect. 7 of the Arbitration Act 1889.

Under the provisions of the Southwark and Deptford Tramways Act 1879, as amended by the Southwark and Deptford Tramways Acts 1881 and 1889, and by the London, Deptford, and Greenwich Tramways Act 1891, the Southwark and Deptford Tramways Company (hereinafter called "the company") were incorporated, and were authorised to construct and maintain certain tramways therein described.

These tramways were shown on the map or plan annexed to this case, and were thereon coloured red, these red lines being purchasable in 1900.

Under the provisions of the Southwark and Deptford Tramways Act 1881, as amended by the London, Deptford, and Greenwich Tramways Act 1891, the company were authorised to construct and maintain certain other tramways in the said Acts described which were shown upon the same map or plan annexed hereto and thereon coloured blue, these blue lines being purchasable in 1902.

Parts 2 and 3 of the Tramways Act 1870 were incorporated with all the Acts hereinbefore referred to, and all of such Acts were to be taken as incorporated in this award and special case, and might be referred to by the parties as if the same were specifically set out herein.

On the 20th Aug. 1900 the London County Council (hereinafter called "the council"), being the local authority within whose district the same were situated, duly gave notice in writing to the company under sect. 43 of the Tramways Act 1870, requiring them as promoters to sell to them, under the conditions and in the manner provided, the whole of the tramways, works, and undertaking authorised by the Southwark and Deptford Tramways Act 1879, as amended by the Southwark and Deptford Tramways Acts 1881 and 1889, and by the London, Deptford, and Greenwich Tramways Act 1891.

On the 1st Oct. 1902 the council, being the local authority within whose district the same were situated, duly gave notice in writing to the company under sect 43 of the Tramways Act 1870, requiring them as promoters to sell to them, under the conditions and in the manner provided, the whole of the tramways, works, and undertaking authorised by the Southwark and Deptford Tramways Act 1881, as amended by the London, Deptford and Greenwich Tramways Act 1891.

The company and the council differed as to the value of the respective tramways undertakings, and by a document dated the 17th Dec. 1903, under the hand of an Assistant Secretary of the Board of Trade the board duly appointed Henry Graham Harris, of Great George-street, in the city of Westminster (in lieu of the late Sir Frederick Bramwell, who had been appointed by the Board of Trade in that behalf on the 19th May 1903), as referee to determine the value (exclusive of any allowance for past or future profits of the undertakings or any compensation for compulsory sale or other consideration whatsoever) of the tramways constructed under the authority of the Southwark and Deptford Tramways Act 1879, as amended by the Southwark and Deptford Tramways Acts 1881 and 1889, and by the London, Deptford, and Greenwich Tramways Act 1891, and also under the authority of the Southwark and Deptford Tramways Act 1881, as amended by the London, Deptford, and Greenwich Tramways Act 1891, and of all lands, buildings, works, materials, and plant of the London, Deptford, and Greenwich Tramways Company suitable to and used by them for the purposes of the undertakings authorised by the Acts of 1879 and 1881, as amended by the further Acts.

The referee, having duly weighed and considered the several allegations of the parties, and also the proofs, vouchers, and documents which had been given in evidence before him, did hereby make and publish his award in writing of and concerning the matters above referred to him (subject as hereinafter mentioned) in manner following—that is to say:

I award and determine (subject as hereinafter mentioned) that the value (exclusive of any allowance for past or future profits of the undertakings or any compensation for compulsory sale or other consideration whatsoever) of the tramways constructed under the authority of the Acts hereinbefore referred to and of all lands, buildings, works, materials, and plant of the London, Deptford, and Greenwich Tramways Company suitable to and used by them for the purposes of the undertakings authorised by the said Acts is the sum of ninety-one thousand three hundred and sixty-three pounds seven shillings and sixpence (say, 91,363*l.* 7*s.* 6*d.*).

At the hearing of the reference before the referee a contention was put forward and a claim made on behalf of the company, which the referee was requested to raise on the face of this award in the form of a special case under the following circumstances:

At the time of the obtaining of the parliamentary powers for the construction of the tramways, the subject of this reference, it was not the practice to require the promoters of tramway undertakings to widen the streets through which the tramways were intended to be run or to make any contribution towards such widening, nor, in fact, were any such streets widened or contribution required in the case of the tramways in question (except in respect of two sums of 1000*l.* and 1603*l.* 1*s.* 6*d.*, respectively, which the referee had considered in making up the amount of his award aforesaid, and otherwise were not material to the question raised by this case). At the date of the notices to purchase, hereinbefore referred to, in accordance with the then practice, such streets, or some of them, would certainly have been required to be widened, and certain costs and expenses would have been incurred in respect thereof, towards which the company would, according to the usual present practice, have been require to contribute one-third as a condition of obtaining powers to establish and work the tramways.

It was contended on behalf of the company that, although such widenings had not in fact been made, and no contribution had, in fact, been made by the company in respect thereof, nevertheless, in determining the value of the tramways undertakings at the date of the notices to purchase, the referee must take into account the

costs and expenses which would have been incurred by reason of the practice aforesaid if such tramways had been authorised and constructed at the date of the notices, on the ground that it was his duty as referee to determine what would be the present cost of constructing and establishing the tramways, the subject of this reference. That such present cost would include the contributions which would now be required from the undertakers in respect of street widenings, and that therefore the probable amount of such contributions must be taken into account by the referee in determining the present value of the undertakings. In other words, that the present value of the undertakings was enhanced by reason of their being freed from the liability to contribute to such widenings, and counsel for the company accordingly tendered evidence to show what widenings would have been necessary, and what the company's proportion of the cost thereof would have been if the tramways had been authorised and constructed at the date of the notices aforesaid.

Counsel for the county council objected to the reception of such evidence on the ground that it was wholly irrelevant to any question for the referee's consideration; and, further, they contended that, as the company had not, in fact, been obliged to contribute to any such widenings, a hypothetical figure as to what they might have been called upon to contribute if the practice at a certain date had been different to what it was, could not be taken into account at all in assessing the value of the tramways undertakings.

Eventually, with the consent of both parties, the referee agreed to hear the evidence tendered by the company *de bene esse*, and subject to the council's objection, and to state his award as to this part thereof in the form of a special case so as to raise the question between the parties aforesaid, and the referee did this on the company undertaking to pay to the council in the first instance such sum as he should determine to be the amount of the costs occasioned by such issue (subject to revision by the court in case the company should be ultimately successful thereon), and on the company also undertaking to hand over their tramways undertakings to the council upon payment by the latter of the amount he should determine to be the value thereof without taking into account the hypothetical amount of the company's contribution towards such widenings as aforesaid, but without prejudice to their further claim under the issue aforesaid.

In the referee's opinion the contention of the company aforesaid was wholly unfounded and (subject to the opinion of the court) he determined the value of the undertakings as hereinbefore mentioned, without taking into his consideration anything in respect of sums which the company might have been called upon to contribute towards street widenings. Should the court, however, be of the opinion that the contention of the company should prevail, then and in that event the referee awarded and determined that the value of the tramways undertakings as aforesaid, with the appurtenances as aforesaid, amounted to the sum of 22,773*l.* 6*s.* 8*d.* (being one-third of the estimated cost of the necessary widenings as set out in the evidence given before him) in addition to the sum of 91,363*l.* 7*s.* 6*d.*, hereinbefore determined.

And he further awarded and determined that the amount of the costs occasioned by the issue so raised by the company as aforesaid was the sum of 165*l.* 6*s.* 5*d.*

And he further awarded and determined that such sum should be set off in the first instance against the amount to be paid hereunder by the council to the company in respect of the general costs of the reference and award, subject, nevertheless, to revision by the court as regarded this amount of 165*l.* 6*s.* 5*d.*, in case the company should be ultimately successful upon the issue so raised as aforesaid.

And he further awarded and directed that save as lastly hereinbefore mentioned, the costs and the expenses of the reference and award should be borne and paid by the council, and that they should bear their own costs of the same.

Sect. 43 of the Tramways Act 1870 (33 & 34 Vict. c. 78) provides:

Where the promoters of a tramway in any district are not the local authority, the local authority, if, by resolution passed at a special meeting of the members constituting such local authority, they so decide, may within six months after the expiration of a period of twenty-one years from the time when such promoters were empowered to construct such tramway, and within six months after the expiration of every subsequent period of seven years, or within three months after any order made by the Board of Trade under either of the two next preceding sections, with the approval of the Board of Trade, by notice in writing require such promoters to sell, and thereupon such promoters shall sell to them their undertaking, or so much of the same as is within such district, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district, such value to be in case of difference determined by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party, and the expenses of the reference to be borne and paid as the referee directs. . . .

Lawson Walton, K.C. (Sir *Edward Boyle*, K.C. and *Vesey Knox* with him) for the tramways company.—The referee was wrong in deciding against the company's contention. Sect. 43 of the Tramways Act 1870 deals with the purchase of tramways by the local authority from the promoters of the tramway. Sect. 3 of the Act defines the term "local authority," in the present case the London County Council, and sect. 4 shows who "the promoters" are. In sect. 43 the important words are that the local authority are to purchase the tramways upon terms of paying "the then value of the tramway," and all lands, works, &c, of the promoters. It may be said that the basis of value is the cost of the undertaking to the promoters; that basis is ruled out by the statute, and we have to get "the then value" on some other basis. The question is, what is the value of the undertaking to the purchaser at the time when he buys it. It is perfectly clear that the purchaser when he buys the tramway means to have a tramway at that particular place. The tramway is there already, and the value would be the cost to him of putting it there, and it would include anything he would have to pay to put it there; and according to

the present practice a person constructing the tramway at the time of the sale would have to pay a proportion of the cost of widening the streets. The question of the "then value of the tramway" was considered by the House of Lords in the two cases of *Edinburgh Street Tramways Company* v. *Lord Provost, &c., of Edinburgh* and *London Street Tramways Company* v. *London County Council* (71 L. T. Rep. 301; (1894) A. C. 456, 489). There is nothing in the judgment in those cases which is at all inconsistent with the contention of the tramways company in this case, and not only the language of those judgments, but also the principle applied, support that contention. It was there held that the "then value of the tramway" must be measured by what it would cost, at the date of the sale, to construct the lines. The costs of widening the streets is just as much a sum which it would cost a new company if they were constructing the tramway, as the cost of actual construction; and there is nothing in the language of sect. 43 which excludes any element of value, except the matters there specified. The right to exemption from an expense—from an annual contribution, or, as in this case, a permanent contribution—is as much an element of value as anything expended, and must certainly enter into the mind of a purchaser in determining what purchase money he will pay. This view is borne out by the judgments of Lord Herschell in the House of Lords, and of Lindley, L J. in the Court of Appeal (70 L. T. Rep., at pp. 572-3; (1894) 2 Q. B. at pp. 205-6), and Lindley, L.J. there says that the value of the tramway for this purpose is what any one would give for it. What has to be considered is the cost of construction *in situ*; that is an element of value in the nature of a relief from the burden of certain expenses, and, if so, it is as much a matter worth paying for as any other. For these reasons the referee was wrong, and the sum of 22,773*l.* ought to be added.

Cripps, K.C. (*Freeman*, K.C. and *Edward Morten* with him) for the London County Council.—There are two fallacies in the argument for the company. First, it is sought to get a value for a tramway which does not exist and in reference to an expenditure which has not been incurred; and, secondly, it is said that in compensation cases of this kind there is to be taken into consideration the saving to the purchaser. As to the first point, the answer is that what is taken over here is a tramway in an unwidened street, and the company's position is this, that what they ought to be compensated for is a tramway in a widened street, and they ask for a sum of over 22,000*l.*, which might have been expended in a widened street, but not a farthing of which has actually been expended in this case. What the tramways company are really asking for is to be recouped for an expenditure which they have not incurred at all, as if they had incurred it. Lord Herschell says (71 L. T. Rep., at p. 304; (1894) A. C., at p. 464): "What, then, does 'tramway' mean as used in the section? I have examined every instance of its use in the statute, and it appears to me in every other case, at all events, to be used to describe the structure laid down on the highway, and nothing more." The structure laid down on the highway here is the tramway laid down on an unwidened street. If the tramway had been laid down in a widened street, then the company would have been entitled to exactly the same compensation as they are claiming now when they have not incurred any expenditure at all. When the expenditure has been actually incurred these sums are no doubt properly taken into account, but in this case no part of this expenditure which is claimed has in fact been incurred. The second fallacy in the argument for the company is this, that you have to consider not what is the value of the thing, but the value to the purchaser. That is contrary to every principle of compensation in these cases. It is contrary to every principle that compensation should be claimed for something which does not exist and for an expenditure which has not been incurred, merely because it confers, or would confer, a benefit on the purchaser.

Lawson Walton, K.C. in reply.—The question really is not one of compensation at all. It is a question of value, what it would cost to put that tramway on that site at the time of purchase. If so, the cost of widening the streets would be an incident in the cost of its present construction. What we have to get at is the cost of placing that structure *in situ* at the date of purchase; and both Lord Watson and Lindley, L.J. say that the present value is what the cost would be—not what the cost had been—if the purchasers had to make it themselves in its then present state.

Cur. adv. vult.

Dec. 21.—BRAY, J. read the following judgment:—This is a special case stated by the referee in his award under the following circumstances. The London, Deptford, and Greenwich Tramways Company, whom I shall call the claimants, constructed under Parliamentary powers certain tramways, and the London County Council, under the powers conferred on them as the local authority by sect. 43 of the Tramways Act 1870, gave notices to the claimants to purchase their tramways. The claimants and the council differed as to the purchase price, and Mr. Henry Graham Harris was duly appointed referee by the Board of Trade. During the course of the arbitration a contention was raised by the claimants that the present value of the tramways was enhanced by reason of their being freed from liability to contribute to the widening of some of the streets in which the tramways were laid, to which, according to the present usual practice, they would, if they were now constructing a tramway, have been required to contribute, although in fact such widenings had not been made, and no contribution had been made by the claimants. The referee considered such contention to be unfounded, but, at the request of the claimants and on certain terms, heard the evidence upon the point, and stated his award in the form of a special case, in order that the opinion of the court might be obtained as to the validity of that contention, and this is the question I have now to determine. The argument of the claimants' counsel was shortly this. The House of Lords in *Edinburgh Street Tramways Company* v. *Lord Provost of Edinburgh* (71 L. T. Rep. 301; (1894) A. C. 456) and *London Street Tramways Company* v. *London County Council* (71 L. T. Rep. 301; (1894) A. C. 489), decided in effect that the value of the tramways must be measured by what it would cost at the date of the sale to establish the tramway, if it did not then exist

subject to a proper deduction for depreciation. By reason of the practice which had now become usual, though it did not exist when the claimants obtained their Parliamentary powers, the promoters, if they had to construct their tramways now, would have to contribute one-third of the cost of the widening of, at all events, certain of the streets as a condition of their obtaining their powers, and, therefore, at the date of the sale, in order to establish the tramways, the promoters would have to pay not only the actual cost of construction, but this contribution in addition, and the referee ought to take this into consideration in assessing the value. It certainly is a startling proposition that the council should have to pay, as part of the purchase price, for an expenditure which has never been incurred, and it was admitted that the contention was novel, and that there was no authority to support it. As there was no authority upon the point I thought it right to take a few days to consider it. I have come to the conclusion that the referee was right when he expressed his opinion that the contention was wholly unfounded. I have read through the judgments in the House of Lords, and of Lord Lindley in the Court of Appeal, and I can find nothing to support the contention. The effect of the judgmen's seems to be that, as the words of sect. 43 prohibit profits or rental value being considered, it is necessary to fall back on what is called in rating cases "structural value"; but that is the structural value of the tramway as it exists, and in all the judgments it is referred to as the cost of "the purchased tramways," or other equivalent words. It is true, of course, that no such point as the present was raised in that case, and it was not contended on behalf of the council that there was anything in that case which precluded me from adopting the claimants' contention, but I can find nothing to encourage it. Now, I think Mr. Cripps pointed out at all events one of the answers to the claimants' contention, when he said that the referee has to find the value of a tramway in an unwidened street, while the claimants are asking him to find the value of a tramway in a widened street. He has to find the value of an actual, not an imaginary, tramway. In my opinion the tramway in a widened street would be a different and, it may well be, a more valuable tramway. There would be more room for traffic, and possibly more cars might be run and more passengers carried; but it is sufficient to say that it is a different tramway. Another answer is that to calculate the structural value is only a mode of arriving at the real value, and to adopt that mode of calculation in the manner suggested by the claimants would not give the true value. It would be absurd to say that the true value of the tramway would be enhanced by the adoption of a practice as to other tramways in other streets. Although in this case the contention would give the claimants a large additional price, in another case where onerous conditions, which were imposed when the tramways were constructed were no longer imposed it would follow, if the claimants' contention were correct, that the claimants would lose the cost of fulfilling those onerous conditions, which would appear to be manifestly unjust. The real value of the tramway is not altered by the change in practice. Many illustrations might be put. What if it became the practice to insist upon double the depth of concrete being put in? Ought the value of this tramway to be enhanced by the cost of the additional concrete which, if the tramway were constructed now, would have to be laid, but which was not required to be laid, nor laid? Mr. Walton was obliged to admit that his contention involved this. So also if it became the practice to require an additional width of stone, or other material, outside the rails to facilitate the ordinary traffic. Surely, unless the additional expenditure was actually incurred, it would not be right to increase the cost of the actual structure. The court, therefore, must declare that it is of opinion that the claimants' contention should not prevail, and that nothing must be added to the sum of 91,363*l.* 7*s.* 6*d.* The claimants must pay the costs of the argument of this case. The other costs seemed to be provided for by the award.

Judgment for the county council.

Solicitors for the tramways company, *Sutton, Ommanney,* and *Rendall.*

Solicitor for the London County Council, *W. A. Blaxland.*

Tuesday, Dec. 20, 1904.

(Before Lord Alverstone, C.J., Kennedy and Ridley, JJ.).

Yorkshire (Woollen District) Electric Tramways Limited (apps.) *v.* Ellis (resp.). (*a*)

Light railways—Electric tramway in streets of borough—"Omnibus"—"Hackney carriage"—Carriage used on light railway—Licence of local authority—Licence for carriage as being a "hackney carriage"—Town Police Clauses Act 1847 (10 *&* 11 *Vict. c.* 89), *ss.* 37, 38, 45—*Town Police Clauses Act* 1889 (52 *&* 53 *Vict. c.* 14), *ss.* 3, 4—*Light Railways Act* 1896 (59 *&* 60 *Vict. c.* 48).

A carriage used for the carrying of passengers at separate fares on a light railway constructed in the streets of a borough under an order made by the Light Railway Commissioners in pursuance of the Light Railways Act 1896 *is not an "omnibus" within the definition of "omnibus" in sect.* 3 *of the Town Police Clauses Act* 1889, *and is not a "hackney carriage" within the meaning of sects.* 37 *and* 45 *of the Town Police Clauses Act* 1847, *and therefore such carriage does not require to be licensed by the local authority under sect.* 37 *of the Town Police Clauses Act* 1847 *as a hackney carriage plying for hire within the borough.*

Case stated by justices of the peace for the borough of Dewsbury in the West Riding of the County of York, sitting at Dewsbury.

An information was preferred on the 10th May 1904 by Hiram Ellis, town clerk of the borough of Dewsbury (the respondent), against the Yorkshire (Woollen District) Electric Tramways Limited (the appellants), for that they, the appellants, on the 10th May 1904 at Dewsbury, being the proprietors of a certain carriage, to wit, a tramway car No. 11, did permit the same to be used as a hackney carriage plying for hire within the borough of Dewsbury, without having

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

obtained a licence from the mayor, aldermen, and burgesses of the borough of Dewsbury for such carriage so to ply for hire, as required by sect. 37 of the Town Police Clauses Act 1847.

This information was heard and determined by the justices at a petty sessions on the 17th May 1904, and upon such hearing they convicted the appellants of the offence and fined them the sum of 2*s.* 6*d.*

The following facts were admitted or proved in evidence before the justices: (*a*) The appellants were the proprietors of the carriage intended to be referred to in the information. (*b*) Such carriage was similar to a tramcar, worked by electrical energy, and was constructed for and used by the appellants to run over their light railway under and by virtue of the provisions of the Spen Valley Light Railway Order 1901, and the Spen Valley Light Railway (Extensions) Order 1901, both Orders being made under the Light Railways Act 1896, and formed a part of the rolling stock for the railways authorised to be provided therefor by the said Orders and Act. (*c*) Such light railway was similar in all respects to a tramway, and ran through the public streets of Dewsbury and the adjoining districts. (*d*) On the 10th May 1904, the carriage was used by the appellants to carry passengers at separate fares within the borough of Dewsbury. (*e*) The carriage had not been licensed by the mayor, aldermen, and burgesses of the borough of Dewsbury, and no application for any such licence had been made

The respondent contended that such a carriage was an "omnibus" within the meaning of the Town Police Clauses Act 1889; that it must therefore be deemed to be included within the term "hackney carriage" in sects. 37 and 45 of the Town Police Clauses Act 1847, and that the appellants permitted the same to be used as a hackney carriage plying for hire within the borough, contrary to the provisions of the last-mentioned section.

The appellants contended (*a*) that such carriage was in any event not an "omnibus" within the meaning of the Town Police Clauses Act 1889, nor a "hackney carriage" within the meaning of the Town Police Clauses Act 1847; (*b*) that by reason of the Light Railways Act 1896 and the said Spen Valley Light Railway Orders, the provisions of the Town Police Clauses Act did not apply to such carriage, and in any case no such licence as was referred to in the information was required therefor; (*c*) that the carriage was not only licensed to be used by the above-mentioned Light Railway Orders, but was required to be so used, and (*d*) that the carriage did not ply for hire within the meaning of those Acts.

The attention of the justices was also called by the appellants to the following reported cases: *City and South London Railway Company* v. *London County Council* (65 L. T. Rep. 362; (1891) 2 Q. B. 513), and *Surrey Commercial Dock Company* v. *Bermondsey Corporation* (21 Cox Mag. Cas. 437; 90 L. T. Rep. 123; (1904) 1 K. B. 474).

The justices, by a majority of three to one, were of opinion that the carriage was an "omnibus" within the meaning of the Town Police Clauses Act 1889, and therefore a "hackney carriage" within the meaning of sects. 37 and 45 of the Town Police Clauses Act 1847; that the provisions of these Acts applied to such carriage and were not overriden by the Spen Valley Light Railway Orders 1901, and that the appellants had been guilty of an offence under sect. 45 of the Town Police Clauses Act 1847 in permitting such carriage to be used as a hackney carriage plying for hire within the borough of Dewsbury without having obtained a licence for the same.

The question for the opinion of the court was whether, upon the above statement of facts, the justices came to a correct determination in point of law, and, if not, what should be done in the premises.

The Town Police Clauses Act 1847 (10 & 11 Vict. c. 89) provides, with respect to hackney carriages:

Sect. 37. The commissioners may from time to time license to ply for hire within the prescribed distance, or if no distance is prescribed, within five miles from the general post office of the city, town, or place to which the special Act refers (which in that case shall be deemed the prescribed distance), such number of hackney coaches or carriages of any kind or description adapted to the carriage of persons as they think fit.

Sect. 38. Every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any street within the prescribed distance, and every carriage standing upon any street within the prescribed distance, having thereon any numbered plate required by this or the special Act to be fixed upon a hackney carriage, or having thereon any plate resembling or intended to resemble any such plate as aforesaid, shall be deemed to be a hackney carriage within the meaning of this Act; and in all proceedings at law or otherwise the term "hackney carriage" shall be sufficient to describe any such carriage: Provided always that no stage coach used for the purpose of standing or plying for passengers to be carried for hire at separate fares, and duly licensed for that purpose, and having thereon the proper numbered plates required by law to be placed on such stage coaches, shall be deemed to be a hackney carriage within the meaning of this Act.

Sect. 45. If the proprietor or part proprietor of any carriage, or any person so concerned as aforesaid, permits the same to be used as a hackney carriage plying for hire within the prescribed distance without having obtained a licence as aforesaid for such carriage, or during the time that such licence is suspended as hereinafter provided, or if any person be found driving, standing, or plying for hire with any carriage within the prescribed distance for which such licence as aforesaid has not been previously obtained, or without having the number of such carriage corresponding with the number of the licence openly displayed on such carriage, every such person so offending shall for every such offence be liable to a penalty not exceeding forty shillings.

The Tramways Act 1870 (33 & 34 Vict. c. 78) provides:

Sect. 48. The local authority shall have the like power of making and enforcing rules and regulations, and of granting licences with respect to all carriages using the tramways, and to all drivers, conductors, and other persons having charge of or using the same, and to the standings for the same, as they are for the time being entitled to make, enforce, and grant with respect to hackney carriages, and the drivers and other persons having the charge thereof, and to the standings for the same in the streets and district of or under the control of the local authority: Provided always that in any district in which any of the powers aforesaid in connection therewith are vested in any authority other than the local authority of such district, such authority shall have and may exercise

the powers by this section conferred upon the local authority.

The Town Police Clauses Act 1889 (52 & 53 Vict. c. 14) provides:

Sect. 3. The term "omnibus" where used in this Act shall include—every omnibus, *char-à-banc*, wagonette, brake, stage coach, and other carriage plying or standing for hire by or used to carry passengers at separate fares, to, from, or in any part of the prescribed distance; but shall not include—any tramcar or tram carriage duly licensed under the provisions of the Tramways Act 1870, or of any provisional order made thereunder and confirmed by Parliament, or under the provisions of any Local Act of Parliament. . . .

Sect. 4 (1). The several terms "hackney carriages," "hackney coach," "carriages," and "carriage," whenever used in sections thirty-seven, forty to fifty-two (both inclusive), fifty-four, fifty-eight, and sixty to sixty-seven (both inclusive) of the principal Act—that is, of the Town Police Clauses Act 1847—shall notwithstanding anything contained in section thirty-eight of that Act, be deemed to include every omnibus. (2) The word "driver" or "drivers" when used in any of the said sections of the principal Act shall be deemed to include every conductor of any omnibus.

Sect. 6. The commissioners may from time to time make by-laws for all or any of the following purposes, that is to say: For regulating the conduct of the proprietors, drivers, and conductors of omnibuses plying within the prescribed distance in their several employments, and determining whether such drivers and conductors shall wear any and what badges. [Then followed various other matters relating to omnibuses in respect of which by-laws might be made by the commissioners].

The Light Railways Act 1896 (59 & 60 Vict. c. 48) established the "Light Railway Commissioners" for facilitating the construction and working of light railways in Great Britain, and for carrying the Act into effect, and power was given to the commissioners to make orders authorising the construction of light railways under the Act; such orders were to be provisional only and were to have no effect until confirmed by the Board of Trade (sect. 7), but when so confirmed they were to have the same effect as an Act of Parliament (sect. 10).

Under these provisions the Spen Valley Light Railway Orders 1901—both dated the 22nd April 1901—were made, and the first of these orders authorised the construction of these light railways in the borough of Dewsbury. By sect. 58 of the order the Board of Trade are required to make general and special regulations (called Board of Trade General or Special Regulations) with regard to the matters therein specified; and sect 60, relating to the power of the local authority to make by-laws, was as follows:

Sect. 60. Subject to the provisions of this order the local authority of any district in which any portion of the railway is laid down may make by-laws as to the following matters:—The rate of speed to be observed in travelling upon such portion of the railway; the distances at which carriages using such portion of the railway shall be allowed to follow one after the other; the stopping of carriages using such portion of the railway; the traffic on the road in which such portion of the railway is laid; for regulating the placing and fixing on the carriages of advertisement boards and placards and notices and the removal thereof if the same are unsafe, unsightly, or inconvenient; for preventing overcrowding of the carriages; for regulating the hours for the conduct of traffic other than passenger traffic.

Danckwerts, K.C. (*A. Llewelyn Davies* with him) for the appellants.—The question is whether the carriages of these light railways or electric tramways are required to be licensed by the local authority as hackney carriages. These electric tramways may run—and, in fact, in the present case they do run—through the districts of several local authorities, and if the decision of the justices is right, then several absurdities would follow as a necessary consequence. In the first place, every single carriage of the light railway or electric tramway, and every driver and conductor would require to be licensed by every one of the local authorities through whose district the railway happened to pass. In the second place, each one of these local authorities would have to say how many of the carriages or electric tramcars there ought to be on the railway; and in the next place, every railway company in the kingdom would have to take out a licence for every one of its carriages and for every one of its drivers or conductors, from every single local authority through whose district the railway happened to pass. It could never have been the intention of the Legislature that such absurd consequences should follow from their light railway legislation. It is said for the corporation that, owing to the extension of the definition of hackney carriage to "omnibus," by sect. 4 of the Town Police Clauses Act 1889, this carriage was an omnibus, and was therefore also a hackney carriage. These tramcars were run, not under the Tramways Act or the Town Police Clauses Act, but under the Spen Valley Light Railway Order 1901, which in law had the same force as an Act of Parliament (sect. 10 of the Light Railways Act 1896). The order uses the term "railways" for these works. In sect. 2 (the interpretation clause) the expressions "the railway" and "the railways" mean the railways and works by this order authorised. By sect. 3 the Lands Clauses Acts and certain portions of the Railways Clauses Consolidation Act 1845 and of the Regulation of Railways Act 1889 are incorporated in the same way as in the case of railways. By sect. 4, under the heading "Railways, etc., authorised," the company are authorised to make and maintain "the railways hereinafter described," thus showing that the tramways constructed under the order are "railways," and not tramways in the ordinary sense. So, sect. 11 restricts the user by the company of any road along which "they lay the railways," and in sect. 45 provision is made as to the carriages the company may use "on the railway." Sect. 49 provides for waiting-rooms for passengers on the route of the railways; sect. 57 provides that the "carriages used on the railways" may be moved by animal or mechanical power, and by sect. 58 the Board of Trade may make regulations as to the use of mechanical power on the railways. [He also referred to sects. 60 and 68 of the order, the latter containing provisions as to the workmen's trains.] All these provisions are suitable for railways, but are wholly unsuitable for tramways or hackney carriages. Coming to the Light Railways Act 1896, sect. 1 establishes the Light Railway Commission and sect. 11 deals with the provisions which may be made by the order. Sect. 12 enacts that the Clauses Acts are not to apply to a light

railway under the Act, except in so far as they may be applied by the order authorising it. That is important as showing that but for that exclusion those Acts would *per se* have applied to light railways; and sub-sect. 2 provides that the general enactments relating to railways shall apply to a light railway in like manner as they apply to any other railway. Sect. 48 of the Tramways Act 1870 gives the local authority power to grant licences with respect to all carriages using the tramways and to all drivers and conductors having charge of such carriages. There is no provision similar to this in the Light Railways Act, and in fact the whole of the legislation points to the fact that what were intended to be constructed under the Act were railways in the ordinary sense and not tramways. [He was stopped.]

Macmorran, K.C. (*C. F. Pritchard* with him) for the respondent.—The justices came to a right conclusion upon the point. Under sect. 37 of the Town Police Clauses Act 1847 power was given to urban district authorities to license hackney carriages. Then sect. 38 contains the definition of "hackney carriage" within the meaning of the Act. Sect. 48 of the Tramways Act 1870 gives to local authorities the like power of granting licences with respect to carriages using the tramways as they are entitled to grant with respect to hackney carriages. Therefore, in 1870, the powers of the local authority as to the licensing of "hackney carriages" were extended to tramcars, and it became necessary for a tramways company to obtain licences from the local authority for their tramway carriages. Then the Town Police Clauses Act 1889 in sect. 4 extends the definition of "hackney carriage" in sect. 37 of the Act of 1847, to "omnibus," and an "omnibus," as defined in sect. 3, is thereby included in "hackney carriage." That definition of "omnibus" in sect. 3 of the Act of 1889 would have applied to and have included tramcars, but as that matter was already provided for by sect. 48 of the Tramways Act of 1870, it was unnecessary to include it; and consequently we find, in the definition of "omnibus" in sect. 3, after describing what the term "omnibus" does include, the statement: "but shall not include—any tram car or tram carriage duly licensed under the provisions of the Tramways Act 1870. . . ." "Omnibus" is defined as including "every omnibus . . . and other carriage plying or standing for hire by or used to carry passengers at separate fares." The words in this definition, "and other carriage plying or standing for hire," would bring within the definition of "omnibus," and therefore within the definition of "hackney carriage," in the Act of 1847, every carriage which plies for hire and which carries passengers at separate fares. They would therefore have brought in tramcars, if tramcars had not been specially excluded from the definition, and the sole reason why tramcars were excluded was that they had already, by sect. 48 of the Tramways Act 1870, been brought in and made subject to the provisions relating to the licensing of hackney carriages in sect. 37 of the Act of 1847. These light railways also came within the words in the definition of "omnibus" "and other carriage standing or plying for hire," and there is nothing in that section which excludes them, as in the case of tramcars. The definition of "hackney carriage" in sect. 37 of the Act of 1847 is every wheeled carriage standing or plying for hire. These cars stand and ply for hire in the streets, and they carry passengers at separate fares, and therefore are "hackney carriages." It is said that this is a railway company, and that if a licence is necessary in this case then every railway company passing through a district would require to be licensed by the local authority; but the answer to that is that these light railways are not railways at all. There is nothing inconsistent with the order in requiring that the appellants shall have a licence from the local authority similar to that required in the case of tramcars, and our contention is that they must have a licence, and that there is nothing to take the case out of the provisions of the Act of 1889 as there is with regard to the tramcars. [Kennedy, J. referred to sect. 60 of the order, which gave the local authority power to make by-laws with regard to the matters there specified.]

Danckwerts, K.C. was not called upon to reply.

Lord Alverstone, C.J.—The point raised in this case does the greatest credit to the ingenuity of the persons who have raised it, because it seems to me that anyone who has had any experience of parallel lines of legislation could not possibly have come to the conclusion that that which is for all effective purposes a railway was to be subject to the provisions of the Town Police Clauses Act in the matter of the licensing of its carriages. The licensing sections are those of the Town Police Clauses Act of 1847, and it is sufficient for this purpose to say that by sect. 37 of that Act the commissioners may from time to time license to ply for hire such number of hackney carriages as they shall think fit. The control thereby given to the town commissioners is, as counsel for the respondent has most fairly said, not only in the matter of vehicles, but in the matter of drivers, and in the matter of the general conduct and the way in which the carriages are to be conducted. Then came the Town Police Clauses Act of 1889, which actually enabled the commissioners to say what badges were to be worn by drivers and conductors, what numbers were to be put on omnibuses, the number of persons to be carried by such omnibuses, and the fitness of the horses, and so on, and the carrying and lighting of proper lamps upon the vehicles. Now, I suppose it was thought by some ingenious person that it might be well that tramways should not come in, so to speak, by implication into that Act, and hence tramcars are expressly excluded in sect. 3 from the term "omnibus," it being the fact that they were already dealt with for certain purposes with regard to the local authority under sect. 48 of the Tramways Act of 1870, an Act which is now more than thirty years old. It has been most ingeniously suggested that because there has been special legislation for tramways in the Act of 1870 in regard to these matters, tramway carriages were therefore excluded from the operation of the Town Police Clauses Act of 1889, and that that means that everything else of this character that is not excluded by virtue of the Tramways Act comes within the definition in the Act of 1889 of "omnibus," and therefore of "hackney carriage." I think that is a most ingenious suggestion. Now, what is the right and proper view to be applied to such a case as this? For a great many years there was legisla-

tion with regard to hackney carriages, culminating in the combined sections of these two Acts of Parliament of 1847 and 1889, and I daresay there may be some other Acts which give the local authority powers in these matters. Then there was a subject matter called into existence rather near hackney carriages and, at any rate, rather near omnibuses—namely, these tramcars, and it was thought desirable that they should be under the jurisdiction of the local authority for this purpose, and accordingly there is an express enactment in sect. 48 of the Tramways Act of 1870 with regard to the powers of the local authority, giving the local authority the like power of making rules and regulations and of granting licences with respect to all carriages using the tramways, as they were entitled to make and grant with respect to hackney carriages. A few years later a number of Acts of Parliament were passed, and there was an amount of legislation with regard to light railways and the carrying out of the work of the light railway legislation and of the orders made thereunder, and, as far as I know, everything was done to make the light railways railways in the sense of being subject to the same provisions as railways were made subject to by previous statutes for a great many years from the time of the Railways Clauses Consolidation Act of 1845, and not a suggestion was made that railways were to be subject in this respect to the local authority. Then we come to the actual legislation by the Light Railways Act of 1896, and the orders of the Light Railway Commissioners made thereunder. There is not a trace in the Light Railways Act of 1896 of any intention on the part of the Legislature to subject the light railways or their vehicles to the local authorities in this respect; but, on the contrary, as Mr. Danckwerts has properly pointed out, there are a number of sections, at any rate, indicating that what is going to be constructed under the powers of that Act, is to be subject to what I may call railway legislation. Then there came the Order in Council of 1901, providing that the Board of Trade should have jurisdiction to make regulations with regard to these very matters, many of them being the same sort of things as to which the local authority have jurisdiction in the matter of hackney carriages, and the order in sect. 60 expressly reserves with regard to carriages such powers to make by-laws as it was thought right to give to the local authorities with regard to the speed and the distances at which carriages should follow one another; and with regard to the stopping on the route, the traffic on the road, advertisements which would be unsightly upon the carriages, the prevention of the overcrowding of the carriages, and the hours for conducting the traffic other than passenger traffic. These are matters which are *in pari materiâ* to a very large extent with those enumerated in that very same section—namely, sect 6 of the Town Police Clauses Act of 1889. In my opinion it is quite impossible to come to the conclusion that, if the Legislature had really meant to give to the local authority with regard to these light railways the other powers which are contained in sect. 6 of the Act of 1889 with regard to omnibuses, they would have cut down in sect. 60 of the order, as my brother Kennedy has pointed out, the rights of the local authority to the particular matters there enumerated. That being so, some ingenious person has persuaded the majority of the magistrates who decided this case that this circular route by which Mr. Macmorran has endeavoured to bring the carriages of this light railway into sect. 3 of the Town Police Clauses Act of 1889, and to make them subject to that Act, was a route on which they could safely travel; and, therefore, it is that there is this decision of the magistrates which is now under our consideration, that every carriage on a light railway, though it is to run under circumstances to a large extent entirely different to the circumstances under which tramcars were contemplated when the Tramways Act was passed, must be licensed, and if the argument of counsel for the respondent is to prevail, I suppose the driver and conductor must be licensed also. The absurdity of that result would be too great. We have given very full consideration to the matter, and our attention has been directed by Mr. Danckwerts to many of the sections of the Order, and I daresay there are more to which our attention might have been called if we had not stopped him in his argument, but all point in the direction that a light railway carriage is a railway carriage, that it is not a hackney carriage and that it is not a tramway carriage. I have no oubt whatever about the matter, and, therefore, his appeal must succeed.

Kennedy, J.—I agree.

Ridley, J.—I agree.

Appeal allowed. Conviction set aside.

Solicitor for the appellants, *Sydney Morse.*

Solicitors for the respondent, *Sharpe, Parker, Pritchards, Barham,* and *Lawford,* for Hiram Ellis, Town Clerk, Dewsbury.

Wednesday, Dec. 21, 1904.

(Before Bray, J.)

Re An Arbitration between Bosworth and another and the Corporation of Gravesend. (*a*)

Burials — "Burial ground" — "Disused burial ground" — Additional land added to cemetery — Part used for burial, remaining part capable of being separated by fence — Sale of cemetery — Basis of value — Metropolitan Open Spaces Act 1881 (*44 & 45 Vict. c.* 34), *s.* 1—*Disused Burial Grounds Act* 1884 (*47 & 48 Vict. c.* 72), *ss.* 2, 3—*Open Spaces Act* 1887 (*50 & 51 Vict. c.* 32), *ss.* 2, 4, *and schedule.*

By an Order in Council, made in 1854 *under the Burial Act* 1853, *it was ordered that no new burial ground should be opened without the approval of the Secretary of State in the places therein mentioned, and that burials therein should be discontinued. Prior to the date of this order a cemetery had been established in one of the places so specified in the order by a cemetery company under a special Act of Parliament. In* 1859 *the then owner of the cemetery acquired an additional piece of land adjoining the cemetery, and in* 1884 *the whole of this "additional piece" was set apart and consecrated as a burial ground, inclosed by a wall, and part of it had been used as a burial ground.*

(*a*) Reported by W. W. Oak, Esq., Barrister-at-Law.

There was no consent by a Secretary of State to the user of this "additional piece" for burials, other than a letter stating that the sanction of the Secretary of State to the proposed addition to the cemetery was not required; but a portion of the additional piece had been used for interments, and the remaining part could be conveniently separated so as to make it available for building.

In an arbitration to fix the price under an agreement for the sale of the cemetery and the additional piece by the owner to a corporation:

Held, that the additional piece having been "set apart for the purposes of interment" was a "burial ground" within sect. 1 of the Metropolitan Open Spaces Act 1881, *as amended by the Open Spaces Act* 1887, *but that it could not be legally used for interments therein; and, further, that it was a "disused burial ground" within sect. 4 of the Open Spaces Act* 1887 *and sect. 3 of the Disused Burial Grounds Act* 1884, *and could not by reason of the latter section be used for building purposes, and that, therefore, the additional piece ought not to be valued as ground in which interments could legally be made, or as building land, but must be valued on the basis that it could not be put to either of such uses.*

Award of an arbitrator stated in the form of a special case for the opinion of the court under sect. 7 of the Arbitration Act 1889.

By an agreement in writing dated the 2nd Oct. 1901, between Emily Bosworth and Helen Bosworth (thereinafter called "the vendors") of the one part, and the mayor, aldermen, and burgesses of the borough of Greenwich (thereinafter called "the purchasers") of the other part, it was agreed that subject to certain provisions, which were not now material to this case, the vendors should sell and the purchasers should purchase the following property (that is to say): "Firstly, the Gravesend and Milton Cemetery in the parish of Gravesend, in the county of Kent, containing 8½ acres or thereabouts, with the chapels, lodges, and other offices and buildings thereon. Secondly, the messuage known as Victoria House, situate at the north-west corner of the said cemetery, with the nursery or garden thereto belonging, as the same is now in the occupation of Thomas William Christmas Box, his undertenants or assigns, under a lease for the term of fourteen years from the 29th day of September 1891 at the yearly rent of 25*l.* Thirdly, a piece of land situate on the east side of the said cemetery and containing two and three-quarter acres or thereabouts, as the same is now believed to be in the occupation of John Hanks Cooper as a yearly tenant at the yearly rent of 13*l.* 15*s.*; and fourthly, all office furniture, tools, implements, barrows, and other chattels and effects belonging to the vendors in, upon, or about the said cemetery and the buildings thereon."

By clause 4 of the agreement it was agreed that the price to be paid by the purchasers to the vendors should, as soon as the consent of the Local Government Board should have been obtained for the loan to be raised by the purchasers for the purchase of the property, be referred to two surveyors (Mr. Green and Mr. Cobb) as referees, or in case of their disagreement to an umpire to be appointed by them, the price to be fixed on the basis of the fair value of the property as between willing seller and willing buyer, and it was further provided that the agreement should be deemed to be a submission to arbitration under the Arbitration Act 1889.

By an agreement in writing made on the 1st May 1902 between the same parties supplemental to and modifying the aforesaid principal agreement, it was agreed that the arbitration should take place forthwith without waiting for the before-mentioned consent.

The referees being unable to agree duly appointed an umpire, who, having heard all the allegations and evidence of the parties, found the following facts (*inter alia*) to have been proved before him.

Part of the Gravesend and Milton Cemetery was the original cemetery belonging to the Gravesend and Milton Cemetery Company, which was incorporated by a special Act of Parliament (1 Vict. c. xxxv.).

On the 11th Aug. 1854 an Order in Council was passed under the provisions of the Burial Act 1853 whereby it was ordered "that no new burial ground shall be opened in the undermentioned places without the previous approval of one of Her Majesty's principal Secretaries of State; and that burials in the said places be discontinued, with the following modifications, from and after the 21st day of August instant (except as is herein otherwise directed)—namely":

Gravesend.—To be discontinued from and after the 1st Jan. 1855 in the churchyard of Gravesend, in the parish burial ground, in the burial ground of Prince's-street Chapel, Gravesend, and of Ebenezer Chapel, Milton, and in Milton churchyard; and forthwith in Prince's-street Chapel, Gravesend.

In 1859 one John Robert Hull, one of the predecessors in title of the vendors, who was the owner of the cemetery, acquired an additional piece of land adjoining thereto, hereinafter called "the additional piece."

On the 22nd Nov. 1884 a letter was sent to Her Majesty's Principal Secretary of State for Home Affairs, which was as follows:

Diocesan Registry, Rochester, 22nd Nov. 1884.—Sir,—Gravesend Cemetery.—The Bishop of Rochester has been requested to consecrate an addition to the Proprietary Cemetery at Gravesend, in the county of Kent, and, referring to the Order of Her Majesty in Council of the 11th Aug. 1854 (published in the *London Gazette* of the 15th Aug. 1854), I take the liberty of asking whether, considering the form of the order, your approval is necessary to such addition being used for burials.—I have the honour to be, Sir, your most obedient servant, George H. Knight, Registrar of the Diocese of Rochester.—The Right Hon. Sir W. V. Harcourt, M.P., &c., Home Office, Whitehall.

A copy of the reply thereto, which was dated the 11th Dec. 1884, was as follows:

Whitehall, 11th Dec. 1884.—Sir,—I am directed by the Secretary of State to acquaint you, with reference to the letter from this department of the 26th ult., stating that the approval of the Secretary of State would be necessary for the opening of any burial ground in the parish of Gravesend, that the Extra Metropolitan Burials Act (16 & 17 Vict. c. 134) does not by reason of the saving in sect. 5 of that Act apply to the Gravesend cemetery, which was established under the Gravesend Cemetery Act 1838, and that the sanction of the Secretary of State to the proposed addition to that

cemetery is not required, and I am to request that this letter may be substituted for the letter previously addressed to you, which perhaps you will be so good as to return to this office. — I am, Sir, your obedient servant, Godfrey Lushington.—G. H. Knight, Esq., Diocesan Registry, Rochester.

The "additional piece" of land was not used as a cemetery before the 11th Dec. 1884, but subsequently the whole of it was set apart and consecrated as a burial ground, inclosed by a wall, and part of it has been used as a burial ground.

There was no consent to the user of the "additional piece" by any of the Principal Secretaries of State unless the court should be of opinion that the aforesaid letter of the 11th Dec. 1884 constituted such consent.

The arbitrator found that of the "additional piece" a portion had either actually been used for interments, or was so situated that it could not be conveniently separated from the part so used.

He found that the remaining part could be conveniently separated from the part so used by a fence, so as to be available for building.

At the hearing he was requested by the parties to make his award in the form of a special case, in order to obtain the opinion of the court on certain points of law, and the following were the contentions of the parties.

It was contended on behalf of the purchasers: (1) That the "additional piece" of land was inclosed within the cemetery walls in violation of the aforesaid Order in Council and the provisions of the Burial Act 1853 (16 & 17 Vict. c. 134). (2) That, having regard to matters in the last paragraph contended, and to the judgment of the Court of Appeal in *Ward* v. *Portsmouth Corporation* (78 L. T. Rep. 771; (1898) 2 Ch. 191), in so far as it decides that an addition to an existing burial ground is within the provisions of sect. 6 of the Act, the "additional piece" could not be legally used for interments. (3) That the "additional piece," having been inclosed as aforesaid and having been used as a burial ground, could not now, by reason of the decision of the Court of Appeal in *Re Ponsford and Newport District School Board* (70 L. T. Rep. 502; (1894) 1 Ch. 454), be used for building land. (4) That the "additional piece" must not be valued either as ground in which interments could legally be made, or as building land, but must be valued on the basis that it could not be put to either of such uses.

It was contended on behalf of the vendors: (1) That by reason of sect. 5 of the Burial Act 1853, the Act did not apply to the Gravesend and Milton Cemetery, or to additions thereto. (2) That the case of *Ward* v. *Mayor of Portsmouth* (*ubi sup.*), relied on by the corporation, did not affect the law as it was in 1884, and that in the year 1884 an addition to an existing burial ground was not under the Act a new burial ground. (3) That the Order in Council of the 11th Aug. 1854 did not purport to prohibit the opening of new burial grounds in Gravesend, except within the particular limits specified in the Order, and that the Gravesend and Milton Cemetery was not within those limits. (4) That if the Burial Act 1853 and the Order in Council of the 11th Aug. 1854 did apply, the letter dated the 11th Dec. 1884 constituted such approval as was required under the Act and Order in Council. (5) That if the Act does apply, the case of *Re Ponsford and Newport District School Board* (*ubi sup.*), relied on by the corporation, could have no application, as, on the corporation's own contention, the "additional piece" had never been partially or wholly closed under the provisions of any statute or Order in Council. (6) That if the "additional piece" could not be legally used as a cemetery, that portion of it which had not been already used for graves could be thrown into the adjoining fields and utilised and valued as building land.

The questions on which the opinion of the court was desired were whether upon the facts (*a*) The "additional piece" of land can be used as a burial ground; (*b*) if not, whether that part of the "additional piece" which can conveniently be severed from the part actually used for interment (hereinbefore called the "remaining part") can be used for building purposes.

If in the opinion of the court the answer to the first question should be in the affirmative, then the arbitrator awarded and adjudged that the total price to be paid by the purchasers to the vendors in respect of all the property referred to in the agreement of sale and purchase, should be 9711*l.*

If in the opinion of the court the answer to the first question should be in the negative, but to the second in the affirmative, then he awarded and adjudged that the total price to be paid by the purchasers to the vendors in respect of the property, should be 9015*l.*

If in the opinion of the court the answer to both questions should be in the negative, then he awarded and adjudged that the total price to be paid to the vendors by the purchasers in respect of the aforesaid property, should be 8305*l.*

The case had previously come before Wright, J. as to both questions (*a*) and (*b*). As to the first of these questions—namely, whether the additional piece of land could be used as a burial ground—Wright, J. gave a decision to the effect that the land could not be used as a burial ground, inasmuch as the approval of the Secretary of State was necessary, and the letter of the 11th Dec. 1884 did not constitute such approval, but no order was made thereon. As to the second question—namely, (*b*) whether the "remaining part" of the additional piece could be used for building purposes—he sent the case back to the arbitrator for a plan to be settled by him. Having regard to the finding of the arbitrator that the remaining part of the additional piece could be conveniently separated from the part used for interments by a fence so as to be available for building, Wright, J. referred the case to the arbitrator to show upon a plan what he meant by that finding, and a plan was accordingly prepared showing the part already used for interments and the part considered by the arbitrator to be available for building.

The Burial Act 1853 (16 & 17 Vict. c. 134), in sect. 1, gave Her Majesty by and with the advice of her Privy Council, power to order that no new burial ground should be opened in any city or town, or within any other limits, without the previous approval of a Secretary of State, or that after a time mentioned in this order burials in such city or town, or within such limits, or in such burial grounds or places of burial, should be

discontinued wholly or subject to any exceptions or qualifications mentioned in such order.

Sect. 5 provides:

The provisions of this Act shall not extend to authorise the discontinuance of burials, or to prevent the burial of the body of any person in any cemetery established under the authority of any Act of Parliament, or in any burial ground or cemetery to be hereafter provided with the approval of one of Her Majesty's principal Secretaries of State [now, by sect. 4 of the Burial Act 1900, the Local Government Board] as herein mentioned.

Sect. 6. Where by any such Order in Council as aforesaid it is ordered that no new burial ground shall be opened in any city or town, or within any limits therein mentioned, without the previous approval of one of Her Majesty's principal Secretaries of State [now the Local Government Board], no new burial ground or cemetery (parochial or non-parochial) shall be provided and used in such city or town, or within such limits, without such previous approval.

By the Metropolitan Open Spaces Act 1881 (44 and 45 Vict. c. 34), which was an Act for amending the Metropolitan Open Spaces Act 1877, and for providing greater facilities for making available the open spaces in the metropolis for the use of the inhabitants thereof for exercise and recreation, it was enacted in the definition clause—sect. 1—as follows:

The term "burial ground" shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, and in which interments have taken place since the year 1800.

By the Disused Burial Grounds Act 1884 (47 & 48 Vict. c. 72)—an Act for preventing the erection of buildings on disused burial grounds—after reciting the Burial Acts 1852 and 1853 (15 & 16 Vict. c. 85 and 16 & 17 Vict. c. 134), and that in pursuance of the provisions of those Acts numerous Orders in Council had been made for the discontinuance of burials in certain burial grounds within the metropolis and elsewhere—it was enacted:

Sect. 2. In this Act a "disused burial ground" shall mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein in pursuance of the provisions of the said recited Acts.

Sect. 3. After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship.

By the Open Spaces Act 1887 (50 & 51 Vict. c. 32)—an Act for extending certain provisions of the Metropolitan Open Spaces Act 1877 and 1881 . . . and for other purposes—it is provided:

Sect. 2. The Metropolitan Open Spaces Act 1881 is hereby repealed to the extent mentioned in this Act. . . . In the schedule, under the heading "Portions of the Metropolitan Open Spaces Act 1881 repealed, are the words: "In sect. 1, the following words occurring in the definition of a 'burial ground,'" namely, "and in which interments have taken place since the year 1800."

Sect. 4. In the Disused Burial Grounds Act 1884 and this Act, the expression "burial grounds" shall have the same meaning as in the Metropolitan Open Spaces Act 1881, as amended by this Act, and the expression "disused burial ground" shall mean any burial ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council, and the expression "building" shall include any temporary or moveable building.

Therefore the defintion of "burial ground" in sect. 1 of the Metropolitan Open Spaces Act 1881, omitting the words which have been repealed by sect. 2, and the schedule of the Open Spaces Act 1887, is as follows:

The term "burial ground" shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment.

Freeman, K.C. (*S. Colefax* with him) for the Corporation of Gravesend.—The contention for the corporation was that as this additional piece had been set apart as a whole for interments, it was a "burial ground," though it could not be used as such, and could not be afterwards used for building. The definition of "burial ground" is given in sect. 1 of the Metropolitan Open Spaces Act 1881, and, omitting the words in that section which were repealed by sect. 2 of the Open Spaces Act 1887, "burial ground" now means "any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment." The case finds that the whole of this additional piece was set apart and consecrated as a burial ground. Therefore it comes within the words "ground set apart for the purposes of interment," and is a "burying ground" though it cannot be used as a burying ground. The definition of "disused burial ground" is given in sect. 4 of the Open Spaces Act 1887, and this is a disused burial ground within that definition. This case is really concluded by the case of *Re Ponsford and Newport District School Board* (70 L. T. Rep. 502; (1894) 1 Ch. 454), and the argument cannot be put better than it is put in the judgment of Kay, L.J. There it was held that under the combined operation of these Acts, a "disused burial ground"—upon which building is prohibited by sect. 3 of the Act of 1884—means any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, whether interments have taken place in them or not, and which has been partially or wholly closed under the provisions of any statute or Order in Council, or has become otherwise disused. In that case the portion of the burial ground in question had never been used for burials and had never been consecrated, yet it was held that neither the fact of its not having been consecrated nor the fact that no burials had taken place in it prevented its being a "burial ground," and in consequence of the Order in Council—which there was in that case—requiring that burials should be entirely discontinued therein it became a "disused burial ground." The facts would undoubtedly bring this case within that decision if there had been any actual Order in Council, as there was in that case. In this case there was an Order in Council—the order of the 11th Aug. 1854—prohibiting the opening of any new cemetery in Gravesend. This order of 1854 was in existence when this additional piece of land was acquired in 1859, and the letter of the Secretary of State of the 11th Dec. 1884 does not in any way affect the question of there having been a prohibitive Order in Council preventing a new cemetery being opened except in the specified cases. The position, therefore, was this: Here were persons who had acquired this additional piece of land and who had set the whole of

it apart as a burying ground and in effect added it to the existing cemetery, and in *Ward* v. *Portsmouth Corporation* (78 L. T. Rep. 771; (1898) 2 Ch. 191), it was held that making an addition to an existing burial ground is the same thing as opening a new burial ground. Directly they had bought this additional piece and consecrated it and set it apart for purposes of interment they had opened a new burial ground, notwithstanding that an order was then existing which immediately applied to it, saying that no new burial ground should be opened. The owners had done all they could to set it apart in exactly the same way as was referred to in *Ponsford's* case (*ubi sup.*). They had done more than was done in that case, as they had it consecrated and had actually buried in part of it and had enclosed it within the wall of the old cemetery. It is, therefore, a stronger case than *Ponsford's* case (*ubi sup.*). It is a burial ground, but in consequence of what was done by the Secretary of State in issuing the Order in Council prohibiting the opening of any new burial ground and consequently prohibiting this addition to the cemetery, this land could not be used as a burial ground. Upon the authority of *Ponsford's* case (*ubi sup.*) it is a "disused burial ground" within sect. 4 of the Act of 1887, and by sect. 3 of the Act of 1884 there is no power to use any part of it or to let it for building purposes. Therefore it can only be valued under the third alternative — namely, in the sum of 8305*l.*

Sir *Edward Boyle*, K.C. and *Eustace Hills* for the claimants.—It is submitted that the case does not come within *Ponsford's* case (*ubi sup.*) at all. The corporation put their case in two inconsistent ways. Under the first head they say: "This is not a burial ground, and we should not pay for it as a burial ground that can be used as such"; then under the second head they say: "This is a burial ground and cannot be used for building purposes." They want it both ways. This is either a burial ground or it is not. If it is held that this is not a burial ground—and they can only succeed on their first point if it is not a burial ground—then they cannot say on the second point that it is a burial ground, and if it is a burial ground presumably it could be used as such. If they take advantage of their first point that it is not a burial ground, then they cannot at the same time defeat the second head under which the claimants claim, and cannot contend that the claimants should not have any value there might be in the land as building land. This portion of the additional piece is not a burial ground at all; it is not within the meaning of the Acts and the decision in *Ponsford's* case (*ubi sup.*)] a disused burial ground. That decision, as summarised in the headnote in the report [(1894) 1 Ch. 454] says that a "disused burial ground" means any ground which has been at any time set apart for the purposes of interment, "and which has been partially or wholly closed under the provisions of any statute or Order in Council, or has become otherwise disused." There has been no Order in Council, and this land has not been either wholly or partially closed by statute or by Order in Council. Then has it become otherwise disused? It could not be otherwise disused because it never was used as a burial ground, and there never was a time at which it could be used as a burial ground.

[Bray, J.—The difficulty you have to meet is that the definition of a "burial ground" is a place set apart for the purpose of interment, and the whole of this land was so set apart, and Kay, L.J. seems to think that a place is a burial ground the moment it is set apart for interment, although no interments may have taken place in it.] That statement by Kay, L.J. is dictum merely. We must put it as high as this, that this portion of the land never could be used as a burial ground. [Bray, J.—You must put it as high as that, otherwise you come within *Ponsford's* case (*ubi sup.*).] We are within *Ponsford's* case unless the words "and which has been partially or wholly closed under the provisions of any statute or Order in Council, or has otherwise become disused," apply to assist the claimants. It is submitted that this piece of land, at all events as to the part that could be separated by a fence, was not a burial ground at all, and that, even if it were a burial ground, it is not a "disused burial ground," as there is no Order in Council and no statute making it so, and it has not "otherwise become disused."

Freeman, K.C. in reply.

Bray, J. — This is not an easy point to decide. The argument put forward on behalf of the corporation is a little inconsistent, and I should be disposed to reject it if I could, but I am afraid I cannot reject it. The point I have to decide arises upon the second question put to the court in clause (*b*)—namely, whether, if the "additional piece" cannot be used as a burial ground, that part of the "additional piece" which can conveniently be severed from the part actually used for interment (called the "remaining part") can be used for building purposes. Now, sect. 3 of the Disused Burial Grounds Act 1884 says that, "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for certain purposes." Then the Open Spaces Act of 1887, in sect. 4, gives a definition of "burial ground" and "disused burial ground"; and the expression "burial ground" is to have the same meaning as in the Metropolitan Open Spaces Act 1881, as amended by the Act of 1887, and if I read the definition of "burial ground" in sect. 1 of the Metropolitan Open Spaces Act 1881, as amended by the Open Spaces Act of 1887, it will be read thus: "The term 'burial ground' shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment." I need not read the latter words in sect. 1 of the Act of 1881, because those latter words "and in which interments have taken place since the year 1800," have been struck out by the amending Act of 1887. I find it stated in the case in terms that the whole of this additional piece was set apart and consecrated as a burial ground. Therefore I come to the conclusion that it is a "burial ground" within the meaning of those sections. But that is not sufficient. I have to interpret the expression "disused burial ground." "Disused burial ground" is defined in sect. 4 of the Open Spaces Act 1887, and it is there said that the expression "disused burial ground" shall mean any burial ground—which I must find that this is—"which is no longer used for interments, whether or not such ground shall have been partially or wholly closed

for burials under the provisions of any statute or Order in Council." It was contended as part of the argument that this piece of land could not be said to be disused, or "no longer used for interments," because, as a matter of fact interments in it were going on, but that it could not be used for building purposes without building a wall and separating it from the part used for interments, which would in effect be disusing it. I think I must hold that that argument is not sound. Then the next point is whether a piece of ground which never could be lawfully used for interments can come within the words "which is no longer used for interments." I have endeavoured to try to find that it could not be said that this piece of ground could no longer be used for interments, but I am afraid I must yield to the argument of counsel for the corporation upon that point. In my opinion it would be correct to say that, within the decision in the case of *Ponsford and Newport District School Board* (*ubi sup.*), this piece of land which was a "burial ground" has become "otherwise disused" as a burial ground, because it certainly now cannot be used at all as a burial ground, and therefore it is a disused burial ground and comes within sect. 3 of the Disused Burial Grounds Act 1884, which prohibits building on a disused burial ground. Consequently I must answer the second question in the negative, the result of which will be that by virtue of the award the compensation will be 8305*l*. As Wright, J. made no order on the first question, I ought to make an order and decide that question also in the negative. Therefore I make an order that the judgment shall be for the corporation on both questions (*a*) and (*b*).

Judgment for the corporation on both questions (*a*) *and* (*b*).

Freeman, K.C., for the corporation, asked for costs.

Sir *Edward Boyle*, K.C.—The costs are all provided for under clause 9 of the agreement, which says: "The purchasers shall on the completion of the purchase pay the vendors' costs and expenses of and incidental to the preparation and execution of this agreement and the said reference and the deducing and verifying of the vendor's title." It is submitted that the costs are agreed, and that the court has no jurisdiction to make any order as to costs.

BRAY, J.—I do not think I have any jurisdiction at all as to costs; but in so far as I have any jurisdiction to make an order as to costs, I order that, so far as my jurisdiction goes, each party shall pay their own costs, without prejudice to the agreement.

Solicitors for the claimants, *Nicholson, Patterson*, and *Freeland*.

Solicitors for the corporation, *Harries, Wilkinson*, and *Raikes*, for *Charles E. Hatten*, Gravesend.

Wednesday, Feb. 1, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

WILSON *v.* CREWE JUSTICES. (*a*)

Licensing—Transfer of licence—No liquor sold by transferor—Application to transfer — Alehouse Act 1828 (9 *Geo.* 4, *c.* 61), *ss.* 4, 14.

D., the holder of a licence for an inn, having become bankrupt, W. applied for a transfer of the licence. The day before the application W. received the key of the premises, placed a quantity of furniture in the house, and gave directions to the painters to paint the premises. Subsequently he let rooms in the house for the periodical meetings of certain benefit clubs who had been in the habit of meeting there during D.'s occupation. W. never slept on the premises, and except as aforesaid had not occupied them as a dwelling-house or as licensed premises.

The licensing justices refused the application for a transfer to W., but the quarter sessions reversed their decision and granted the transfer, but intimated their opinion that W. was not a fit and proper person to hold the licence, and that it was granted to him as a temporary arrangement on the understanding that he should not sell under the licence, and that at the earliest practicable moment an application should be made to transfer it to someone else.

An application was made to the licensing justices by W. to transfer the licence to S., who had signed an agreement for the tenancy of the house and had taken possession of the premises. The justices refused this application on the ground that they had no jurisdiction or power to grant it.

On appeal to quarter sessions it was proved that W. never in fact sold liquor at the inn under his licence, but the quarter sessions allowed the appeal and granted the transfer to S.

Held, that the quarter sessions had jurisdiction to grant the transfer to S.

CASE stated by quarter sessions.

On the 8th March 1904 an application was made at the general annual licensing meeting for the borough of Crewe by Herbert John Wilson for an order granting unto him a renewal licence by way of transfer authorising him to apply for and hold an excise licence to sell by retail at the fully licensed house known as The Earl of Chester's Own Inn all intoxicating liquors to be consumed on or off the premises in pursuance of the statutes in that behalf.

At the date of the application the then holder of the licence was Alfred William Derbyshire, who had become bankrupt, and whose trustee in bankruptcy appeared and assented to the application. Herbert John Wilson had received the key of the premises on the 7th March 1904, and had thereupon during the occupation of Alfred William Derbyshire placed a lot of furniture in the house and had given directions to the painters to paint the premises, which they proceeded to do, and he subsequently to such occupation let rooms in the house for the periodical meetings of certain benefit clubs who had been in the habit of meeting there during Alfred William Derbyshire's occupation, but Herbert John Wilson never slept on the premises, and except as hereinbefore stated had not

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law

occupied them as a dwelling-house or as licensed premises.

The application was refused by the licensing justices at the general annual licensing meeting.

Notice of appeal against the decision was duly given on the 9th March 1904. The appeal was heard at the general quarter sessions of the peace for the county of Chester holden at Chester Castle on the 6th April 1904.

The Court of Quarter Sessions heard the appeal and made an order reversing the decision of the licensing justices, and the court in giving judgment intimated their opinion that Herbert John Wilson was not a fit and proper person to hold the licence; that the then respondents had not proved to their satisfaction that the agreement was onerous or unreasonable or unsatisfactory; that as to the question whether the licence was required or not to meet the wants of the neighbourhood they did not think there was sufficient reason to take it away, and that as in their view the licence must not be lost, it should be granted to Herbert John Wilson as a temporary arrangement, on the understanding that he should not sell under the licence, and that at the earliest practicable moment an application should be made to the local justices to transfer it to someone else.

On the 16th April 1904 this order of the court was forwarded by the clerk to the peace of the licensing justices.

On the 19th April 1904, being the earliest date on which an application could be made, an application was made to the licensing justices on behalf of Walter Kinder Spencer for temporary authority to sell at the premises.

The application was refused.

On the 28th June 1904, being the first day on which the justices sat to hear applications for transfers, an application was made to the licensing justices by H. J. Wilson to transfer the licence in respect of the inn to W. K. Spencer. An agreement for the tenancy of the house had been signed by W. K. Spencer on the 5th April 1904, and possession of the premises given by H. J. Wilson to W. K. Spencer on the 27th June 1904. The application was heard at length, a number of witnesses being called for the applicant, and the hearing occupied nearly two hours.

After hearing the application the decision of the licensing justices was announced by the chairman in the following terms:

> The magistrates, having heard the whole of the facts and circumstances in connection with the case and the legal argument put forward, are unanimously of opinion that they have no jurisdiction or power to grant the application.

Notice of appeal against this decision was duly given on the 30th June 1904, and the appeal was heard at the general quarter sessions of the peace for the county of Chester, holden at Chester Castle on the 19th Oct. 1904.

On behalf of the licensing justices a preliminary objection was taken to the hearing of the appeal on the ground that no appeal lay as a matter of law, inasmuch as the licensing justices had declined jurisdiction. The objection was overruled, and the court proceeded with the hearing of the appeal.

At the last-mentioned hearing the facts above set out in the preceding paragraphs were admitted or proved, it was further proved that H. J. Wilson never in fact sold intoxicating liquors at the inn, under the licence or otherwise.

It was contended on behalf of the licensing justices that under the above circumstances H. J. Wilson was not and never had been the holder of the licence, and that as a matter of law there was no existing licence vested in H. J. Wilson which it was competent for the licensing justices to transfer.

This contention was overruled by the Court of Quarter Sessions, who found that the facts hereinbefore proved or admitted constituted in law possession of the licensed premises by H. J. Wilson at the time when the application for the transfer to himself was made, and that H. J. Wilson remained in such possession thereof until he yielded up the same to W. K. Spencer, and the appeal was allowed and the licence ordered to be issued to Walter Kinder Spencer subject to the opinion of the King's Bench Division of the High Court of Justice on the case herein.

The questions for the opinion of the court are: (*a*) Whether the Court of Quarter Sessions was right in law in deciding that an appeal lay to the court from the decision of the 28th June 1904 of the licensing justices; (*b*) Whether the Court of Quarter Sessions was right in law under the circumstances and on the facts set out in deciding to transfer and in transferring the licence from H. J. Wilson to W. K. Spencer.

F. Low, K.C. and *Ellis J. Griffith* for the licensing justices.—There was no jurisdiction here for the justices at quarter sessions to transfer this licence from Wilson to Spencer. Under sect. 4 of the Alehouse Act 1828 (9 Geo. 4, c. 61) they can only license such persons intending to keep inns theretofore kept by other persons being about to remove from such inns, as they, the justices, deem fit and proper persons. In the first place, the inn must "theretofore" have been kept as an inn. But these premises had not been kept by Wilson as an inn, for no liquor had been sold during the whole time that Wilson was the tenant. Wilson also never lived on the premises. In *Reg.* v. *Cotham* (78 L. T. Rep. 468; (1898) 1 Q. B. 802), where a person was not and had not been in occupation of premises in respect of which he held a licence, and no excisable liquors had been sold upon the premises for years, it was held that a transfer of that licence could not be granted. That case is directly in point here. Further, there could be no transfer of the licence, for it has been expressly found that Wilson was not a fit and proper person to hold a licence, and therefore he cannot be considered to be the holder of a licence which can be transferred. They referred to

> *Mackrell* v. *Brentford Justices*, 83 L. T. Rep. 31; (1900) 2 Q. B. 387;
> *Tower Justices* v. *Chambers*, *ante*, p. 13; 91 L. T. Rep. 643; (1904) 2 K. B. 903.

Marshall, K.C. and *Trevor Lloyd* for Wilson.—This was a general application for a transfer. In *Reg.* v. *Cotham* (*sup.*) the application was made under sect. 4 of the Alehouse Act 1828, but here the justices at quarter sessions could act both under that section and under sect. 14. No appeal was made against the transfer from Derbyshire to Wilson by the quarter sessions, and Wilson

must be taken as being the holder of the licence from whom a transfer might be obtained. They referred to

Freer v. *Murray*, 71 L. T. Rep. 444; (1894) A. C. 576.

There was plenty of evidence for the justices at quarter sessions to hold that Wilson kept this place as an inn, and they have so found as a fact. They referred to

Reg. v. *Liverpool Justices*, 49 L. T. Rep. 244; 11 Q. B. Div. 638;

Baldwin v. *Dover Justices*, (1892) 2 Q. B. 421.

Those cases show that, even although there is a break, the justices can transfer under sect. 14.

Lord ALVERSTONE, C.J.—This, like many other cases under the Licensing Acts, raises points of very considerable difficulty. The points that have been argued before us may, practically speaking, I think, be treated as two. The first is whether or not the licensing justices had any jurisdiction under either sect. 4 or sect. 14 for this purpose to grant a licence to Spencer by way of transfer from Wilson, and upon that whether the house in respect of which the transfer was sought to be made had been kept as a beerhouse or kept as an inn sufficiently long to give the justices jurisdiction at the time of the application for transfer. The second point is whether or not Wilson was a person in such a position that he could transfer any licence at all, that he could be allowed to be a transferor, and subordinately, and as a part of that point whether this must be treated as an application by Spencer for having a licence transferred to him, and not merely an application by Wilson to transfer a licence. It seems to me that no question was raised upon that point. The court of quarter sessions, it seems to me, have dealt with it as an application in respect of which they had a power to transfer a licence. Upon the first point nobody, I think, can doubt that it is a point which presents considerable difficulty, and it has been strenuously argued by Mr. Low, and very naturally, that *Reg.* v. *Cotham* lays down a general principle that if the house has not been kept as a beerhouse and not been kept as an inn at the time the application is made, if there has been any substantial break—not a minimum or mere fraction of time that the law might disregard, but a substantial break—then the house is not one in respect of which the transfer can be made. The facts do not seem to be seriously in dispute. Derbyshire became bankrupt some time in February. The key is given to Wilson on, I think, the 7th March. He occupies part of the house by putting furniture in it, and he appears to have let part of the house to certain clubs, but from the time that he went into possession until the hearing before the justices of quarter sessions in October it must be taken that he never sold any liquor there. Intermediately he has made several applications, some successful and some unsuccessful. He made an application in the first instance to the justices that he might have a licence transferred to him. That was refused. Upon the appeal quarter sessions granted a licence which, upon the face of the order, appears to have been a licence to Wilson. It is said, and I think truly said, and we must take it for this purpose that at the time of the hearing he was told that he was not a person to whom a licence would be granted, but that the licence was granted to keep it alive in order that an application might be made for a transfer to a fit and proper person. I wish to state that fully because, in the event of this matter being further considered on another occasion, that fact must not be overlooked, and I do not in any way deny, so to speak, its importance from the point of view of Mr. Low's argument. In furtherance of that action or decision of the Court of Quarter Sessions, they sent apparently the order for the licence to the clerk to the justices instead of to the man himself. In pursuance of that intimation of the justices, Spencer, the person who is seeking to get the licence, makes an application to the justices. They decline to entertain it on the ground that they had no jurisdiction. There is then an appeal to the quarter sessions, and the Court of Quarter Sessions have decided that they could not grant a licence to Spencer, a licence at any rate under sect. 14. The first point, as to whether the appeal lay to the quarter sessions from the justices having declined to exercise jurisdiction, has not been argued before us, and I do not at present know whether any substantial argument could have been raised in respect of it, but the case must be dealt with by us on the basis of what our view is with regard to the second point and not the first. Now, the difficult consideration, I think, in this case is to decide rightly whether or not under the circumstances the case falls within any principle such as that laid down in the case of *Reg.* v. *Cotham* or whether or not either in fact or in law it could be distinguished from the principle therein laid down. I should have thought that it was pretty well established that mere temporary cessation of sale was not a conclusive bar to the magistrates acting either under sect. 4 or under sect. 14. I say acting under one of those sections because, without saying the sections must be read together, they both must be regarded together, and you cannot treat them as what I call separate and independent enactments. They both deal with the question of the power of the justices to transfer and to license such persons who intend to keep inns theretofore kept by others persons being about to move from such inns, and sect. 14 deals with licensing other persons in the event of bankruptcy or death and giving up possession and new tenancies, and a number of other cases which are analogous or may be said to be special cases arising out of the general classes which are mentioned in sect. 4. I should have thought that with regard to the jurisdiction under the two sections dealing with them as a whole it really could not be contested now that not selling for a limited time was a bar to the jurisdiction. I would only refer in passing to the cases mentioned in the course of the argument, which were referred to in the other cases which Mr. Low and Mr. Marshall mentioned as far back as *Reg.* v. *Liverpool Justices*. That, I think, established that a person applying in respect of a house where there had been no selling for a considerable time still was entitled to apply. That is the way in which it has been dealt with, I think, by Lord Coleridge in the following passage which I read from *Symons* v. *Wedmore* (69 L. T. Rep. 801; (1894) 1 Q. B. 401): "Where there are licensed premises and a person goes out of occupation of them, and for a short time they cease to be used as

premises in which liquor is sold, an applicant who applies within the proper time for a renewal of the licence in respect of those premises . . . need not be a person who has had anything to do with the premises before." I agree that this is not what I may call a decision upon the express point, and was not used by Lord Coleridge for the purpose of his decision, but it was used by him in the course of his judgment for the purpose of assuming that a temporary interruption would not be a bar. Then there was the case of *Baldwin* v. *Dover Justices*, in which *Reg.* v. *Liverpool Justices* was considered, and where most undoubtedly this interruption in the business was a very prominent point. Therefore it seems to me that the mere non-sale would not be conclusive in itself. The point is to a large extent a question of fact. Here as I have said, without repeating myself, they certainly were endeavouring and purporting to carry on this place as an inn all the time. Wilson was applying for a licence there. He was occupying it as a house which had been used for a great many years as an inn, and which so far as he did anything except selling liquors would be used for the kindred purposes, like letting it for meetings of various clubs to meet there as they had met before. He applies in various ways to the sessions and appeals to the quarter sessions to get the premises continued as a licensed inn. Then when the justices in June made the order granting the licence they do it under terms which at any rate show that the premises were going to be so continued, because they make it, as Mr. Low has said, a sort of condition that he shall apply, or some other person shall apply, for a transfer to a fit and proper person. Now, I have been greatly troubled, I admit, by the reasoning founded on the case of *Reg.* v. *Cotham*, and if I had come to the conclusion that my brother Wills or my brother Kennedy in *Reg.* v. *Cotham* had meant to lay down as a principle that any substantial interruption of the sale of liquor or any substantial interruption of the carrying on of the inn in the sense of the place where liquor is in fact sold was a bar, I should, following the principle which I have always adopted in this court, have felt bound to obey that ruling, even though possibly some criticism might be addressed to it with regard to the general ruling. But I cannot help thinking that Wills and Kennedy, JJ. in that case were really speaking of that case with regard to its facts. Wills, J. there says, when it is demonstrated, as it is here, that they granted a licence in respect of a place which was not an inn, and had not theretofore been kept as an inn, and from which there was no person who had kept it about to remove, it is plain that they (the justices) cannot have decided according to law. Therefore Wills, J. (and we know his great care in these matters) is really pointing out that it was an extravagant suggestion in that case that because Wallace had a licence in respect of premises which for thirteen years had been a draper's shop, the occupier of which was about to go, that such premises were therefore to be treated as coming within the section. I do not think that it was necessary for the decision of that case to lay down this general principle, defined by Wills, J., calling attention to what I call the striking facts in the case with regard to the matter. Kennedy, J. said on p. 808: "As Wallace did not occupy the house in any sense, he could not be said to have removed from or yielded up possession of it." He also refers on p. 807 to the words of the section. He says: "The jurisdiction, by the very terms of the section is founded upon the existence of a certain state of things—namely, that the premises have been theretofore kept as an inn, and that a person holding a licence is about to remove from the inn in respect of which he held it." Therefore I come to the conclusion on the facts that the justices have distinguished this case, and that we ought not to hold that there is a general principle preventing the justices in entertaining an application under sect. 4 or under sect. 14, under a state of facts such as I have already enumerated and will not repeat, of a practically continuous occupation, though not clearly a continuous user of the premises for the purposes of sale of liquor. That brings me to the remaining point of whether or not in this proceeding Mr. Low is entitled to say that the terms under which the justices made the order, and what they did with the order when they granted Wilson a licence, shows that Wilson was a person who could not transfer. Now, if this was to be treated as solely an application by Wilson to transfer, it is possible that what my brother Channell pointed out in the case of *Mackrell* v. *Brentford Justices* might apply, that the transfer machinery under the statute did not cover this case. I think that would be a narrow ground. I think that Mr. Marshall is right in saying that sects. 4 and 14 being read together, the magistrates have dealt with it either as a transfer from Wilson or as an application by Spencer, who is the person of the class intended to apply under sect. 14. However, it seems to me that Wilson was a licensed holder. The justices had granted a licence and had granted a licence upon terms that he should transfer. If that is not so, I think also for the purposes of this order we are entitled to treat this as being an application on behalf of Spencer, who had become a new occupier under agreement, and comes within the language of sect. 14. I think, therefore, that the magistrates have decided this question to a large extent as a question of fact, and I do not think they contravened of necessity any principle which is laid down as a guiding principle of law in the case of *Reg.* v. *Cotham*, and therefore this appeal must be dismissed.

KENNEDY, J.—I desire to add a few words as being one of the members of the court which decided the case of *Reg.* v. *Cotham*. I think I ought to speak with some diffidence as to the construction or the relative meaning of sections in these licensing Acts, but so far as one can form a competent opinion I do not think there is any real doubt about the relations of sects. 4 and 14. It is a relation which I am sure both Wills, J. and myself thought clearly proved in the case of *Reg.* v. *Cotham*, and we gave our judgment upon that view as regards which I see no reason whatever to doubt. Sect. 4 of this Act provides for there being a number of special sessions, which in popular language are spoken of as transfer sessions; it is not an artistic phrase. Sect. 14 is a section which tells justices under what circumstances they may act under sect. 4. I think Mr. Bruce Williamson in his book, which I have before me, perfectly rightly says in reference to sect. 14: "This section, the terms of which are

involved and somewhat obscure, should be read in conjunction with sect. 4. It enacts the cases in which the justices of special or transfer sessions may grant licences, and limits the jurisdiction of the justices to the cases here specified. In other words, sect. 4 is the statutory enactment creating a special sessions or transfer sessions, and sect. 14, although perhaps it may be said it is somewhat obscure in some respects, still purports and is intended to state those classes of cases in which the transfer at transfer sessions may properly be granted by the justices." That being to my mind plainly the relation of the two sections, you cannot read sect. 4 without sect. 14, and that is why I ventured at one stage, perhaps quite needlessly as it turned out, to point out to the learned counsel for the respondent here that it would be dangerous to him if he threw away sect. 4. What does Wills, J., point out in his judgment? Sect. 4, as it constitutes the tribunal which may grant transfers in cases specified under sect. 14, says, with regard to all such cases, that it is for the purpose of licensing "persons intending to keep inns theretofore kept by other persons being about to remove from such inns." Therefore, with great respect to the learned counsel for the respondent, I cannot help thinking that there is a fallacy in suggesting that the words in sect. 4 are not necessarily words which in the case of all transfers are to be borne in mind, because sect. 4 which creates the authority is created as this—to licence "persons intending to keep inns theretofore kept by other persons being about to remove from such inns." Now that was what Wills, J. pointed out as the basis of his judgment—viz, that you must in each case under sect. 4 at those special sessions find that there are persons intending to keep inns theretofore kept by other persons about to remove from such inns. That governs sect. 4, and therefore governs sect. 14, which merely defines the particular cases on which the tribunal created by sect. 4 may work. In this case, that being the meaning, one must find somewhere upon the facts that there was a keeping of an inn which a person intending to remove wished to transfer to another. In this case it is a transfer from Wilson to Spencer. Now, it is objected by the justices first of all that Wilson was not the person who (reading those sections as I think they ought to be read) could be treated as a person who had kept an inn. I do not think we ought to give those words an unnecessarily narrow meaning. We ought to give them a reasonable and fair meaning, and it seems to me that keeping an inn is a question of fact in each case. Was Wilson a person who could be said to have kept these premises as an inn? I think there was evidence upon which the justices at quarter sessions were entitled so to find. Wilson had become by his appeal, which I think was heard on the 6th April 1904, a person in whom the licence had vested by the act of the magistrates. I am not going to criticise, because it is irrevelant, it appears to me, to criticise the other statements of sect. 5 and the various sub-sections, and however strange it may appear that even for a temporary purpose the justices should have granted a licence to a person who at the same time they intimated was unfit to hold it, it is equally strange that justices who use the expression that although they did not think there was sufficient reason to take away the licence, so far as regards the locality, should then go on to say that in their view the licence must not be lost. But all those things are matters of criticisms of policy possibly of their right to do it, but the ultimate fact was and on that Wilson and his intended transferee rely that Wilson was granted the licence and he became the licensee by the proper order for this purpose. The magistrates, to prevent mischief happening, have kept the licence, and have sent it on through their official to the clerk of the licensing justices, so Wilson never physically had possession of the licence, and therefore prudently perhaps did not take upon himself to sell liquor. He none the less became the licensed occupier of premises which he was entitled to occupy in this sense that he did use them for certain purposes of which an inn would be used, such as holding a club meeting and matters of that kind in the inn, though he did not in fact sell, yet so far as was possible and in him lay, he being the holder of the licence, also in my opinion kept the premises as an inn. He kept them for no other purpose, and the magistrates have found that in fact he had the possession of them. Now, of course, I need hardly say that those are not the facts in *Reg.* v. *Cotham.* The man in that case who held the licence never either had possession or occupied for many years past, and somebody else had occupied and kept them, not as an inn, but kept them as a draper's shop. I cannot say that the justices at quarter sessions were wrong in fact in holding that in this case the crucial point is not established by the appellants that these premises might be not fairly treated as premises kept as an inn. They were intended to be used as an inn by Wilson. He did not do it because of certain actions of the justices, but there was no intention by anybody to use them for anything else, and he was in possession of them and had the key. He in order to carry out what the magistrates had proposed—viz., that while he was to have the licence he was as soon as possible to find a transferee, apparently was in negotiation with Mr. W. K. Spencer, to whom now the licence has been transferred. Mr. W. K. Spencer apparently came on to the premises—whether he lived there or not I am not very sure on the statement of the facts—but he came on to the premises, and the justices have found as a matter of fact that there was possession of the licensed premises by Wilson at the time of the transfer to himself, and they found also that Wilson remained in such possession until he had yielded up the same to Walter K. Spencer. So there has never been an absence of possession altogether. The premises have never been kept for any other purpose. They have been kept as an inn so far as they could be kept pending the decision of the justices which they had themselves invited for a transfer to somebody from the other man. The fact that owing to the times at which the sessions are held some months intervened during which no beer or other liquor was sold does not seem to me to be necessarily sufficient, though it might constitute facts with other circumstances which would justify the magistrates in finding that there was in fact no keeping of an inn at the time of this application to transfer. But I do not think that in itself, looking at all the circumstances here, that the justices were wrong in finding, as they must have found, as it seems to me, to justify

their jurisdiction, that the necessities of sect. 4, as well as of sect. 14, were fulfilled in the case so far as regards the actual condition, and the only thing which sect. 14 is relevant for here is that there is a case that from some cause or another there is a person removing from a place kept as an inn. Therefore the other point which is taken as regards *Reg.* v. *Cotham* seems to me to be one which in no way touches the decision there. I am not only speaking of my own judgment, but of my brother Wills' judgment, which I believe to be absolutely right, and that any other decision would have been straight in the teeth of the very words which are the essential words in sect. 4 about the premises being kept as an inn, which is a condition precedent. Then the other point that is taken is that Wilson could not be a proper transferor because of the terms under which he had a licence granted to him. It seems to me that we cannot go into that. He was a person to whom the licence was transferred by order of the proper tribunal. The fact that they did a number of other things, or even intimated that they were wrong in doing so, cannot make it less a transfer as far as his rights are concerned. It appears to me he remained the holder of the licence and the occupier, and though not wholly the occupier, sufficiently the occupier to constitute proper occupation and possession of the premises, and in applying as he did to this sessions the magistrates were justified in saying that the facts are such as to make it the case of a man who has kept an inn being a licence holder, and he was using that licence so far as he could reasonably under all the circumstances—transferring it to a person who was intended to be his successor in keeping that inn. I therefore think this appeal should be dismissed.

RIDLEY, J.—I am of the same opinion, and I will add very few words. I was struck in the course of the argument by the case of *Reg.* v. *Cotham*, in which case it was decided that upon those facts then before the court the transfer could not be granted to a person not intending to keep an inn theretofore kept by other persons being about to remove from it, but being granted to a person who was proposing to keep an inn not theretofore kept by other persons about to remove from it. The facts in that case, however, when they are accurately examined, appear to be widely different from the present case, and it must be to a large degree a question of fact in each case, whether the inn is kept by another person about to remove from it, or whether it is not. In that case it was not kept as an inn at all in the ordinary sense of the word. There was a person named Wallace who had a licence, but he never went near the premises in respect of which the licence was granted. He was not the occupier of them, but some other persons were who carried on therein a draper's shop. Now, I think if that set of facts were put to any court, they would hardly fail to arrive at the conclusion which my brother Wills and my brother Kennedy arrived at in that case, that it was not a case in which the inn was occupied by another person about to remove from it. But, then, taking the facts in this case, I think there is good ground upon which the justices might arrive at the opposite conclusion. It is a very difficult case in respect of its facts, for the inn had never been deserted as an inn. There was no actual break in the possession of the inn and the use of it, and although it was not used for the purpose of actually retailing intoxicating liquors, it was yet used as an inn of such a nature that I do not think one could rightly say, having regard to it, that there had been a cessation of the keeping of the inn. Upon these grounds I think that *Reg.* v. *Cotham* is clearly distinguishable from the present case, and, without making any further observation, I agree with my Lord and my brother Kennedy's judgments.

Appeal dismissed.

Solicitors: *E. W.* and *Bruce Beal*, for *C. E. Speakman*, Crewe; *Taylor, Hoare*, and *Pilcher*, for *A.* and *G. J. Fletcher*, Northwich.

Wednesday, Feb. 1, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

CRICK (app.) *v.* NICHOLLS (resp.) (*a*)

Weights and measures—By-law—Weighing instrument for purpose of weighing coal not exceeding 2cwt.—1cwt. sacks—½cwt. dead weight—Weights and Measures Act 1889 (52 *& 53 Vict. c.* 21), *s.* 28.

By a by-law made by a local authority under sect. 28 *of the Weights and Measures Act* 1889 *every coal dealer conveying coal for sale by retail or for delivery to a purchaser from or out of any vehicle shall constantly carry therewith a correct weighing instrument for the purpose of weighing any quantity of coal not exceeding 2cwt.*

The respondent carried out coal in a cart made up in ½cwt. and 1cwt. bags. He had only one 56lb. dead weight.

Held, that he had committed an offence against the by-law.

CASE stated on an information preferred by the appellant, Nathan William Crick, county inspector of weights and measures for the county of Somerset, against Charles Nicholls, of Bridgwater, for that he, Charles Nicholls, on the 22nd April 1904, at the parish of North Petherton, being then a coal dealer, and then and there conveying and carrying out coal for sale by retail in a certain vehicle, unlawfully did not carry or provide, and was not then provided with, such vehicle, a correct weighing instrument, stamped by an inspector, for the purpose of weighing any quantity of coal not exceeding 2cwt., contrary to the by-law for the county, duly made and passed by the Somerset County Council on the 3rd Jan. 1893, and which by-law was at the time of the commission of the offence, and still is, in force in the county.

Upon the hearing of the information the following facts were proved or admitted:

Nathan William Crick was an inspector of weights and measures for the County Council of Somerset, being the local authority for the county.

The by-law hereinafter set forth was duly made and published by the County Council of Somerset, as required by the Weights and Measures Act 1889 (52 & 53 Vict. c. 21), s. 28, and approved by

(*a*) Reported by W. DE B. HERBERT, Esq. Barrister-at-Law.

the Board of Trade (as by the section provided) on the 10th March 1893.

The respondent was a coal dealer carrying on business at Bridgwater, in the county of Somerset, and on the 22nd April 1904, at the parish of North Petherton, in the county, was conveying and carrying out coal for sale by retail in a cart or waggon.

In such cart or waggon he had some bags or sacks of coal made up, some ½cwt. and some 1cwt., the majority being ½cwt.

The respondent was delivering coal at North Petherton on the 22nd April 1904 in the ordinary course of business.

Nathan William Crick spoke to the respondent there on that day, and called his attention to the scale and to the fact that he had only one 56lb. dead weight.

The machine which the respondent had at the time was practically correct, and was duly stamped by a qualified inspector of weights and measures.

The aforesaid by-law of the Somerset County Council, so made by such council on the 3rd Jan. 1893, under sect. 28 (1) of the Weights and Measures Act 1889 (52 & 53 Vict. c. 21), is as follows:

Every coal dealer shall provide, and every person employed by him who shall convey or carry out coal for sale by retail or for delivery to a purchaser from or out of any vehicle, shall constantly carry therewith a correct weighing instrument stamped by an inspector, for the purpose of weighing any quantity of coal not exceeding 2cwt. The foregoing by-law was made and adopted by the Somerset County Council at a meeting held at the Shire Hall at Taunton on Tuesday, the 3rd Jan. 1893. In witness whereof the common seal of the county council is hereunto affixed. The common seal of the county council was hereunto affixed in the presence of EDWARD FLATMAN, E. R. TROTMAN, Members of the Council.—WILLIAM DUNN, Clerk to the Council.—Approved by the Board of Trade this 10th of March 1893.—C. CECIL TREVOR, Assistant Secretary.

On the part of respondent it was contended that he had a certain machine in the cart or waggon, that he had a ½cwt. weight but not a 1cwt. weight, and that it was possible to weigh 1cwt. of coal with a ½cwt. weight, which he had, as he could weigh the coal in two portions; that he had a correct weighing instrument, stamped by an inspector, capable of weighing 2cwt. of coal; that the reason the respondent carried one weight only—namely, a ½cwt. weight—was that if he carried other weights he would have to reduce, according to their weight, the quantity of coal he carried.

On the other hand, the prosecution contended that the weighing machine which the respondent had in the cart or waggon did not comply with the above by-law, and that it was necessary for and incumbent upon the respondent to have sufficient weights to weigh at one time 2cwt. of coal if the purchaser required that amount; or, at all events, that the respondent was bound to have then and there in his possession weights to the extent of 1cwt., seeing that he had bags of coal for sale of 1cwt. in weight.

The justices were of opinion that the respondent had complied with the meaning of the by-law under the Act of Parliament, and dismissed the case.

Garland for the appellant.

The respondent did not appear.

Lord ALVERSTONE, C.J.—I think that the point that Mr. Garland takes for the appellant is one to which we must give effect—namely, that here the by-law contemplated that there should be a means of checking the weight of each bag that was being tendered for sale or being delivered in pursuance of a request. I think it was intended that the inspector should be able to weigh any bag that he might pick out by chance. The 1cwt. bag could not be weighed in this case except in two operations, or, by what is more feasable, by weighing a ½cwt. bag and then treating that as a ½cwt. weight. The justices ought to have convicted. If they had dismissed the case because the offence was trifling we should not have interfered, but they have dismissed it on the ground that the by-law was complied with. This was not a case for a heavy penalty, for the respondent seems to have acted perfectly honestly.

KENNEDY and RIDLEY, JJ. concurred.

Case remitted to justices.

Solicitors, *Reed* and *Reed*, for *Reed* and *Co.*, Bridgwater.

Wednesday, Feb. 1, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

BAYLEY (app.) *v.* COOK (resp.). (*a*)

Food and drugs—Certificate of analyst—Standard of percentages not set out—Sufficiency.

A person being charged with selling milk deficient in milk fat to the extent of 53 per cent., the analyst's certificate stated that the sample contained parts and the percentages of foreign ingredients as under: "Milk fat 1·4 per cent.; milk solids, other than milk fat, 5·6 per cent. Observations: This milk is deficient in milk solids, other than milk fat, to the extent of 2·9 per cent., which is equivalent to the addition of 34·2 per cent. of water. It is also deficient in milk fat to the extent of 53·4 per cent. of the milk fat."

Held, that the certificate was good.

CASE stated on an information preferred against the respondent for unlawfully and wilfully selling to the appellant, to his prejudice, milk not of the nature, substance, and quality demanded, being deficient in milk fat to the extent of 53 per cent.

It was objected on behalf of the respondent that the analyst's certificate was defective owing to its stating that the sample contained "the percentages of foreign ingredients as under," and not setting them out, and in not stating the standard upon which it was based.

The material parts of the certificate were as follows:

I am of opinion that the same is a sample of adulterated milk, and I am of opinion that the sample contained the parts as under, and the percentages of foreign ingredients as under: Milk fat, 1·4 per cent.; milk solids other than milk fat, 5·6 per cent. Observations: This milk is deficient in milk solids other than milk fat to the extent of 2·9 per cent., which is equivalent to the addition of 34·2 per cent. of water. It is also deficient in milk fat to the extent of 53·4 per cent. of the milk fat.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

The justices dismissed the information on the ground that the certificate was bad.

C. A. Russell, K.C. and *W. J. H. Brodrick* for appellant.

The respondent did not appear.

Lord ALVERSTONE, C.J.—I do not wish it to be thought that the provisions of the Sale of Food and Drugs Act 1899 have in any way lessened the obligation of the analyst to state what he is bound to state under sect. 18 of the Sale of Food and Drugs Act 1875, and to give his certificate in the form necessary by that section. If nothing more appeared on the certificate than "milk fat 1·4 per cent." I do not think that would be enough. The certificate must show that the sample of milk has been compared with some standard. It would perhaps have been more correct to state in the certificate what the proper quantity of milk fat ought to be, but upon examination that does appear on the face of the certificate, for it shows correctly how much milk fat was deficient, and when that is compared with the 3 per cent. in rule 1 of the Sale of Milk Regulations 1901, made under sect. 4 of the Act of 1899, the standard of calculation can be gathered from the certificate itself.

KENNEDY, J.—I am of the same opinion. A person charged should know what was complained of and what he was accused of, without having to enter into elaborate calculations. The certificate should err on the side of clearness and simplicity. The Act of 1899 does not in any way lessen the duty of the analyst under the Act of 1875.

RIDLEY, J.—I agree.

Appeal allowed.

Solicitors: *Robbins, Billing, and Co.*, for *H. Barber*, Winchester.

Thursday, Feb. 2, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY, and RIDLEY, JJ.)

ROBINSON (app.) *v.* GREGORY (resp.). (*a*)

Local government—By-law—Borough — Evidence of publication—Authenticated copy—Municipal Corporations Act 1882 (45 *& 46 Vict. c.* 50), *ss.* 23, 24.

By sect. 24 *of the Municipal Corporations Act* 1882 *the production of a written copy made by the council, if authenticated with the corporate seal, shall, until the contrary be proved, be sufficient evidence of the due making and existence of the by-law.*

Held, that such certificated copy was prima *evidence that the requirements of sect.* 23 *had been complied with, and no further evidence of publication need be given.*

CASE stated on an information preferred by the appellant under by-law No. 6 of the by-laws duly made for the good rule and government of the borough of Swindon under the provisions of sect. 23 of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), against the respondent, for that he, the respondent, on the 15th June, at the borough and parish of Swindon, did frequent and use a certain street—to wit, Milton-road—within the borough, either on behalf of himself or of some other person, for the purpose of bookmaking or betting or wagering, or agreeing to bet or wager, with some other person, contrary to the by-law for the borough in that behalf duly made at a meeting of the council of the borough, held on the 14th May 1901, which by-law was, at the time of the commission of the offence, and still is, in force for the borough.

The by-law under which the proceedings were taken is as follows:

No person shall frequent and use any street or public place, either on behalf of himself or of any other person, for the purpose of bookmaking or betting or wagering, or agreeing to bet or wager with any other person.

Upon the hearing of the information the respondent pleaded not guilty, and evidence in support of the charge was taken, which the justices considered disclosed a case for the respondent to answer, and included evidence of the due making and existence of the By-law No. 6 and the production of a printed copy of the by-law authenticated by the corporate seal of the borough of Swindon.

The respondent did not offer any affirmative evidence to show that the by-law did not exist, or was not in force or had not been duly made or published; but, as a preliminary objection, contended that the information must be dismissed because there was no evidence before the justices of any publication of the by-law, and he referred to *Mottram* v. *Eastern Counties Railway Company* (7 C. B. N. S. 58).

The appellant relied upon sect. 24 of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), and contended that the authenticated copy so put in by him as aforesaid was sufficient evidence, until the contrary was proved, of the by-law being in force and of compliance with the requirements of sect. 23 of that Act, and that no further publication of the by-law was necessary, and that even assuming publication was necessary publication ought to be presumed, and that it was for the respondent to disprove publication.

The justices were of opinion that the contention of the respondent was well founded, and that in order to obtain a conviction the appellant ought to have given some evidence, however slight, that the by-law was published or promulgated after it came into force by virtue of sect. 23 of the Municipal Corporations Act 1882.

They therefore dismissed the information.

The written judgment of the justices was as follows:

In this case one Alfred Gregory was summoned by the police under the sixth corporation by-law on two summonses which alleged that he frequented and used Milton-road on the 15th and 16th June for the purpose of bookmaking. The town clerk appeared for the police. The defendant was represented by counsel (Mr. Biron). By consent the two summonses were taken together, and the defendant pleaded not guilty. The town clerk having examined on oath a detective sergeant, and, Mr. Biron having cross-examined him, Mr. Biron called on the town clerk to formally prove the by-law, which the town clerk proceeded to do, following the procedure prescribed by sect. 24 of the Municipal Corporations Act 1882, and we find as a fact that the due making and existence of the by-law were proved. The town clerk then closed his case. Mr. Biron thereupon on behalf of the defendant submitted that no offence had been disclosed, no publication of the by-

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

law having been given in evidence. The town clerk submitted that no publication of this by-law was necessary beyond that prescribed by sect. 23 of the Municipal Corporations Act 1882. After consultation we came to the conclusion that this by-law required publication, and that the requirements prescribed by sect. 23 of the Municipal Corporations Act 1882 included publication, and that the offence being a criminal offence some proof of publication was necessary, and in the complete absence of proof we dismissed the summons, but we adjourned the formal entry of the judgment for fourteen days to enable the town clerk to consult the corporation, and, having regard to the likelihood of an appeal being lodged against our decision, we thought it best to reduce our judgment into writing and shortly state our reasons. We believe that all laws require promulgation or publication, though the manner of promulgation is matter of very great difference. With regard to the common law of England, previous publication is presumed and formal promulgation is only excused in the case of statutes as "every man in England is in judgment of law party to their making, being present thereat by his Parliamentary representative." But whatever the manner, it is incumbent on the promulgator to do it in the most public and perspicuous manner, and even with regard to statutes copies are printed at the King's Press for the information of the whole land. By-laws are an invasion of the common law of the realm, and, we should have thought, require the fullest publicity before binding persons to be affected thereby. We have tested our decision by the analogy of such other by-laws as occur to us. With regard to railway by-laws, a particular form of publication is prescribed by the Consolidation Act of 1845, and in the case of *Motteram* v. *Eastern Counties Railway* the necessity for promulgating all laws is treated as accepted law. With regard to by-laws under the Elementary Education Act 1870, if such by-laws are sanctioned by His Majesty by Order in Council, then such by-laws have effect as if they were enacted in the Elementary Education Act 1870, and formal promulgation is rendered unnecessary. With regard to by-laws under the Public Health Acts, we have carefully considered sects. 182 to 188 of the Act of 1875, so as to try to come to a correct legal decision in this case. With regard to by-laws made under the Municipal Corporations Act 1882 and the Local Government Act 1888, we can discover no provisions in these statutes with regard to publication, and the town clerk submitted that no publication was required by law, and that because the due making of this by-law was proved and its existence (which we read to mean "non-appeal") no proof of publication was necessary. In our opinion the compliance by the police with sect. 24 of the Municipal Corporations Act 1882 does not impose on the defendant the liability to prove non-publication, therefore in our opinion the question remains: Must this by-law be duly published after the requirements of sect 23 of the Municipal Corporations Act 1882 have been complied with and the publication proved? In our opinions publication is necessary, and therefore some proof of publication was necessary to support the summons against the defendant. Very slight proof of publication would have satisfied us on the principle *Omnia rite acta*, &c.

The following is a copy of the certificate attached to the copy of the by-laws produced before the justices:

I hereby certify that a copy of the foregoing by-laws, sealed with the corporate seal of the said borough, was on the 15th May 1901 sent to His Majesty's Principal Secretary of State; that copies were also on the same day affixed on the town hall in the said borough; and that His Majesty the King, by the advice of his Privy Council, within the period of forty days after a copy of such by-laws was sent to His Majesty's Principal Secretary of State as aforesaid, did not disallow the said by-laws or any part or parts thereof, nor did His Majesty the King enlarge the time within which the said by-laws should not come into force.—Dated this 3rd day of July 1901.—(Signed) ROBT. HILTON, Town Clerk.

Daldy for the appellant. The justices dismissed the information on the ground that there was no evidence of publication of this by-law. A sealed copy of the by-laws was put in evidence, and so far as by-laws of this nature are concerned—namely, for the good government of the borough, the question depends upon sects. 23 and 24 of the Municipal Corporations Act 1882. By sub-sect. 3 of sect. 23 a by-law is not to come into force until the expiration of forty days after a copy thereof has been fixed on the town hall, and under sub-sect. 4 the by-law is not to come into force until the expiration of forty days after a copy thereof, sealed with the corporate seal, has been sent to the Secretary of State, and if within those forty days the Queen, with the advice of her Privy Council, disallows the by-law or part thereof, the by-law or part disallowed is not to come into force. By sect. 24 the production of a written copy of a by-law made by the council under that Act, if authenticated by the corporate seal, shall be sufficient evidence of the due making and existence of the by-law, and if it is so stated in the copy of the by-law having been approved and confirmed by the authority. The fixing on the town hall is really a part of the creation of the by-law, and the authentication by the corporate seal and the certificate attached to the copy of the by-laws signed by the town clerk are evidence that the by-law has been duly made and is in existence. Therefore it is in force, and all the conditions necessary to bring it into force, such as the fixing and publication, must be presumed.

The respondent did not appear.

ALVERSTONE, C.J.—We need not trouble you any more, Mr. Daldy. It seems to us that the magistrates ought to have convicted in this case. The certificate put in under the seal stated that the by-law had been sent on the 15th May to His Majesty's Secretary of State, and that copies were also on the same date fixed on the town hall in the said borough. Sect. 23 provides that the by-law shall be fixed on the town hall, and also there are certain limits of time before it can come into operation. Sect. 24 says: "The production of a written copy made by the council, if authenticated with the corporate seal, shall, until the contrary be proved, be sufficient evidence of the due making and existence of the by-law." I thought at first possibly, inasmuch as there were two separate conditions, it would not be sufficient to show only the formality as to the making had been complied with. But it seems to me, inasmuch as the certificate deals with the condition which is necessary before the by-law can exist, and as the section has made it *primâ facie* evidence both of the making and of the existence, and the certificate refers to the particular matter which would give it validity, that this objection ought not to prevail. I am aware it is entirely within our discretion as to what we do with the costs where the appellants do not appear and do not put the law in motion, but at the same time in this case, there being no merits, and the point having been taken as an answer to the information, and the appellants being obliged to come here to get the

matter set right, we think the respondent ought to pay the costs of this appeal.

KENNEDY, J.—I am of the same opinion. It appears to me sect. 24, which makes the production of a written copy of the by-law, if authenticated by the corporate seal, until the contrary is proved, sufficient evidence of the due making and existence of the by-law, and the by-law having been approved and confirmed, covers all the provisions of sub-sects. 2, 3, and 4 of the preceding section, and, until the contrary is made out, it is to be sufficient evidence of the due making. That refers evidently, I should say, to sub-sect. 2 of sect. 23. Such a by-law shall not be made unless at least two-thirds of the whole number of the council are present. What do the words "existence of the by-law" mean? It must mean existence of the by-laws in an operative condition. Now, such a by-law shall not come into force until the expiration of forty days after a copy thereof has been fixed on the town hall, and there are certain other provisions about its not coming into force until certain things shall have been done. It seems to me making and existence means the making of the by-law and its existence as an operative existence, an effective thing, and if so, proof was given here, and there was sufficient evidence of publication.

RIDLEY, J.—I agree.

Appeal allowed

Solicitors: *Robbins, Billing,* and *Co.*, for *Robert Hilton*, Town Clerk, Swindon.

Thursday, Feb. 2, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

POPLAR UNION (app.) *v.* MARTIN (resp.) (No. 2.)(a)

Poor law—Pauper—Refusal to maintain—Work offered with conditions—Vagrancy Act 1824 (5 *Geo.* 4, *c.* 83), *s.* 3.

M., an able-bodied pauper, having entered the P. Workhouse, was taken to and offered work on a farm. He would not have been allowed to start work on the farm without giving an undertaking and signing an agreement to conform to the rules and conditions of employment on such farm.

The following were the material conditions in the agreement: I promise to abstain from all intoxicating drink whilst resident on the colony; and I pledge myself not to enter any premises where intoxicating drink is sold, and to discourage others from doing so. I also promise to abstain from the use of all profane language whilst on the colony. I promise to attend the Saturday night roll-call meetings in the citadel, and any special meetings which may from time to time be arranged by the governor of the colony. I also promise to attend some place of worship once on a Sunday.

M. refused to sign the agreement and to work on its terms.

He subsequently returned to the workhouse and became chargeable to the rates.

On an information charging him that he, being a person able wholly or in part to maintain himself, wilfully refused and neglected so to do, whereby he became chargeable to the union.

Held, that, as these conditions had no relation to either the work or to the proper or efficient discharge of the work, the refusal of the pauper to accept work on these conditions did not make him guilty of having wilfully refused and neglected to maintain himself.

CASE stated on an information preferred by the appellants against the respondent for that he being a person able wholly or in part to maintain himself by work or other means, did wilfully refuse or neglect so to do, whereby he became chargeable to the union.

The respondent was an able-bodied man of thirty-nine years of age, and on the 23rd Feb. 1904 was admitted to the Poplar Workhouse, and on the 13th April following he and ten other inmates were taken by the labour-master to the farm colony established by William Booth for the reception and employment of destitute men.

Under the terms of an agreement between the appellants and William Booth the respondent could have started work at the colony on probation, receiving as remuneration his food and lodging free and 6*d.* a week in the nature of pocket money, and if the respondent had after two or three weeks been employed upon brickwork he could have earned 4½*d.* a yard for digging clay, at which rate it is possible for some men to earn 30*s.* a week.

He was told to go to work in the brickfield at the colony.

It was not possible to do more than guess at the remuneration which he might have earned later on.

These terms were explained to the respondent, and he was asked to sign an undertaking to conform to the rules of the colony, but he refused to work upon these terms or to sign such undertaking, and left the colony.

On the 18th April 1904 the respondent returned to Poplar Workhouse and again became chargeable on the rates.

It was contended on behalf of the appellants that the respondent had rendered himself liable to conviction as an idle and disorderly person under sect. 3 of 5 Geo. 4, c. 83.

The magistrate decided against this contention, but stated a case for the High Court, which remitted the matter to him (91 L. T. Rep. 550) to inquire whether the respondent did actually refuse wilfully to maintain himself.

At the further hearing it was proved that on the 13th April 1904 the respondent came to the colony, and on the 14th was handed a form of agreement to sign, and that the respondent refused to sign it and to work on its terms.

The respondent would not have been allowed to work at the colony except upon his agreeing to all the terms of this agreement.

The respondent assigned no reason for refusal except that the remuneration was insufficient. The respondent stated that he was a member of the Church of England, and it was proved that there was a church of that denomination that he could have attended.

The magistrate was of opinion that the conditions contained in the agreement, by which the colonist was required to undertake to discourage other colonists from entering premises where intoxicating liquors are sold and was to attend the Saturday night roll-call and other

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

special meetings, which were explained to be a form of church parade, and was to attend some place of worship once on a Sunday, were not reasonable conditions to be attached to his employment, and the respondent was justified in refusing work on those conditions, and was therefore not guilty of the offence.

The agreement to be signed was as follows:

I being by trade or profession a but being unable to find work, hereby apply for admission and work on the above-mentioned colony. I agree to obey all the rules and regulations made for the good and management of the colony, and to carry out all the instructions which may be given me by the officers and superintendents under whom I work. I promise to abstain from all intoxicating drink whilst resident on the colony, and I pledge myself not to enter any premises where intoxicating drink is sold, and discourage others from doing so. I also promise to abstain from the use of all profane language whilst on the colony. I promise to attend the Saturday night roll-call meetings in the Citadel, and any special meeting which may from time to time be arranged by the governor of the colony. I also promise to attend some place of worship once on a Sunday. I fully understand the regulations as to grants as printed on the other side, and am quite willing to allow all or part of my cash earnings for special work or overtime or grant recommended by superintendent to be credited to me in the service fund of the colony week by week. I will not at any time during my residence on the colony engage in trade or barter, either with my fellow colonists or outsiders. I agree that all matters in dispute as between myself on the one hand and any representative of the governor or any other colonist or other person on or connected with the colony on the other hand during or arising out of or in connection with my stay here shall be referred to the sole arbitration of the governor for the time being of the colony, whose decision shall be final and binding upon both of us, and further I agree that I will not take or commence any steps or proceedings of a legal nature or character against any outside person without the governor's previous advice and consent in writing, except upon the terms that all my connection with the colony be previously severed. For any infringement of rules, negligence of work, disobedience, or any other misconduct, I render myself liable to instant dismissal, and fully understand that such dismissal shall thereafter be a barrier to my readmission either to the training farm or main colony. This condition also applies in the event of my leaving secretly or without due regard to the terms and conditions of this agreement. I hereby declare that I have read or have had read to me the preceding rules and conditions and thoroughly understand them.—Signed .—Date .

Colam for the appellants.

The respondent did not appear.

Lord ALVERSTONE, C.J.—The question in this case raises a point of very considerable difficulty, and undoubtedly it may possibly have to be considered again with reference to other circumstances where a charge is made under this section. Of course, what we have got to say is that the person charged in this case, being able wholly or in part to maintain himself or his or her family by work or other means, wilfully refused or neglected to do so, by which refusal or neglect he or she becomes chargeable to the parish. The man is offered work for his food and 6*d.* pocket money, and there are undoubtedly salutary and useful conditions, to which Mr. Colam has called our attention, that if any man is paid for his work it will go to a fund in which he has some interest—what exact interest he has we have not been informed; and he was about to be employed in work which would make him competent to earn a higher rate of wages, it is said, in two or three weeks. I am perhaps putting it too high; the words are, "if the respondent had after two or three weeks been employed upon brickwork he could have earned 4½d. a yard for digging, at which rate of pay it is possible for some men to earn 30s. a week." However, he probably would have got himself into such a position or habit of working as to have got a fair rate of wages. Now, taken by itself, and if there had been nothing else in the case, I should have hesitated a long time before I came to the conclusion that the man who was offered without restriction employment of that kind had not wilfully refused to work. It is true the man objected to the rate of pay; he said it was not enough; and there might be circumstances under which, if it turned out that the food offered, or something of that sort, showed that he was not getting very substantial remuneration, that there might be a ground for refusal; but the magistrate has thought that the conditions attached to this possible employment were either not reasonable, or, we must take it, were not such as the non-compliance or the refusal to comply with made the man wilfully refuse to do work which would help him wholly or in part to maintain himself. I do not wish to express that the conditions in themselves are unreasonable conditions. I do not think if a man does go down to a colony of this kind it is at all unreasonable that he should be asked to report himself or to attend meetings, nor do I think it unreasonable that he should, if he goes there, be asked to put himself under certain restrictions as to intoxicating liquors; but I have this feeling, that those are not the kind of tests which ought, in dealing with this case of a criminal offence, to apply. It seems to me, it being necessary to draw the line at some point, the conditions ought to be conditions which affect his work, and, if the terms on which he is offered work are reasonable with reference to the work which he is called on to do, we ought to hesitate a long time before we should hold that a man was justified in refusing to do work on conditions which are reasonable with reference to the work, as, for instance, coming at certain hours, obeying orders in the course of his work, observing hours for meals, and things of that kind, and as to conducting himself during the hours of work and in connection with his work in a way which would seem to be reasonable. But I doubt myself whether, in considering this question under sect. 3, we have a right to say that the court may regard the conditions imposed upon the man to which he is not willing to assent, which are conditions imposed upon the man and made an obligation, which have no relation to the work at all. The attendance at some place of worship on Sunday is a perfectly proper thing, and if we can induce people so to attend it is obviously what we ought to encourage. I take no objection in this particular case to attending the meetings of the particular organisation that was offering the man work; on the other hand, of course, there are religious bodies and religious creeds in England which are perfectly lawful, to which people might take very reasonable objection to attending. In the same way, as far as I am concerned, anything which would promote

the cause of temperance, or which will induce people to advocate the cause of temperance, no judge, who knows the connection between crime and drink, I think, would for a moment hesitate to say that he would be the last person to think that that is unreasonable. On the other hand, I doubt whether it is quite a consideration we ought to allow to form a matter of consideration when we are dealing with a question of refusal to work. The obligations not to go to a public-house while he is at the colony, to abstain from all intoxicating drink, and to pledge himself not to enter any premises where intoxicating drink is sold, and to discourage others from doing so, admirable as they are in themselves, in my opinion have nothing to do with the man's work, or the question whether he is willing to work at all, or whether he will work in a proper way. Without going as far as the magistrate goes in saying they are not reasonable conditions — possibly what he meant to express in his own short way of putting it was that they were not reasonable conditions to be attached to the conditions of his employment — I come to the conclusion that these conditions or some of them, having no relation to either the work or the proper and efficient discharge of the work, are not conditions which a court of justice ought to take into consideration when they are deciding whether a man has wilfully refused or neglected to do work within the meaning of sect. 3. I think, therefore, for this reason, the decision of the magistrate must be upheld.

KENNEDY, J.—I am of the same opinion. I wish to add but little, because I expressed a view (which I see no reason to change) on the previous occasion when this case came before us (91 L. T. Rep. 550); and I entirely concur in the way my Lord has expressed our reasons, reasons which satisfy me, for refusing to reverse the decision of the magistrate in this case. I only wish to say this, that while we have nothing but admiration for the particular system in a particular colony such as this for encouraging men to work and give them hope, and at the same time keep them under wholesome disciple and reasonable restraint, yet one must be careful when one approaches the question whether it is right to say that a refusal on the part of a man to enter that particular establishment, and to make himself subject to those particular rules and regulations, is so unreasonable that one should treat as an offence against the law the result of his refusal as being something which amounts to a wilful refusal or neglect to wholly or partly maintain himself. It is no reflection in the slightest degree upon the excellent intentions and the excellent work of the particular institution if one declines to treat a refusal (which must be applied to all persons) to enter into it as involving that which can be criminally punished. I see nothing whatever to object to, speaking broadly, in any reasonable rules which would apply not only to the kind of work and the hours of work, but which would apply, for example, in the working hours to what must be done in the way of conduct during working hours, or to reasonable rules of discipline, not merely in doing the work itself, but in coming to and going from that work. I see nothing in men being told to behave as reasonable human beings while in the lodgings provided for them, or soberly or decently in conversation, but I do feel this, that while in this particular case there may be nothing which most men, at any rate, would dispute to be reasonable, I do think it would be something which, at any rate, I would not be a party to, to say that whatever meetings, unquestionably of a religious kind, are held the man must attend; and, although it may be difficult to draw the line, it is easy to exaggerate the extent of compliance which it is intended to exact. I do think also that while sobriety and the abstinence from drink may be a very reasonable thing for the man himself, it is not well that he should be made more or less, according to the discretion of his superiors, a wrongdoer unless he carries out the duty of preaching to others as well as restraining himself. I therefore concur in the judgment which my Lord has pronounced. In stating this I am by no means prepared to say that the mere existence of particular rules of discipline relating to work or working hours is any bar to any magistrate coming to a different conclusion.

RIDLEY, J.—I agree with the judgments which have been given. I think also this is a matter of importance. The regulations of this colony seem to be such that no one can object to them, and they deserve, I think I might say properly, our admiration. There may be many other colonies which have similar regulations, but with a different object. In those cases also we might have to agree with the regulation as being framed for the benefit of all concerned, but we must draw the line somewhere. The question is whether in such cases the person who refuses to abide by them wilfully refuses or neglects to accept the work which is offered to him. I find it extremely difficult to suggest any limit or line which can be drawn except that which my Lord suggests—namely, that the regulations in question must have something to do with the work which is offered, or the wages that are offered for it. If you go beyond that you will find difficulties arising upon every and each single occasion. I find myself unable to suggest where any other line can be drawn, and I think it may be very properly said that the regulation to which the person objects must be one having reference to the work he has to do, or to the wages that he is to receive for it. Therefore I agree with the judgments which have been given.

Appeal dismissed.

Solicitors: *C. V. Young* and *Son.*

Thursday, Feb. 2, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

OATLEY (app.) *v.* LEMON (resp.). (*a*)

Food and drugs — Warranty—Milk—Place of Delivery—Milk tampered with in transit—Sale of Food and Drugs Act 1899 (62 & 63 *Vict. c.* 51), *s.* 20 (6).

The respondent, a farmer at S., entered into a contract to supply to a retail purveyor at A.-road Station, new milk with all its cream, with a written warranty to that effect. On arrival it was found that the milk had had

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law

abstracted 16 per centum of its fat, and upon the retailer being summoned under sect. 9 of the Sale of Food and Drugs Act 1875, he showed that it was part of a consignment received at A.-road Station from the respondent with the warranty.

The respondent having been summoned under sect. 20 (6) of the Sale of Food and Drugs Act 1899, for having given a false warranty, while admitting the abstraction of fat between S. and A.-road Stations, proved to the magistrate's satisfaction that at and from the handing over of the milk to the railway company at S. to the delivery at A.-road, he had reason to believe the statements in the warranty were true.

The magistrate thereupon dismissed the summons. Held, that the magistrate was right.

CASE stated on a complaint laid by the appellant against the respondent for giving a false warranty in writing in respect of a consignment of milk.

At the hearing the following facts were admitted or proved.

The respondent, who is a farmer living at Sudbury in the county of Derby, prior to the present year, entered into a contract as follows with a retail purveyor of milk trading at Holland-road, Kensington.

By this contract, which is and at all times relevant to this appeal has been subsisting and in full force, the respondent agreed to supply the retail purveyor with daily consignments of new milk with all its cream at specified prices, each consignment to be forwarded by rail to, and to be delivered to the servants of the retail purveyor on its arrival at Addison-road Railway Station, Kensington, accompanied by a written warranty to the effect hereinbefore set forth.

No writing was forthcoming relating to the aforesaid contract, which was made between the parties by word of mouth, and the evidence respecting it was sufficiently vague to create doubt as to where the property in the milk passed and the warranty became operative.

Upon the whole, the magistrate concluded that both conditions came into existence upon delivery at Addison-road Station.

On the 28th April 1904 the retail purveyor was summoned under sect. 9 of the Sale of Food and Drugs Act 1875 for selling without disclosure milk altered by the abstraction of 16 per centum of its fat. The abstraction and sale were proved at the hearing of the prosecution, but on the defendant proving that the milk so sold was part of a consignment forwarded to him by the present respondent at the Addison-road Station under and with the above-stated contract and warranty respectively, and that he had duly complied with the several provisions of the Sale of Food and Drugs Act 1875 and 1899, ss. 25 and 20 (1) respectively, that summons was dismissed.

Thereupon the proceedings for giving a false warranty under the Act of 1899, s. 20 (6) were instituted against the respondent by the appellant.

At the hearing the respondent, while admitting the abstraction of fat as alleged at some time and place between the departure of the milk from Sudbury Station and its delivery to the retailer at Addison-road Station proved to the magistrate's satisfaction that at and from the handing over of the milk to the railway company at Sudbury to the final delivery thereof at Addison-road he had reason to believe that the statements and descriptions in the warranty were true.

The actual facts given in evidence of the last-mentioned defence did not extend beyond the time when the milk was put into the hands of the railway company at Sudbury, and thereupon the appellant's solicitor, who did not challenge the magistrate's finding as up to and including that time, contended that there was no evidence before him to warrant a finding of such reasonable belief as aforesaid on the respondent's part at the time when the warranty was given—that is, when the milk was delivered at Addison-road.

It was not, however, suggested on behalf of the prosecution that interference of the kind in question with milk consignments did not in fact sometimes occur or was reasonably to be apprehended in the course of railway transit. Effectual control or examination of milk by consignors, whether during transit or at the station of delivery, would, as it appeared to the magistrate, have been practically and commercially impossible, and even if such control were theoretically possible legal insistence upon it would go far to substitute certainty of knowledge for reasonableness of belief and to do away with the statutory defence.

Accordingly, the magistrate found as a fact that the respondent had brought himself within the protective operation of sect. 20 (6) of the Act of 1899, and he dismissed the proceedings.

Courthope-Munroe for the appellant.

The respondent did not appear.

Lord ALVERSTONE, C.J.—Mr. Munroe has clearly pointed out what is obviously correct, that it may be that a different standard of guilt and innocence may arise where proceedings are taken under sub-sect. 6 in consequence of a warranty being set up, and where the person who has given the warranty is the original seller. Undoubtedly, if proceedings had been taken against Lemon for selling the milk at Addison-road in an impure condition or in an adulterated condition there would be no defence on the ground that he did not know. I desire to point out that a different consideration might arise in that case, because you have to find as a matter of fact that the milk was sold in that condition at a particular place and at a particular time. In other words, it does not of necessity follow that because delivery is taken under a contract of sale at a particular place that the sale is at that particular place. I only mention that because it must not be assumed that in every case the facts will be exactly the same where you are taking proceedings for a sale, and where you are relying upon a warranty given by the vendor. In this case the retailer having set up a warranty, proceedings were taken in due time against Lemon, who gave the warranty, and those proceedings are based upon sub-sect. 6 of sect. 20 of the Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), which provides that "every person who in respect of an article of food or drug sold by him as principal or agent gives to the purchaser a false warranty in writing shall be liable on summary conviction for the first offence to a fine not exceeding 20*l.*, and for any subsequent offence to a fine not exceeding 100*l.* unless

he proves to the satisfaction of the court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true." Now, that section was not the section under consideration in the case of *Parker* v. *Alder* (79 L. T. Rep. 381; (1899) 1 Q. B. 22), and it has, of course, no application to the original offence of selling. This is legislation in order still further to protect the purchaser by enabling you to punish people who give false warranties. In this case, as a construction of law, the magistrate has held, and for this purpose we must assume quite rightly held, that the warranty was operative at Addison-road, or, in other words, it must be taken that Lemon warranted that at Addison-road the milk was in a pure condition. The magistrate has come to the conclusion on the facts that he was justified in finding as a matter of fact that Lemon really had reason to believe that the warranty was true, and that the milk when delivered at Addison-road would answer the warranty he had given. Mr. Munroe has told us, but, of course, we cannot take it into consideration in this case because it nowhere appears, that Lemon ought to have known that there were such opportunities for the milk being tampered with on the journey that the warranty would be broken, so that it was a false warranty to say that the milk was pure at Addison-road. I should be very loth unless there was some statement of fact of a competent authority to draw the conclusion that the facts are such as Mr. Munroe has stated. At any rate the magistrate has not done so. The magistrate has come to the conclusion that Lemon, having put pure milk in at the sending station, had reason to believe that the milk would be in the same condition when it was received at Addison-road. Under these circumstances it seems to me fair to hold that Lemon has warranted it as at Addison-road, which I agree is the point the magistrate has decided, and when he gave the warranty for the purpose of this case he is to be taken to have given it as at Addison-road and as applying to Addison-road, and he has found as a fact that when the person alleged to have given the false warranty gave it he had reason to believe that it was true. That really he has found as a finding of fact, and we cannot possibly hold because there has been something done upon another prosecution that he must be, although innocent, held liable under a statute which on the face of it contemplates that an innocent warrantor may give as a defence that he believed the description was true. I therefore come to the conclusion that the decision of the magistrate, Mr. Lane, on the facts found by him, is perfectly right.

KENNEDY, J.—I am of the same opinion. I think Mr. Munroe has pointed out what may be the result in the same case in which there was a prosecution under sect. 6 of 38 & 39 Vict. c. 63, and that it would be something different from that which would result from a prosecution under sect. 20, sub-sect. 6, of 62 & 63 Vict. c. 51. That is a matter for the Legislature to consider. I will only say this, that I think, as Wills, J. pointed out in *Parker* v. *Alder* (*sup.*), the case Mr. Munroe cited, that, assuming there was a case under sect. 6 of this kind on such facts as were proved before Wills, J., it would be a case in which there would be a conviction and must be a conviction according to the ruling of this court presided over by the late Lord Chief Justice. Yet at the same time, as my brother pointed out, what would happen if there were absolute innocence in the case of a wholesale seller is that there would be a nominal penalty, and that, it seems to me, is the real method for drawing an apparent distinction between the question of knowledge required according to one section to justify a conviction, or rather the want of knowledge, and if the honest belief is proved as regards the warranty it is a defence, whereas under the other it would be no defence to say, I honestly believed that the milk I was selling was good. I agree that it is a distinction, but one must leave that to the Legislature. As Mr. Munroe pointed out, the conviction, if the court thought it was an honest one, would be merely a nominal amount of 1*s.* or 1*d.* That is the nearest equitable result one can get under these two sections.

RIDLEY, J.—I agree for the same reasons.

Appeal dismissed.

Solicitors: *Watson, Son,* and *Room.*

Thursday, Feb. 2, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, L.JJ.

MILE END GUARDIANS (apps.) *v.* SIMS (resp.). (*a*)

Poor law — Pauper — Disobedience of order of workhouse officer — "Misbehaviour" — Poor Relief Act 1815 (55 *Geo.* 3, *c.* 137), *s.* 5.

Wilful disobedience of the lawful order of an officer of a workhouse is not "misbehaviour" within sect. 5 *of the Poor Relief Act* 1815.

CASE stated on an information charging the respondent for that he, being a person maintained in a public workhouse, had been guilty of misbehaviour.

On the 17th Nov. 1892, under the authority of 12 & 13 Vict. c. 103, s. 14, as amended by sect. 22 of 39 & 40 Vict. c. 61, the appellants, with the sanction of the Local Government Board, entered into a contract with the Kensington Guardians whereby able-bodied paupers chargeable to the appellants might be received and maintained in the workhouse belonging to the Kensington Guardians.

The respondent was admitted to the appellants' workhouse at Mile End, on the 31st Aug., and, being an able-bodied pauper, was on the following day ordered verbally to go to the Kensington Guardians' workhouse at Notting Hill, and at the same time an order for admission was handed to him to take with him.

The respondent refused to go to the Notting Hill Workhouse, saying that he would go to Blackheath, and when in the street he left the workhouse official who was to have accompanied him to Notting Hill.

He did not go to the Notting Hill Workhouse, but on the 3rd Sept. was admitted to the Mile End Workhouse and again became chargeable to the appellants.

He was then given into custody and charged before the magistrate under the Poor Relief Act

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

1815, s. 5, which is to the effect that if in any case any person maintained in a workhouse shall refuse to work at any work suited to his age, strength, or capacity, or shall be guilty of drunkenness or other misbehaviour, he shall be liable to hard labour on conviction.

The appellants contended that the wilful disobedience to a lawful order of an officer of their workhouse was misbehaviour within the section.

The magistrate held that the misbehaviour must be *ejusdem generis* with drunkenness, and that disorderly, violent, or offensive conduct was meant, and he was fortified in his opinion by the fact that refusal to work was made a specific offence which would have been unnecessary if disobedience of an order was misbehaviour. Further, provision was made in case of disobedience by art. 127 of the General Consolidated Order of the 24th July 1847, for any pauper who, being an inmate of a workhouse, shall wilfully disobey any lawful order of any officer of the workhouse is to be deemed disorderly. Under art. 129 the master may punish disorderly paupers by restrictions as to diet.

He therefore dismissed the information.

R. Cunningham Glen and *Bethune* for the appellants.—The question here is whether or not the disobedience of an order of an officer of the workhouse by a pauper constitutes "misbehaviour" within sect. 5 of the Poor Relief Act 1815. That section provides that if any person maintained in any workhouse refuses to work "or shall be guilty of drunkenness or other misbehaviour" shall, on being convicted, be sent to hard labour. The learned magistrate has held that the word "misbehaviour" is governed by the word drunkenness, but there is no reason for such a construction. We contend that misbehaviour is constituted by a refusal to do something which the pauper is lawfully ordered to do by an officer of the guardians. Although the pauper was outside the walls of the workhouse at the time of his disobedience to the order, it was none the less disobedience of a lawful order of the officer of the guardians. All that the General Consolidated Order 1847 does is to enable masters of workhouses to deal with lighter cases in a lighter way. The master could not have proceeded under that order, for the pauper was outside the workhouse, and the order cannot have been intended to supplant the statute. "Misbehaviour" does not import disorder as of necessity. It includes all breaches of discipline within the workhouse.

The respondent did not appear.

ALVERSTONE, C.J.—Our opinion is that the magistrate has taken the correct view. We are asked to apply a section of workhouse law passed when things were different to what they now are, and when undoubtedly there was no question of taking a man from one workhouse to another or a refusal to go from one to the other. Sect. 5 of the Poor Relief Act 1815 also provides that a person maintained in a workhouse who refuses to work can be taken before the magistrate, and if found guilty be sent to prison with hard labour. Now, I quite think there are a great many cases of misbehaviour—in addition to drunkenness—which would undoubtedly make a man disorderly, such as behaving improperly or being guilty of improper conduct in the workhouse which might be dealt with under this section. But in this case we are asked to extend this section to the case of a man who lawfully, I will assume, has been ordered to go to a certain workhouse and refuses to go there. I think it would be straining the section to include this disobedience to "misbehaviour" within the meaning of the section when we find that there is more modern legislation which provides that disobedience of lawful orders may be dealt with in a different way. I do not think we should put on the word this wide construction when we find that there is an alternative punishment for the offence. The decision of the magistrate is right.

KENNEDY and RIDLEY, JJ. concurred.

Appeal dismissed.

Solicitor: *C. V. Whitgreave.*

Thursday, Feb. 2, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

WELCH (app.) v. CUTLER (resp.). (a)

Bread—Sale otherwise than by weight—Loaf weighed with others—Bread Act 1836 (6 & 7 *Will.* 4, c. 37), *s.* 4.

A purchaser having asked for a loaf of bread was served with a loaf for which he paid 3d. It purported to be a 2lb. loaf, but on being weighed was ½oz. short of 2lb. The seller proved that all the loaves of bread were weighed three-quarters of an hour after they were baked, three loaves at a time, and that all the batches of three loaves weighed 6lb.

Held, that this was a sale otherwise than by weight within sect. 4 of the Bread Act 1836.

The weighing of the bread must be sufficient to ascertain the quantity or weight of bread in the particular loaf that is handed to the purchaser.

CASE stated on an information preferred by the appellant against the respondent, for, that he being a baker did cause to be sold a certain loaf of bread otherwise than by weight, to wit for the sum of 3d. for the loaf, the loaf not being bread usually sold as French or fancy bread or rolls, contrary to the Bread Act 1836.

At the hearing of the information it was proved that the appellant was the inspector of weights and measures for the borough of Maidstone, and that on the morning of the 24th Aug. 1904 he sent one Charles Clifton to buy bread at the defendant's shop. Charles Clifton went to the shop and asked for a loaf of bread. He was served with a long tin loaf, for which he paid 3d. He went outside the shop and handed the loaf to the appellant. Both men then went into the shop and weighed the loaf, which purported to be a 2lb. loaf. The loaf was half an ounce deficient in weight. The loaf was produced in court, and it was an ordinary loaf that had been baked in a tin.

On behalf of the respondent it was proved that all the loaves of bread baked on the morning of the 24th Aug. 1904 were weighed three quarters of an hour after they were baked—three loaves at a time—and they all weighed the 6lb. The loaf in question had been weighed with two other

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

loaves precisely similar, and the three loaves weighed 6lb. It was also contended that the loaf was French or fancy bread.

The justices were of opinion that the bread was not French or fancy bread or rolls, but they dismissed the information on the ground that the bread had been weighed by the defendant after it was baked and before it was sold to the purchaser, although not in the purchaser's presence, and it was not proved that the purchaser asked for any particular weight.

Moreover in the Bread Act 1836 loaves are not required to be of any particular weight, and although it was suggested that loaves always weighed 1lb., 2lb., or 3lb., it was not so proved to them, and it appeared to them that there was nothing unlawful in the defendant selling a loaf weighing 1lb. 15½oz. for 3*d*., provided he had previously weighed the bread, as he had in this case, and provided the purchaser did not ask for a loaf of any particular weight.

Hohler for the appellant.—This is an appeal against the refusal of the justices to convict under sect. 4 of the Bread Act 1836 (6 & 7 Will. 4, c. 37) for selling bread not by weight. The justices have assumed that because the respondent weighed three loaves which together weigh 6lb. each loaf weighed 2lb. Weighing three loaves together is not weighing every loaf. In *London County Council* v. *Read* (81 L. T. Rep. 452; (1900) 1 Q. B. 288), which is a case under the London Bread Act, which enacted that any baker or seller of bread who sells, or causes to be sold, bread in any other manner than by weight is liable to a penalty, the respondent was asked by a purchaser for a 2*d*. loaf, and served him with a loaf for which he paid 2*d*. The loaf was not weighed in the shop in the purchaser's presence, nor was any statement made to him as to its weight, nor was there any evidence that it had ever been weighed. When subsequently weighed, the loaf, which resembled in shape and appearance a 2lb. loaf, weighed 2¾oz. short of 2lb. It was held that it was immaterial that the purchaser had not asked for a loaf of a specific weight, and that the respondent had sold bread otherwise than by weight within the meaning of the section. In the case of *Cox* v. *Bleines* (86 L. T. Rep. 563; (1902) 1 K. B. 670), which was a prosecution under the same Act, the servant of the respondent was asked by a purchaser for a half-quartern loaf, and served him with a loaf and two rolls for which he paid 2*d*. The loaf and rolls were in the purchaser's presence placed in the pan of a pair of scales in the opposite scale of which there was already a 2lb. weight. The beam of the scales did not move, and the weight of the loaf and rolls was not ascertained at the time of sale beyond the clear fact that they weighed less than 2lb. On being taken away and weighed the bread was found to weigh 5oz. short of 2lb. It was held here that a sale by weight meant a sale by the true weight of the bread sold, and that the respondent had sold bread otherwise than by weight. The only weighing in this case was of the batch of loaves of which this loaf formed one. Therefore the true weight of this loaf which was sold was never ascertained, and the loaf was sold otherwise than by weight.

The respondent did not appear.

Lord ALVERSTONE, C.J.—It is very unfortunate in these bread cases that we do not get the assistance which we always get by hearing the case argued on both sides. I do not want it to be thought that I decide that if the bread has actually been weighed either in a batch or otherwise, and nothing more happens except that the bread is handed out, of necessity there must be a conviction. But it seems to me that where a loaf of bread is asked for and sold, and it is proved in fact that that loaf never has been weighed, but only weighed with the batch, the condition, which was thought to be a necessary condition in *London County Council* v. *Read* (*sup.*), and which was adopted in the other case of *Cox* v. *Bleines* (*sup.*), applies—namely that that loaf never has been weighed—so that the man who sells it does not know what weight he is selling. It may be, of course, much more deficient than this particular loaf turned out to be. I think, therefore, in this case the objection taken by the justices to the summons that the bread had been weighed, was not a proper dealing with the weighing of the bread. The weighing of the bread I think must be sufficient, at any rate, to ascertain the quantity or weight of bread in the particular loaf that is handed over the counter. I think that is the effect of the decisions, and therefore this appeal must be allowed.

KENNEDY, J.—I agree. What my Lord has said expresses my view, and is also in accordance with the interpretation put upon these statutes by the decided cases. That view is illustrated quite plainly by the decision of my Lord and Darling and Channell, JJ. in *Cox* v. *Bleines* (*sup.*). Here there was no weighing of this particular loaf as a subject of weight by itself. To weigh it with other things does not show its particular weight as distinguished from those other things.

RIDLEY, J.—I agree entirely.

Appeal allowed.

Solicitors: *Sharpe, Parker,* and *Co.,* for *Monckton,* Town Clerk, Maidstone.

Wednesday, Jan. 25, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

NATHAN v. ROUSE AND ANOTHER. (*a*)

Public health (*London*)—*Drain*—*Nuisance through defect in drain*—*Drainage of adjoining houses*—*Owner of one house having right to discharge sewage into drain under adjoining house*—*No duty to repair drain on adjoining premises*—*Costs of abating nuisance*—*Right to contribution*—*Public Health* (*London*) *Act* 1891 (54 & 55 *Vict. c.* 76), *s.* 120.

The persons who are liable under sect. 120, *subsect.* 3 *of the Public Health* (*London*) *Act* 1891, *to contribute to the costs of abating a nuisance under the Act, are persons upon whom there is a duty to repair and prevent the nuisance, and who could have been proceeded against under the Act as being persons whose acts or defaults caused the nuisance; and it is only against persons who could have been proceeded against under the Act, as being persons whose acts or*

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

defaults caused the nuisance, and who were liable to prevent the nuisance, that the right of contribution exists under this sub-section.

Consequently, where the owner of one house has the right to discharge his sewage into and through a drain under the house of his neighbour, but is under no duty or liability to repair that drain, such owner cannot be made liable, under sub-sect. 3 of sect. 120, to contribute to the costs incurred by his neighbour under an order of the court, in abating a nuisance which has arisen solely on his neighbour's premises through the defective state of the drain under those premises, or of a pipe under those premises, through which only the sewage of the owner passes to the drain. In such cases the mere fact of sending the sewage through the neighbour's drain, there being a right so to send it, does not, in the absence of any duty to repair the drain on his neighbour's premises, render the owner liable to contribute to the costs of abating the nuisance, the whole work of which was done on his neighbour's premises.

APPEAL by the plaintiff from a judgment of the judge of the Shoreditch County Court.

The action was brought by the plaintiff as the occupier of a house No. 5, St. Mark's-terrace, to recover the sum of 29*l.* 8*s.*, described as the "apportioned cost of reconstruction of joint drains running through No. 5, St. Mark's-terrace, as awarded by the surveyor to the Clothworkers' Company, in accordance with the lease under which the property is held."

The three adjoining houses, Nos. 4, 5, and 6, St. Mark's-terrace, belonged to a common owner (the Clothworkers' Company), and by an order of the local authority they were drained by a combined operation.

A drain went underneath the premises, No. 5, from the back to the front of the house, and thence emptied into the public sewer under the roadway in front of the houses. The drainage from No. 4 passed into this drain under No. 5 by means of pipes laid from the rear of No. 4, and, passing through the boundary between the houses and through a space of about 12ft. in the premises of No. 5, connected with the drain of No. 5 at the back of the houses, and so passed through the drain under No. 5 on to the sewer, so that the whole of the sewage of No. 4 passed into the drain under No. 5.

The house No. 6 was drained in the same way, its whole drainage passing at the rear of the houses into the drain under No. 5, and through that drain to the sewer.

The plaintiff was the occupier under a lease of the house No. 5, and the defendants were the lessees and occupiers of the adjoining house No. 4 under a lease. Each of these leases reserved to the landlord and his lessees and tenants the free passage and running of water and soil from any other building of the landlord through the sewers, channels, and drains made, and to be made, through the land thereby demised, the lessees or tenants of such other lands or buildings paying a due proportion, to be settled by the landlord's surveyor, for the cleansing and repairing the same; and also contained a covenant by the tenant to pay a proportionate part of the expense of making and repairing all sewers and drains belonging, or which should belong, to the demised premises, and other premises thereto adjoining or near, to the satisfaction of the landlord's surveyor, and in such proportion in common with the owners of buildings interested therein as he should direct.

A nuisance arising from defects in this drain existed on the premises, and work was required to be done in all three houses. The plaintiff and the defendants, as being the owners or occupiers of the houses Nos. 5 and 4 respectively, were served with notices by the local authority under sect. 4 of the Public Health (London) Act 1891, to abate the nuisance on their respective premises. The defendants complied with this notice as to the work to be done on No. 4, and had caused the work to be done and had paid for the same, and no question now arose as to the work done on No. 4. The plaintiff, not having complied with the notice, was summoned, and an order was made by a metropolitan police magistrate that he should abate the nuisance on his premises, No. 5. Proceedings were only taken before the magistrate in respect of the one house, No. 5. Prior to these proceedings, it was found, on opening up the drain under No. 5, that the 12ft. of pipes under No. 5, which conveyed only the sewage of No. 4 into the main pipe under No. 5, were defective; that they had never been jointed or secured in any way, the joints being only fastened with clay, and that in consequence the sewage running from No. 4 came out and saturated the ground under No. 5, thereby contributing to the nuisance; it was also found that the drain was defective in the part after it had received the drainage from No. 4, where it was conveying the sewage of all three houses, and that the defects in this part of the drain also contributed to the nuisance.

All the work done was done by the plaintiff on his own premises, and the work so done abated the nuisance. The total cost of the work (121*l.*) was apportioned by the landlord's surveyor, and 29*l.* 8*s.* was apportioned upon the defendants as the occupiers of No. 4.

The plaintiff brought the present action in the County Court under sect. 120, sub-sect. 3 of the Public Health (London) Act 1891, to recover from the defendants the sum so apportioned on them.

The learned County Court judge, in his judgment, said: "I find that the whole of the money now sought to be recovered was for work done on No. 5. I have had no evidence to show that the defendants were liable to repair or make good the drains running from house No. 4 under No. 5. It therefore seems to me that the plaintiff, the owner of No. 5, was the person by whose act and default these drains allowed sewage to escape, and hence the nuisance was not caused by any act or default of the defendants." He gave judgment for the defendants with costs.

The plaintiff appealed.

[The case had previously been before the County Court judge, when it was contended for the plaintiff that the defendants were liable to the plaintiff upon an implied contract arising from the leases, and that they were also liable under sect. 120 of the Act. The judge held that there was no implied contract between the plaintiff and the defendants making the defendants liable to pay to the plaintiff any contribution; he also found that the pipe, having been laid by order of

the vestry for the drainage of the houses by a combined operation, was a drain and not a sewer, and that 29*l.* 8*s.* was a proper sum for the defendants to pay if liable either under an implied contract or under sect. 120, sub-sect. 3, of the Act, but—sect. 117 of the Act not having been called to his attention—he also held that, as sect. 120 gave a remedy in a court of summary jurisdiction, he had no jurisdiction to deal with the matter. The judge added a note that sect. 117 had afterwards been called to his attention by counsel for the plaintiff, and stated that if this had been done at the hearing he would have given judgment for the plaintiff for 29*l.* 8*s.* On appeal the Divisional Court affirmed the decision that there was no liability upon any implied contract contained in the covenants in the leases, but remitted the case for a new trial as to the liability of the defendants under sect. 120 to contribute to the cost of abating the nuisance.]

The Public Health (London) Act 1891 (54 & 55 Vict. c. 76) provides:

Sect. 4. (1) On the receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or if such person cannot be found on the occupier or owner of the premises on which the nuisance arises, requiring him to abate the same within the time specified in the notice, and to execute such works and do such things as may be necessary for that purpose, and if the sanitary authority think it desirable (but not otherwise) specifying any works to be executed.

Sect. 120. (1) Where any nuisance under this Act appears to be wholly or partially caused by the acts or defaults of two or more persons, the sanitary authority or other complainant may institute proceedings against any one of such persons, or may include all or any two or more of them in one proceeding; and any one or more of such persons may be ordered to abate the nuisance, so far as it appears to the court having cognisance of the case to be caused by his or their acts or defaults, or may be prohibited from continuing any acts or defaults which in the opinion of the court contribute to the nuisance, or may be fined or otherwise punished, notwithstanding that the acts or defaults of any one of such persons would not separately have caused a nuisance; and the costs may be distributed as to the court may appear fair and reasonable. (2) Proceedings against several persons included in one complaint shall not abate by reason of the death of any among the persons so included, but all such proceedings may be carried on as if the deceased person had not been originally so included. (3) Where some only of the persons by whose act or default any nuisance has been caused have been proceeded against under this Act, they shall, without prejudice to any other remedy, be entitled to recover in a summary manner from the other persons who were not proceeded against a proportionate part of the costs of and incidental to such proceedings and abating such nuisance, and of any fine and costs ordered to be paid by the court in such proceedings. (4) Whenever in any proceeding under the provisions of this Act relating to nuisances it becomes necessary to mention or refer to the owner or occupier of any premises, it shall be sufficient to designate him as the "owner" or "occupier" of such premises, without name or further description.

Sect. 117. (1) All offences, fines, penalties, forfeitures, costs, and expenses under this Act or any by-law made under this Act directed to be prosecuted or recovered in a summary manner, or the prosecution or recovery of which is not otherwise provided for, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts. (2) Proceedings for the recovery of a demand not exceeding fifty pounds, which a sanitary authority or any person are or is empowered to recover in a summary manner, may, at the option of the authority or person, be taken in the County Court as if such demand were a debt.

Macmorran, K.C. (*J. W. Moyses* with him) for the plaintiff.—The learned judge was wrong in holding that the nuisance was not caused by any act or default of the defendants. In the first place, with regard to the 12ft. pipe, that 12ft. pipe, although laid through the premises of the plaintiff, was used exclusively for conveying the sewage from the defendants' house to the drain under the plaintiff's house, and no sewage from the plaintiff's house passed through that pipe. It was proved that this pipe was defective even up to the boundary of the property, and that sewage escaped and caused the nuisance. The nuisance so caused was caused by the act or default of the defendants. In the next place, the drain was defective in a part after it had received the drainage from the defendants' house, and the nuisance was partly caused by that. The defendants, by sending through this drain sewage which escaped and caused the nuisance, thereby contributed to the nuisance—and a witness has so stated—and are liable to pay a part of the costs in respect of that. As to that, the nuisance was caused equally by the sewage of all three houses, and all three are liable. The defendants, as the owners of the dominant tenement (namely, No. 4), were entitled to send their sewage through the plaintiff's premises. They have that easement, but they must keep their easement so working that it does not cause a nuisance to the plaintiff. For that proposition there is authority. While the owner of the servient tenement (that is, No. 5) cannot compel the owners of the dominant tenement (No. 4) to keep this pipe in repair, he can compel them so to keep it as not to cause a nuisance, and the defendants could have gone on the plaintiff's premises for that purpose. The defendants' duty was to keep their sewage, which passed from their premises under the plaintiff's premises, from escaping from the pipes in the plaintiff's premises, and so causing a nuisance upon the plaintiff's premises:

Humphreys v. *Cousins*, 36 L. T. Rep. 180; 2 C. P. Div. 239.

That was a considered judgment of Denman and Lindley, JJ., and the cases on the subject are fully dealt with. It is there said: "The *primâ facie* right of every occupier of a piece of land is, to enjoy that land free from all invasion of filth or other matter coming from any artificial structure on land adjoining. He may be bound by prescription or otherwise to receive such matter; but the burthen of showing that he is so bound rests on those who seek to impose an easement upon him." [Lord ALVERSTONE, C.J.—That is rather like the old common law doctrine that if filth is created on a man's land, then "he whose dirt it is must keep it that it may not trespass."] Yes; the principle is the same. Under sect. 120 the plaintiff is entitled to a proportionate part of the costs of abating the nuisance. As to the single part of the drain (namely, the 12ft. pipe) there can be no doubt about the liability, as the only obligation on any person to deal with that is the obligation on the defendants, as

owners of No. 4, as they are persons who come within sect. 4 as being persons by whose act, default, or sufferance the nuisance arose. Then as to the nuisance arising in the other part of the drain, the defendants, by sending their drainage through the drain, caused a nuisance, and for that also they are liable to contribute.

R. Cunningham Glen for the defendants.—The defendants had the right to drain on to the plaintiff's land, and they are under no obligation to repair that drain. The defendants were not persons by whose acts or defaults the nuisance was caused. In sub-sect. 1 of sect. 120 it is said: "And the costs may be distributed as to the court may appear fair and reasonable." That applies to the court previously referred to in the section, that is, the court of summary jurisdiction. Here there was no proceeding befcre the court of summary jurisdiction in respect of a common or joint nuisance and no distribution of costs by that court, but only a distribution by the surveyor. The County Court cannot distribute the costs; the court of summary jurisdiction alone can do so. The claim to a proportionate part of the costs of abating the nuisance is under sub-sect. 3 of the section. That sub-section is only a corollary to sub-sect. 1, and it only applies where proceedings have been taken or might have been taken under sub-sect. 1. No such proceedings were taken in this case against the defendants under sub-sect. 1, and no such proceedings could have been taken, as sub-sect. 1 only applies where the nuisance has been caused either wholly or partially by the person proceeded against. This matter was recently considered by the Court of Appeal in *Haedicke* v. *Friern Barnet Urban District Council* (*ante*, p. 51; 91 L.T. Rep. 750; (1905) 1 K.B. 110), with regard to the Public Health Act 1890, as to a single private drain, and the court there said that as the whole of the expenses had been incurred on the premises of the person in question, no claim for apportionment could be made. Collins, M.R. said (91 L. T. Rep., at p. 760): "The question of apportionment does not arise; there is nothing to apportion, the whole obligation is upon her; she has discharged it, and she cannot fall back upon the question of apportionment, even if it had been *ad rem* in the discussion at all." So, here the whole nuisance arose on the premises of the plaintiff, and the whole expenses were incurred on the premises of the plaintiff, and there is nothing to apportion, and even if there were the plaintiff cannot recover in an action of this kind an amount settled by his own nominee. It is said that the defendants as the owners of the dominant tenement could have come upon the plaintiff's premises and have done the repairs, but, even if that were so, there is no duty or obligation upon them to do so, and the learned judge has expressly found that there was no evidence to show that the defendants were liable to repair or make good the drains running from their house under the plaintiff's house.

Macmorran, K.C. in reply.

Lord ALVERSTONE, C.J.—I am sorry to say that I have frequently to express my doubts when I have to deal with these cases and to decide questions arising under the application of the law to drains and sewers under the Public Health Acts. I think there is a great deal to be said in favour of the view which counsel for the plaintiff has urged — namely, that, inasmuch as the nuisance has been apparently occasioned by sewage coming out from the premises No. 4, the premises of the defendants, the Legislature might have thought it right to put upon the persons sending the sewage through a statutory obligation to get the drain repaired, and possibly a duty to contribute to the amount expended by the local authority in the event of the local authority doing the repairs. I do not, however, think that that is the natural meaning of the section—sect. 120—and, speaking for myself, I am not prepared to say that the learned County Court judge has come to a wrong conclusion. It must be taken for the purpose of this case that the defendants had a right to discharge their sewage through the pipe, and counsel for the defendants is quite right in saying that when this case was before us previously we did find and did decide—and it must be taken that we rightly decided—that there was no right in the plaintiff to recover against the defendants on the ground of any implied contract in the covenants contained in their respective leases; and therefore for the present purpose that must be taken to be so. The only evidence, then, that we have got is that sewage from No. 4 was passing through a drain under No. 5, and that as to a part of the pipe 12ft. from the boundary up to the man-hole—the whole of that 12ft. of pipe being under No. 5—the only sewage that passed through it was the sewage of No. 4. Does that fact enable the court to act under sect. 120 of the Public Health (London) Act 1891? The learned County Court judge says that he had no evidence to show that the defendants were liable to make good or repair the drains running from the house No. 4 under the house No. 5. I think, certainly, we are not able to say that there is anything wrong in that finding as a matter of law, or to say that that circumstance is not one to be taken into consideration when we are dealing with the rights of the persons whose acts or defaults are complained of under sect. 120. Then he says that it therefore seemed to him that the plaintiff, the owner of No. 5, was the person by whose act and default these drains allowed sewage to escape, and that hence the nuisance was not caused by any act or default of the defendants. Now, it seems to me, notwithstanding the contention of counsel for the plaintiff that the defendants might have had a right to go in and repair those drains under the house No. 5 if they wished to do so, that it cannot be said that there was a duty upon them as owners or occupiers of No. 4 to go in and repair those drains at the instance of the plaintiff as the owner or occupier of No. 5. I do not think that there is any statute that enables the local authority to impose such an obligation on the defendants as to make them persons by whose acts or defaults the nuisance has been caused in this case, and I see this further difficulty. It seems to me that the purview and object of sect. 120 was very different. There is first the case of a number of persons occupying, if I may use the expression, the drains complained of, and it is very likely there would be a liability to contribute, by virtue of their occupation, to the cost and repair of the drains when they came to be repaired, and it might well be that each one of them, by their acts upon the premises, caused the actual nuisance. Then there is also the case

where a sewer or a drain, the whole of which causes the nuisance, runs through more than one property, and all the work of repair is done, but it becomes necessary to apportion the costs in accordance with the obligations of the several persons interested as to their several parts. Sect. 120 might apply in those cases. I do not, however, think that sect. 120 was enacted for the purpose of dealing with the case where there was a right to use the drain, but not of necessity any obligation to repair it, and I feel the greatest difficulty in seeing how it is possible to apportion expenses of repair unless the apportionment has some relation to the property in which the work is done and the expense incurred, and to the obligations of the persons with regard to that property. Now, in this case the work was entirely done under No. 5, and counsel for the plaintiff says that all equally caused the nuisance; that the sewage from No. 5, the sewage from No. 4, and the sewage from No. 6 all caused the nuisance, and he contends that the costs ought to be apportioned accordingly. Now, there would seem to be no possible method of apportioning the cost amongst the owners or occupiers simply because more or less sewage might come from one of the houses of the three owners or occupiers. I merely mention that, not for the purpose of saying that the Legislature might not have said that the cost should be apportioned according to the view of the tribunal as it thought right, but for the purpose of pointing out that it rather seems to me to indicate that the section is dealing with the apportionment of the expenses between persons who are liable to prevent the nuisance. In this case the nuisance is caused by the non-repair of the drain on the plaintiff's premises. There is no evidence of any obligation on the defendants to repair any part of that drain, and, that being so, it seems to me that I am unable to come to the conclusion that the learned County Court judge was wrong when he said that there was no act or default of the defendants causing the nuisance. Possibly the argument is a little stronger with regard to the 12ft. of pipe which is not used for the sewage of the plaintiff, but which is used solely for the sewage of the defendants, than it is with regard to the rest of the drain; but I do not think we ought to allow this appeal on the ground of such a small matter as that. If I have taken the right view that this matter does not depend upon user, but does depend upon obligation to prevent the nuisance, and if I am also right in thinking still further that the Act points to an apportionment between the owners or occupiers of properties in which the work has been executed, then, in my opinion, we ought not to say that the mere fact that a piece of this pipe happens to convey the sewage from No. 4 only is sufficient to force the learned County Court judge to apportion the costs of repairs as against the defendants. I therefore think, though I do not hesitate to repeat that I always have the greatest difficulty in giving reasons satisfactory to my own mind when dealing with these matters under the Public Health Acts, that the appeal fails, and must be dismissed with costs.

KENNEDY, J.—I am of the same opinion. The matter is certainly not free from difficulty, but, on the whole, I do not see my way to say that the judgment pronounced by the County Court judge is wrong. There are several considerations which make me prefer the view urged for the defendants, because I do not see how, if we adopt the plaintiff's view, the real position of things which would necessarily be involved could be dealt with consistently with justice. Sect. 120, sub-sect. 1 only contemplates the case of the nuisance being caused wholly or partially by the acts or defaults of two or more persons. That, I presume, involves the idea that either of those two or more persons might originally have been made properly subject to an application under this Act by way of summons, and I am inclined to think that sub-sect. 3 refers to the same persons when it says: "Where some only of the persons by whose act or default any nuisance has been caused have been proceeded against under this Act." It again assumes that there may be persons who may be brought in as contributories, and persons who may have originally been proceeded against before the magistrate in respect of the nuisance. Then the learned County Court judge says, and apparently he is justified in saying, that he had no evidence that the defendants were liable to repair or make good the drains running from house No. 4 under house No. 5. If that is so, then clearly they could not have been prosecuted or proceeded against, because they were not persons who originally could have been subject to proceedings instituted against them. It is said that legally as owners of a dominant tenement they might have gone in and repaired, but the right to repair—and that I understand to be the learned County Court judge's opinion—is by no means necessarily equivalent for the purpose of this Act with a duty to repair, and does not necessarily imply a duty to repair. If there is no duty to repair then the defendants could not have been proceeded against under this section; and it is only against persons who could have been proceeded against under this section (although they were not) that a right of contribution exists. The argument of counsel for the defendants went in that direction, and I think that view is confirmed by sub-sect. 3, because that sub-section not only speaks of contribution in respect of the costs of and incidental to such proceedings and abating such nuisance, but also proceeds to make the persons liable for the fines and costs ordered to be paid by the court in such proceedings. It seems to me that it would be an iniquitous proceeding to make a person liable for a share of a fine and costs who neither has been in fact proceeded against, nor has had an opportunity of dealing with the case, nor, in fact, could have been proceeded against unless he was primarily liable or might have been liable as much as the persons who have been made liable. It seems to me, therefore, under the circumstances that it is impossible to say that the learned judge's view was wrong, although I quite appreciate what has been urged on behalf of the plaintiff as to its being only fairness that he should get this contribution, because the premises under this house No. 5 were really premises which were subject to an easement in favour of a user by the defendants, which, to some extent, no doubt, by saturating the ground with sewage, has caused the damage for which the owner of No. 5 has been at present made liable. I do not, however, think that that is a case which it is proper for us to hold falls under this section.

RIDLEY, J.—I am of the same opinion, and I only wish to make a few observations. In the course of the argument I put a question to counsel for the defendants with regard to the words "act or default" in sub-sect. 3 of sect. 120, indicating that it might be possible that the Act of Parliament intended that proportionate contributions should be had from anyone by whose act or default the nuisance was caused in the sense that that person was contributing in some way to the actual nuisance. It appears to me that the answer to that question really is to be found in this, that that is not the purview of the Act. The Act is really dealing with the persons who are liable to do the repairs to the pipes; and it is not possible, as I think, to adopt the argument of counsel for the plaintiff when he says that in following that liability you must go into the question as to what rights are given by some easement to adjoining owners. I think there is a good deal to be said for the observation of my brother Kennedy when he says that it is impossible that anyone should be asked to pay for a proportionate part of the costs, and also to pay a proportionate part of the fine and the costs ordered by the court in such proceedings, without he was made a party to the summons in the first instance. I fully concur in that observation. Therefore, while I do feel considerable difficulty in the construction of this Act, I am not at all prepared to say that the learned County Court judge was not quite right when he said that he had no evidence to show that the defendants were liable to repair or make good the drains running from house No. 4 under No. 5, and that therefore he must give his judgment for the defendants. Upon the whole I do not see my way to interfere with that judgment, and I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: for the plaintiff, *Wainwright, Pollock, and Co.*; for the defendants, *Paines.*

Tuesday, Jan. 31, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

SCOTT AND CO. LIMITED (apps.) *v.* SOLOMON (resp.). (*a*)

Revenue—Dealing in gold or silver plate—Licence—Coupons given on sale of tea—Watches given as prizes in exchange for coupons in coupon competition—Necessity of licence—"Trading in or selling" plate—Revenue Act 1867 (30 & 31 *Vict. c.* 90), *ss.* 1, 3.

The appellants, who were dealers in tea, advertised a gigantic tea competition, and sold tea in packets with each of which a coupon was given. At the end of a certain time the purchasers of the packets of tea with the coupons sent in their coupons to the appellants, and those purchasers whose coupons represented the largest quantity of tea purchased during the time obtained prizes of various articles, including gold watches. Several customers had obtained, through this coupon competition, gold watches of sufficient weight to require the sellers thereof to hold a licence under sect. 1 *of the Revenue Act* 1867, *but the appellants held no such licence.*

The appellants having, upon an information under sect. 3 *of the Act, been convicted of dealing in plate without a licence:*

Held, that what was sold and what the purchasers paid for was the tea and the coupons which entitled the purchasers in certain events to receive gold watches; that this constituted a trading in watches by means of receiving payment for them by instalments when the money was paid for the tea, and that therefore there was a "trading in or selling" watches within sects. 1 *and* 3 *of the Revenue Act* 1867, *and the appellants were properly convicted.*

CASE stated by three justices of the peace acting in and for the county borough of Bolton.

At the court of summary jurisdiction sitting at the Townhall, in Bolton, on the 2nd June 1904, the appellants (Messrs. Scott and Co. Limited) were upon the information of the respondent (William Solomon) charged for that they, within six calendar months before the date of exhibiting the information—namely, between the 15th Nov. and the 31st Dec. 1903, in the borough of Bolton, in the county of Lancaster, did deal in plate without a proper licence in that behalf, contrary to the form of the statutes in that case made and provided.

The information was laid under sect. 3 of the Act 30 & 31 Vict. c. 90 (the Revenue Act 1867), which is as follows:

Every person who shall do any act, or carry on any trade or business for which a licence to deal in plate is required by this Act, without having in force a proper licence authorising him so to do, shall for every offence forfeit the sum of 50*l.*; and in any proceeding for the recovery of such penalty it shall be sufficient to allege that the defendant did deal in plate without a proper licence in that behalf, and it shall not be necessary further or otherwise to describe the offence.

The solicitor for the respondent contended that the class of business carried on by the appellants as disclosed by the evidence of the several witnesses was one that required a plate licence to be taken out, and that there was a binding contract between the appellants and their customers, that the ownership of the watch was transferred from the appellants by virtue of such contract as between the appellants and their customers, for so soon as the latter complied with the conditions there was a binding contract. The property in the watch passed to the customer for a consideration, and that was the payment of money for tea and coupons. The evidence given before the court was as follows:

William Lloyd, officer of inland revenue, said:

The appellants last year (that is, 1903) carried on business in Bolton as teamen at two shops, as the "Queen Tea Company" at 60, Deansgate, and as "Black and White" at 43, Market-street. Prior to Oct. 1903 I had seen various articles in the window to be handed to customers at 60, Deansgate-street. In Oct. 1903 there were two gold watches and chains in the window. On the 13th Oct. I went into the shop and spoke to the assistant. I asked "How much tea is it necessary to purchase to gain one of the watches?" He handed me a handbill and said, "They are not to be given in the ordinary way of bonus." The handbill was headed "Gigantic Tea Competition," and stated that 3020*l.* was "to be given away absolutely in addition to our usual marvellous presents," and the competition was "open to all consumers of our fragrant and delicious tea." There was a "first grand prize of a cottage or 250*l.* in money,"

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

and then there were twenty pianos value 40*l.* each, and a number of other articles, including fifty ladies' gold watches and chains, value 7*l.* 10*s.* each, 100 timepieces, 100 silver teapots, value 1*l.* 1*s.* each. The handbill stated "On each packet of tea at 2*s.* 2*d.*, 2*s.* 4*d.*, 2*s.* 6*d.*, 2*s.* 8*d.*, and 3*s.* we sell from the 2nd June to the 31st Dec. will be a special coupon. The coupons must be cut out, saved up, and given in at any of our branches between the 1st and the 11th Jan. 1904. Customers will be provided with forms for filling in particulars of quantities, names, and addresses. The customer sending in the highest number of coupons in ¼lb., ½lb., and 1lb. (representing the largest purchase of tea) will be awarded the first grand prize; the next twenty highest will each receive a piano, and so on through the list." There was a large card at the doorway, headed: "Queen Tea Company's Gigantic Competition as advertised. Fine 18ct. gold, fully jewelled, keyless ladies' watch and solid gold long guard, complete in case—value 7*l* 10*s.*—fifty of these to be given away. Tea can be obtained from our numerous agents in the usual way." I said, "I am an officer of Inland Revenue and that a licence ought to be taken out." I went on the same day to the shop No. 43, Market-street. I there saw a gold watch and chain exhibited in the window. Similar notices were also exhibited on these premises. I got a handbill headed "List of the Prizes for our Gigantic Tea Competition," containing the same list of prizes as shown in the handbill given in the other shop and the words "Save the picture coupons on tea bags till the 31st Dec," and it stated that there were a first prize of 250*l.* and 1500 other valuable prizes of the total value of 3020*l.*, to be given away absolutely. On the 3rd Dec. 1903 I went to No. 43, Market-street and purchased 1lb. of tea for 2*s.* 6*d.* It was in a wrapper headed "Black and White's Teas," containing on one side a picture coupon headed "prize coupon—one pound," and at the bottom "Proprietors—Scott and Co. Limited," and at the side were the words "This coupon to be cut out round the dotted line and reserved till close of competition, the 31st Dec. 1903." I also at the same time received an envelope containing the same list of prizes on one side and on the other side: "Save up your coupons in this envelope till the end of the year, then count the numbers, fill in particulars of contents and hand in at any of our establishments." On the next day, the 4th Dec 1903, I went to 60, Deansgate, and I there purchased 1lb. of tea for 2*s.* 6*d.*, in a wrapper headed "Queen Tea Company's Teas" and containing a picture coupon as in the case of the other shop. I also received an envelope in which the coupons were to be placed. This envelope was headed "Gigantic Tea Competition," and on it were the words "Save up your coupons in this envelope till the end of the year, then count the numbers, fill in particulars of contents and hand in at any of our establishments. The competition ends the 31st Dec., and all coupons must be sent in by the 11th Jan. 1904." Then, under "Particulars of Contents," there were spaces for the number of ¼lb., ½lb., and 1lb. coupons, and a space for the customer's name and address; and it was signed Scott and Co. Limited, Proprietors. On the 19th Feb. I obtained at each of the shops a list of the names and addresses of the winners in the competition, and this list contained the names of fifty persons who had received watches, and among these were Mrs. Ball, Mrs. Holdbrook, and Mrs. Oddie. I called upon Mrs. Ball and Mrs. Holdbrook and saw two gold watches and chains. These watches appeared to be gold, and each watch was considerably over the two pennyweights requiring a licence. No licences were held last year in respect of either of these shops.

In cross-examination he said:

I cannot say if they carry on business in a large way. They carry on business elsewhere. I do not know if this system is in use by traders in the country.

Mrs. Holdbrook said:

I live in Bolton. I received one of these watches and chains. I showed it to the witness William Lloyd. I obtained this watch through this competition. I was a regular customer at 60, Deansgate. I bought tea from the Queen Tea Company. I received coupons with the tea. I purchased and received packets similar to those produced. I paid 2*s.* 4*d.* a pound. I sent in my coupons in the envelope supplied to me (similar to the envelope above described). I had coupons for 112¾lbs. I sent it to 60, Deansgate in Dec. 1903. I got the watch in Dec. 1904.

Mrs. Ball said:

I live in Bolton. I obtained one of these watches through this competition. It was one of the watches shown to Mr. Lloyd. I purchased a number of packets of tea. I sent the coupons in the envelope produced. I sent in 109 coupons. I paid 2*s.* 6*d.* a pound. I received the watch at 60, Deansgate. I paid the money for the tea. I bought a little extra when the competition was on.

Mrs. Oddie said:

I live near Bolton. I obtained one of these watches by means of the competition. After I had heard of the competition I purchased tea in packets. These packets bore coupons. I sent 108 coupons in the envelope produced. I purchased 108lb. I sent them to the shop 60, Deansgate. I received a gold watch and chain.

In cross-examination she said:

I bought my tea at that shop before the competition began and all through the competiiion. The price was the same before and after. I got the same good tea.

In answer to questions from the justices, this and the two previous witnesses said:

I understood that in purchasing the tea I was purchasing the possibility of obtaining a gold watch or one of the other articles.

The documents referred to and produced were annexed to the case.

Counsel for the appellants admitted that there was a contract between the appellants and their customers and also the facts, but contended that the appellants had committed no infringement of the law, and were entitled to continue to act as they had done; that there was no trading or selling according to that Act. He contended: First, that there was no trading by a person whose business it was to deal in gold or silver plate; secondly, that there was no sale or evidence of a sale of gold or silver plate by the appellants to the persons called as witnesses; and thirdly, that, even if there were a sale of a chance such as might be objectionable under the Lottery Act, it was no sale or evidence of a sale of the prizes in respect of which the chance was taken.

The justices found that the appellants did deal in plate without a proper licence in that behalf, and fined them 40*s.* and costs.

The question for the opinion of the court was whether upon the facts stated, which were not in dispute, the conviction was right.

Sect. 1 of the Revenue Act 1867 (30 & 31 Vict. c. 90) provides:

In lieu of the duties now payable in Great Britain on licences to persons trading in, vending, or selling gold or silver plate, and in Ireland on licences to persons to sell or make gold or silver plate, there shall . . . be charged and paid the following excise duties on licences to deal in plate to be taken out yearly in the United Kingdom by the persons hereinafter mentioned;

that is to say: By every person who shall trade in or sell any article composed wholly or in part of gold or silver, in respect of every house, shop, or other place in which his trade or business shall be carried on; where the gold shall be above two pennyweights and under two ounces in weight, or the silver above five pennyweights and under thirty ounces in weight, the sum of two pounds six shillings; where the gold shall be of the weight of two ounces or upwards, or the silver of the weight of thirty ounces or upwards, the sum of five pounds fifteen shillings.

Danckwerts, K.C. (*J. R. Atkin* with him) for the appellants. — The justices were wrong in finding that the appellants dealt in plate. The appellants sold their tea in packets with these coupons, and amongst other articles given in exchange for a certain number of these coupons were watches. According to the accepted definition that is neither trading in, nor selling, plate. By sect. 1 of the Revenue Act 1867 the only person who is obliged to take out a dealer's licence is a person who trades in or sells any article comprised wholly or in part of gold or silver. Then sect. 3 imposes a penalty upon every person who without a proper licence carries on any trade or business for which a licence to deal in plate is required by the Act. Before the appellants can be convicted under sect. 3 it must be proved that they carried on a trade or business in gold or silver plate for which a licence is required under sect. 1. A "dealer" means a person who sells goods which he has either made himself or has purchased, and who sells those goods with a view to profit. That definition has been adopted by Lord Davey in the case of *Grainger and Son* v. *Gough* (74 L. T. Rep. 435, at p. 440; (1896) A. C. 325, at pp. 345-6), which was a case dealing with income tax under the Income Tax Acts. In *Harris* v. *Amery* (13 L. T. Rep. 504, at p. 505; L. Rep. 1 C. P. 148, at p. 154, Willes, J. points out that the word business is more extensive than the word trade, and says that farming is a business, "though it cannot properly be called a trade, which is a word having a technical meaning connected with buying and selling, and is limited to the case of the buying and selling of wares, and so forth." The same view was taken by Collins, J. in *Killick* v. *Graham* (75 L. T. Rep. 29, at p. 32; (1896) 2 Q. B. 196, at p. 203), which was a case under another section (sect. 17) of this same Act, and had reference to the sale of watches and the meaning of the words trading in plate under sect. 1, and carrying on a trade or business under sect. 3, is there considered. A contract of sale is defined in sect. 1 of the Sale of Goods Act 1893, and in order to have a sale there must be a contract to pass the property from the owner to someone else for the payment of money. Here there was no payment of the money for the giving of the watches, and no passing of the property for money. A witness stated that she gave the same price for the tea before and during the competition, so that the tea without the watch was value for the money. There was no sale of the plate and there was no element of such sale. There was a gift of the watches. All that was sold was the tea, and at the most the purchaser of the tea got with the tea a fraction of a chance of getting a number of things, some of which were plate and others not. It was a lottery, and in *Taylor* v. *Smetten* (11 Q. B. Div. 207) a similar thing was held to be a lottery. At the most the appellants bartered the watches, and bartering is the exchange of one set of goods for another set of goods, and barter is not a sale. This was simply the distribution of these things by pure chance, and that cannot be a sale. The appellants did not take this into consideration in fixing the price of the tea, but the expenses would be included in the expenses of the business.

Rowlatt (Sir *Robert B. Finlay*, A.-G., with him) for the respondent.—The conviction was right. There was a sale of, and a trading in, plate within the meaning of sects. 1 and 3 of the Act. It is impossible to contend that the price of the tea was not enhanced by the chance of getting the watch. In *Taylor* v. *Smetten* (*ubi sup.*), where the transaction was very similar, Hawkins, J. said (at p. 211): "There can be no doubt that the appellant in inclosing and announcing the inclosure of the coupon in the packet of tea did so with a view to induce persons to become purchasers and realise a profit to himself; and, although it was admitted by the respondent that the tea was good and worth all the money, it is impossible to suppose that the aggregate prices charged and obtained for the packages did not include the aggregate prices of the tea and the prizes." That applies here, and shows that the prices charged for the tea included something for the watches. There is, no doubt, a certain element of chance, but the real substance of the matter is that a person who goes to this shop and buys this tea becomes, in a certain event which can be calculated, entitled to a certain piece of plate. This may or may not be a lottery (*Hall* v. *McWilliam*, 85 L. T. Rep. 239), but, whether it is or is not a lottery, it is not thereby prevented from being a trading in plate within the meaning of these sections. It is said that bartering is not trading, but it must be trading.

Danckwerts, K.C. in reply.

Lord ALVERSTONE, C.J.—In this case, a case has been stated by the magistrates who had before them a summons under sect. 3 of the Revenue Act 1867 (30 & 31 Vict. c. 90), in respect of persons dealing in plate without a proper licence, the dealing being for this purpose—doing any act or carrying on any trade or business for which a licence to deal in plate is required. That throws us back to sect 1 of the Act, which says that a licence to deal in plate must be taken out by "every person who shall trade in or sell any article composed wholly or in part of gold or silver." The "doing any act" in sect. 1 does not seem to me to enlarge the scope of the section. The case seems to me to be near the line, but to a certain extent it is a question of fact. If counsel for the appellants could have made good his point that there is no evidence here of anything which amounts to either a sale or trading, we should have been bound to give effect to that contention. What happens is this: "A large amount of tea is sold. That tea is either sold with or is packed up in something, called a coupon, which is some token indicating that the tea has been purchased from a particular shop. The evidence of one witness, Mrs. Oddie, in cross-examination, was: "I bought my tea at that shop before the competition began. . . . I understood that in purchasing the tea I was purchasing the possibility of obtaining a gold watch or one of

the other articles." That is not at all conclusive on the matter, but it seems to me to point to one view of the facts—namely, that it was all one transaction. In respect of the payment for the tea, each of the various purchasers got what has been called this "coupon." Counsel for the appellants does not dispute, and I do not think he could dispute, that that was a sale of coupons. The suggestion that there is full value given for the tea, meaning that there is nothing given for these coupons, is simply absurd. This very large business of the appellants, to the extent of thousands of pounds, could not possibly be carried on if there were no charge for the coupons. The coupons are delivered out with the tea, and the persons who received them, either having purchased them themselves or having obtained them from other purchasers, on presenting them became entitled to receive certain articles, and amongst other things they become entitled in certain events, according to the number of coupons they present, to receive a very considerable number of articles of plate—watches and other things of the kind. It seems to me that, looked at in its real essence, it is a trading in watches by means of receiving payment for them by instalments when the money is paid for the tea, and afterwards recognising the value of those various instalments, evidenced by the coupons, by giving back, in this particular case, watches. The magistrates have thought that that was a dealing in plate; that it was a trading in or selling plate witin the meaning of the 1st section of the Act. I am not prepared to say that they were wrong. We were impressed with the language of Lord Davey in the case of *Grainger and Son* v. *Gough* (74 L. T. Rep. 435, at p. 440; (1896) A. C. 325, at pp. 345-6), in which, referring to trade for the purposes of estimating income tax in an income tax case, he says: "Trade in its largest sense is the business of selling, with a view to profit, goods which the trader has either manufactured or himself purchased." I am by no means sure that if that definition really is applied in strictness, it would not cover the exact transaction in this case; but it seems to me that it cannot have been meant to say that there can be no trading unless the money for the article passes at the actual moment. Some portion of the money passes when the coupon is given out, but, of course, the whole money for the watch does not then pass, because the watch is not delivered out until a certain number of coupons are presented. In *Harris* v. *Amery* (13 L. T. Rep. 504, at pp. 505-06; L. Rep. 1 C. P. 148), which was a case stated by a revising barrister on a question of qualification, Willes, J., referring to farming, said (35 L. J., at p. 92, C. P.) it was more a business than a trade: "It has never been doubted that farming was a business, though it could not properly be called a trade, since the latter has the technical meaning of buying and selling." I cannot think that in using that expression Willes, J. meant to say that there could be no trading unless the money was paid for the article at the time, and I should have thought that trading by barter was also a method of trading, and, if the plate formed the consideration on one side, the transaction would have been within the mischief aimed at in this section. Then there is one other point suggested, that this transaction is after all only a lottery. If the magistrates had come to the conclusion that giving the prizes was quite disconnected from the transaction whereby the coupons were given in exchange for the tea, I could have understood that contention; but, it seems to me, treating it as a system whereby a large number of watches were disposed of to the public, it would be wrong to find that there was no trading, because possibly, even in this event, and certainly under another state of circumstances, the proceeding is simply a lottery. I think, therefore, though the case is near the line, that the conviction must be affirmed.

KENNEDY, J.—I agree.

RIDLEY, J.—I agree.

Appeal dismissed.

Solicitors for the appellants, *Chester, Broome,* and *Griffithes,* for *Holt, Risque,* and *Robson,* Manchester.

Solicitor for the respondent, *Solicitor of Inland Revenue.*

Friday, Feb. 3, 1905.

(Before KENNEDY and JELF, JJ.)

BOYCE (pet.) *v.* WHITE (resp.). (*a*)

Municipal corporation—Election of councillor—Disqualification of candidate—No notice given to electors—Right to claim seat.

The petitioner and the respondent were the only candidates for the office of councillor for a borough. Both were nominated, but the respondent at the time of his nomination was absent from the United Kingdom and no written consent by him to such nomination given one month before such nomination was ever produced. The petitioner was not aware of this fact until the day of the poll, when it was too late to print and circulate in the constituency a notice of the objection to the respondent's nomination.

The respondent was elected.

On a petition against the respondent.

Held, following Hobbs *v.* Morey (21 *Cox Mag. Cas.* 346; 89 *L. T. Rep.* 531; (1904) 1 *K. B.* 74), *that the court could only declare the election void, and not that the petitioner was elected.*

SPECIAL CASE.

The election of a councillor for the south ward of the borough of Scarborough was appointed to be held on the 8th Nov. 1904.

The petitioner, of No. 147, North Marine-road, Scarborough, and the respondent, of No. 1, Belmont-terrace, Scarborough, were respectively candidates for the office of councillor of the ward, and the respondent was declared to be duly elected.

A petition was presented on the 24th Nov. 1904 claiming the seat on behalf of the petitioner.

There was only one vacancy at the election of councillors for the ward, and the petitioner and the respondent were the only candidates for the office of councillor for the ward at the election.

The petitioner was on the 31st Oct. 1904 duly nominated in writing as a candidate for the office of councillor at the election in accordance with the Municipal Corporations Act 1882, and no objection had ever been made to his nomination or candidature.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

Two papers nominating the respondent in writing were delivered at the town clerk's office on the 31st Nov. 1904. No written consent of the respondent given within one month before the day of the nomination in the presence of two witnesses was produced at the time of the delivery of the two nomination papers or at all.

The respondent was absent from the United Kingdom at the time of the nomination, but he accepted the nomination.

The mayor duly attended on the 1st Nov. 1904 at the proper time and place for the purpose of hearing objections to the nomination papers delivered by the candidates or their proposers or seconders, and the petitioner was present.

The petitioner was not aware until the 2nd Nov. 1904, but did learn on that day, that the respondent was so absent, and the petitioner was not aware until the 8th Nov. 1904, but did learn on that day, that no written consent of the respondent given within one month before the day of the nomination in the presence of two witnesses had been produced at the time of the delivery of the nomination papers or at all.

The names of the petitioner and of the respondent were published as being the two persons validly nominated for the vacancy of the south ward.

A poll was held in the south ward on the 8th Nov. 1904 between the petitioner and the respondent.

Inasmuch as the 8th Nov. 1904 was the polling day, the petitioner had not then time to print and circulate to the constituency a notice of any objection to the nomination or candidature of the respondent, but on that day he wrote out such an objection and took it to the counting.

Prior to the opening of the ballot-box the petitioner handed in the objection to Alderman Fowler, the acting returning officer, and stated that the respondent had been absent from the United Kingdom at the time when the papers so nominating him had been delivered, and that no such written consent had been then or at all produced, and thereupon the petitioner claimed the seat.

After the counting and before the declaration of the poll the petitioner again raised the like objection.

Alderman Fowler in answer said that as far as his duties were concerned they were to count, and he could have nothing to do with the objection.

The respondent had a majority of votes at the poll, and was declared to be duly elected. The number of votes recorded for the respondent was 297, and for the petitioner 172.

The respondent, having been served with a copy of the petition, duly gave notice, on the 2nd Dec. 1904, of his intention not to oppose the petition, and no other person had given notice in writing to the master of his intention to apply to be admitted as respondent.

The questions for the consideration of the court were: (1) Whether the nomination of the respondent was valid; (2) if it was not valid, whether the petitioner was entitled to be declared duly elected.

Corrie Grant for the petitioner.—By rule 16 of part 2 of sched. 3 of the Municipal Corporations Act 1882 the nomination of a person absent from the United Kingdom is to be void unless his written consent, given within one month, before the day of his nomination in the presence of two witnesses, is produced at the time of his nomination. This case is an exception by statute from the rule laid down in *Hobbs* v. *Morey* (21 Cox Mag. Cas. 346; 89 L. T. Rep. 531; (1904) 1 K. B. 74). That was a case of an ordinary nomination, but the present is a case of a special nomination. He also referred to

Brown v. *Benn*, 53 J. P. 167.

This is not a case of disqualification, but of failure to nominate, and there being no nomination of another candidate the petitioner ought to be declared duly elected.

Willoughby Williams for the respondent.

KENNEDY, J.—We are both of opinion that this case is indistinguisable in principle from *Hobbs* v. *Morey* (*sup.*), and it is therefore unnecessary to go into the reasons for that decision, which will be found in the judgments in that case. Here a person was elected who was not qualified to go to the poll, and he got a large majority of lawful votes. He went to the poll apparently correctly and duly qualified so far as the knowledge of the voters was concerned, for his nomination was in no way disputed to the knowledge of those electors. He ought not to have gone to the poll, and he ought not to have been elected, but we can only declare his election invalid, and we cannot declare the petitioner duly elected.

JELF, J.—If this matter were *res integra* there might be much to be said, for it is certainly hard that where the knowledge of the invalidity of the nomination only came at the last moment, so that there was no time to give notice to the electors, the validly nominated candidate cannot claim to be duly elected, but must go to the trouble of another contest. But it was considered in *Hobbs* v. *Morey* that on the whole it was in the interest of voters there ought to be a new election. I think *Hobbs* v. *Morey* was perfectly right, and we must follow it.

Election declared void. Leave to appeal.

Solicitors: *Radford* and *Frankland*, for *Birdsall* and *Cross*, Scarborough; *Jakes* and *Co.*, for *Turnbull* and *Co.*, Scarborough.

CROWN CASES RESERVED.

Saturday, Jan. 28, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY, RIDLEY, CHANNELL, and PHILLIMORE, JJ.)

REX *v.* SMITH. (*a*)

Criminal law—Evidence—False pretences—Course of conduct—Evidence of subsequent transaction—When admissible.

The test to be applied in considering whether, on the trial of an indictment charging obtaining money, goods, or credit by false pretences, evidence of acts of the defendant subsequent to those which are the subject of the indictment is admissible, is whether the evidence is relevant. A connection must be shown to exist between the acts which are the subject of the indictment, and the acts sought to be proved. The fact that the subsequent acts show that the defendant has committed an offence distinct from that which is charged in the indictment, is not sufficient to make evidence of the subsequent acts inad-

(*a*) Reported by A. A. BETHUNE, Esq., Barrister-at-Law

missible if a connection is shown to exist between the transactions.

Reg. v. Holt (3 *L. T. Rep.* 310; 8 *Cox C. C.* 411) *considered and explained.*

CASE stated by the Recorder of Brighton.

The prisoner was indicted for obtaining certain office furniture from one Henry Matthew Cooper on the false pretence that he came from the Mercantile Syndicate Limited, of Coventry House, South-place, Finsbury, in the city of London, and that the syndicate was about to open a branch office in Brighton, and that the furniture was for the syndicate for whom he, the prisoner, was the local agent. The indictment contained other counts charging the prisoner with obtaining credit from Cooper by the same false pretences. Evidence was given that on the 17th Oct. 1904 the prisoner had made the statement to Cooper charged as the false pretence, and that he asked Cooper to supply him with carpets and linoleum, but that Cooper did not supply these articles, and had recommended the prisoner to go to one Boutcher. It was proved that the prisoner's statements were false. The defence was that the prisoner had not said that he was the agent for the Mercantile Syndicate, but that he was himself the purchaser, and was about to commence business in Brighton as "The Brighton Tradesmen's Mercantile Syndicate" or "The Mercantile Syndicate of Brighton." The prosecution called Arthur Charles Walker, a salesman in the employment of Boutcher, who proved that the prisoners had on the 25th Oct 1904 come to Boutcher's shop, and, after giving Cooper as a reference, purchased certain goods, stating that he was purchasing them on behalf of the Mercantile Syndicate of London. Objection was taken to this evidence on behalf of the prisoner, but it was admitted by the Recorder. The jury convicted the prisoner and the Recorder stated the case, the question for the consideration of the court being whether the evidence of Arthur Charles Walker was admissible.

E. E. Humphreys for the prisoner.—Walker's evidence was only evidence that the prisoner had committed another offence, and was therefore not admissible as showing that he had obtained the goods the subject of the charge by a false pretence: (*Reg.* v. *Holt*, 3 L. T. Rep. 310; 8 Cox C. C. 411). No connection was shown to exist between the prisoner's transaction with Cooper and his transaction with Boutcher so as to establish a course of conduct. To make the evidence admissible the prosecution must prove that the prisoner was carrying on a fraudulent business in which the transaction with Cooper was an incident:

Reg. v. *Rhodes*, 79 L. T. Rep. 360; 19 Cox C. C. 182; (1899) 1 Q. B. 77;

Reg. v. *Ollis*, 83 L. T. Rep. 251; 19 Cox C. C. 554; (1900) 2 Q. B. 758;

Rex v. *Wyatt*, 20 Cox C. C. 462; (1904) 1 K. B. 188.

Raven for the prosecution.—The decision in *Reg.* v. *Holt* is bad law. The evidence is admissible as rebutting the prisoner's defence. [He was stopped by the Court.]

Lord ALVERSTONE.—We have none of us any doubt in this case. When the facts are stated the case seems stronger than any of the cases *Reg.* v. *Ollis*, *Reg.* v. *Rhodes*, *Rex.* v. *Wyatt*. It is distinctly within the rule stated by Lord Herschell in *Makin* v. *Attorney-General of South Wales* (79 L. T. Rep. 778; (1894) 1 A. C., at p. 65). The defence was that the defendant never said that the goods were for the Mercantile Syndicate of London, but only gave the Mercantile Syndicate as a reference. The prisoner could not obtain all the goods at one place, and he therefore goes to Boutcher, and there it is said that he made a statement. The rule is that on the trial of an indictment charging obtaining goods, money, or credit by a false pretence, evidence is admissible which negatives accident or mistake on the part of the defendant. With regard to that I have nothing to add to what I said in *Rex* v. *Wyatt*, in which case I followed Lord Russell, C.J. in *Reg.* v. *Rhodes*. The point to be ascertained is whether the business the prisoner was carrying on was a bogus or sham business. Here the case was that the prisoner expressly stated that he was buying the goods for the Mercantile Syndicate of London. With reference to *Reg.* v. *Holt* I must say this. If it is supposed to lay down simply that evidence of the transaction sought to be proved is inadmissible simply because it shows a separate offence, then the decision is wrong. All that that case shows is that the man committed a distinct offence, and that Holt, C.J. and Erle, J. thought that evidence of that offence was inadmissible on his trial for a previous offence. Two attempts to make use of the same pretence are not sufficient to make evidence of each admissible against the prisoner on his trial for the other. But we ought not to hold that *Reg.* v. *Holt* is an authority that evidence of transactions subsequent to that which is the subject of the indictment which is being tried, and in which the same pretence is used is inadmissible, if there a connection is shown to exist between all the transactions.

KENNEDY, J.—I agree. The question is whether the evidence is relevant; its admissibility depends upon its relevancy.

RIDLEY, J.—I also agree. I do not think that what I said in *Rex* v. *Wyatt* is in conflict with what I say now. The question is whether the transactions have a bearing on the acts charged. I agree that in this case they have. I agree with the principle, the question is as to its application. If the matter sought to be proved is material to the issue before the court it may be proved. In *Reg.* v. *Ollis* the question was whether evidence of the state of the prisoner's banking account was relevant. In that case I was of the opinion that the evidence was not relevant. It is clear that the application of that principle to this case makes the evidence as to the subsequent transaction admissible.

CHANNELL, J.—I agree. The principle which ought to be applied has now become quite clear. The whole difficulty is in applying the principle to the facts. Now, these facts are very like the facts in the other cases, and therefore the decision must be the same. You must first find the principle, and then apply it to the facts of the case in question. Here I have no difficulty in applying the principle, and I therefore think that the conviction must stand.

PHILLIMORE, J.—I agree that the conviction must be supported.

Conviction affirmed.

Solicitors: For the prisoner, *Marx* and *Thompson*, Brighton; for the prosecution, *Hobbs* and *Young*, Brighton.

Jan. 21 *and* 31, 1905.

(Before Lord ALVERSTONE, C.J., RIDLEY, DARLING, CHANNELL, and PHILLIMORE, JJ.)

REX *v.* LAWSON. (*a*)

Criminal law — Evidence — False statement— Director—Manager — No necessity for formal appointment — Person acting as manager— Practice—Restating case — Larceny Act 1861 (24 *& 25 Vict. c.* 96), *s.* 84.

A person who de facto *acts as manager of a company is a "manager" within the meaning of sect.* 84 *of the Larceny Act* 1861. *Evidence that the person charged as a "manager" under that section took an active part in the management of the company, and was not merely directing or advising a policy to be carried out by others, is sufficient to support a conviction for making, circulating, and publishing a false statement with intent to induce persons to become shareholders in the company, and no evidence of a formal appointment is necessary.*

THIS case, stated for the opinion of the court by A. T. Lawrence, J. was as follows:

1. Henry John Lawson was tried before me on the 22nd Nov. 1904 and following days at the Central Criminal Court on an indictment charging him, under sect. 84 of the Larceny Act 1861, with unlawfully making, circulating, and publishing written statements false to his knowledge with intent to induce persons to become shareholders in the Electric Tramways Construction and Maintenance Company Limited.

2. The said company was a limited company registered under the Companies Acts 1862 to 1900.

3. The articles of association (which were put in evidence and may be referred to as part of this case) contained provisions empowering the board to appoint a manager.

4. No minute of the board appointing a manager was in evidence, and there was no evidence of any actual appointment of the prisoner as manager by the directors of the company.

5. The nominal capital of the company was 250,000*l.*, divided into 250,000 shares of 1*l.* each.

The issued capital consisted of 55,000 shares issued as fully paid.

6. The whole of these shares, with the exception of about 5000, were held by the prisoner or his nominees.

7. The prisoner had given the then existing directors their share qualifications, and the said directors had executed blank transfers of such shares and lodged the same with the prisoner.

8. The prisoner, with the assent and concurrence of the directors, dictated the policy of the company, and managed its affairs. He also paid the expenses of publishing the incriminated matter.

9. The indictment, counts 8 to 16 inclusive, charged the prisoner with publishing in the *Financial News*, the *Statist*, and a report or circular, certain false statements.

The indictment and the exhibits containing the said statements may be referred to as part of this case.

10. The prisoner submitted that he was not a "manager" within the meaning of sect. 84 of 24 & 25 Vict. c. 96.

11. I directed the jury that if the prisoner was the person who in fact managed the affairs of the company he was a manager within the meaning of the section.

12. The jury found the prisoner guilty.

13. I sentenced him to twelve months' imprisonment with hard labour, but respited the execution of the sentence until after the decision of this case.

The prisoner was admitted to bail.

The question for the opinion of the court is whether my direction to the jury was right. If right, the conviction is to stand; if wrong, the conviction is to be quashed.

A. T. LAWRENCE.

Dec. 21, 1904.

Rufus Isaacs, K.C., *Horace Avory*, K.C, and *Chalmers* for the prisoner.—The case is not satisfactorily stated. The point is whether the prisoner was ever formally appointed a manager of the company. That question is not properly raised by the case. Further, the statement in par. 7 is incorrect. There were three directors only one of whom received his qualification from the prisoner. In par. 8 the statement that the prisoner paid the cost of printing the incriminated matter is also incorrect; this expense was paid by the company. The case should be sent back to the judge to be restated. [Lord ALVERSTONE, C.J.—If the facts are not properly stated in a case, the proper course is to apply to the judge.]. No application has been made to the judge, but the court has jurisdiction to remit the case. [Lord ALVERSTONE, C.J.—We should not send a case back merely on a statement that the facts are incorrectly stated.]

Sir *R. Carson* (S.-G.).—I do not agree that the facts are incorrectly stated. The prisoner gave their qualifying shares to two out of the three directors. The prisoner made the payments referred to in par. 8.

The Court refused the application.

Rufus Isaacs, K.C.—Lawson, the prisoner, was not a manager within the meaning of sect. 84 of the Larceny Act 1861. He was not an officer, because he was never appointed. He was not a "director manager, or public officer" of the company. His name did not, and could not, appear in the register of directors and managers, which the company was obliged to keep under sect. 45 of the Companies Act 1862. He might be under a civil liability for publishing a false statement, but it does not follow that he is criminally liable. In *Gibson* v. *Barton* (32 L. T. Rep. 396; L. Rep. 10 Q. B. 329) Quain, J. did not agree that a person who was not duly appointed but was *de facto* manager, could be even civilly liable as a manager. In *Coventry* v. *Dickson* (42 L. T. Rep. 559; 14 Ch. Div. 665) the question was whether unqualified persons who acted as directors were liable as directors to proceedings under sect. 165 of the Companies Act 1862, and the Court of Appeal held that they were not. It was there held that a person could not be a director *de son tort*; if that is so in a civil action, it is so *a fortiori* in criminal proceedings. Informality in the appoint-

(*a*) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

ment is not, by reason of the provisions of sect. 67 of the Companies Act 1862, to invalidate the acts of an officer, but that implies that there must have been an appointment of some kind. Accountants who act as auditors of a company, but without any formal appointment, are not "creditors" within the meaning of sect. 10 of the Companies (Winding-up) Act 1890:

Re Western Counties Steam Bakeries and Mining Company, 76 L. T. Rep. 239; (1897) 1 Ch. 617.

And where a person who had not been duly appointed a director of a company was charged under sect. 81 of the Larceny Act for embezzlement as a director, the Recorder of London withdrew the case from the jury:

C. C. C. Papers, May 1900, vol. 132. p. 439.

The Electric Tramways Construction and Maintenance Company Limited was incorporated under the Companies Act 1862; and a person can only be a director if he is appointed in accordance with the articles of association which govern the company. He can therefore be only appointed by resolution of the directors, and there was no evidence of a resolution appointing Lawson to any office. If a person is not duly appointed he is not a director, and if not a director cannot be convicted as if he were a director:

Reg. v. *Portugal*, 16 Q. B. Div. 487.

Sir *E. Carson* (S.-G.), *H. Sutton*, and *Muir*, for the Crown, were not called upon.

Lord ALVERSTONE, C.J.—In this case the first application made to the court was that the case should be sent back to the learned judge for restatement, and it was stated that there should be some slight qualification of the statement in par. 7. The court has ample power to send a case back in the event of its finding upon the argument that the case has not been properly stated and does not raise the point in issue, and if the allegations which Mr. Isaacs sought to correct could be said to be the allegations upon which this direction of the learned judge depended we should have had to consider whether or not there might be a ground for requiring a restatement. But the matters which it was contended on behalf of the prisoner should have been stated were merely matters of history and narrative leading up to the point on which the learned judges ruled. It is not disputed that there was evidence in support of the direction which the learned judge gave to the jury which would justify the jury in coming to a conclusion of fact on that direction if the direction is right. The direction was in these terms: "I directed the jury that if the prisoner was the person who in fact managed the affairs of the company he was a manager within the meaning of the section." Now, if Mr. Isaacs was justified in saying that we were to read that direction—a direction, I wish to observe, made after a trial which had lasted a great many days, and a direction which was a summary of a much fuller explanation to the jury—as merely a direction that a person who merely pulled the strings was a manager, I should agree that the case did not come within the section. It seems to me that it is first necessary to see what the learned judge meant. He had referred to the issuing of certain documents which are before us, documents which related to the dividend to be paid by the company, documents which contained conclusions to be drawn by the persons who were managing the company and upon which the company was to act, with the result that persons might be induced to become, or to refuse to become, shareholders in the company. When one looks at the statements made in the earlier part of the case, and the documents which form part of the case, it is to my mind abundantly clear that the learned judge when he used the words "managed the affairs of the company" meant managed the affairs of the company, and not merely directed its policy. I think that that is the only fair way to construe this direction, because in the earlier part of the case he has used language which shows that he was quite alive to the effect of the expression "dictating the policy," and that he has in his final direction, as he has summed it up, described the conduct of the defendant as of the person who in fact managed the affairs of the company. I understand that as a direction that if the defendant was in fact the manager of the company he came within the section. Now, is that right or wrong? Mr. Isaacs, in his very able argument, contended that the manager must be a constituted officer of the company, at any rate in form, and that he must be under the control of the directors so as to be a servant, thus limiting the operation of the statute, and that the direction of the learned judge is therefore insufficient, because it was not explained to the jury when these conditions were fulfilled. We have to construe the direction and to consider whether Mr. Isaacs is right in his construction of the enactment. The section was enacted in the year 1857. It is contained in an Act the title of which is "An Act to make better provision for the punishment of frauds committed by trustees, bankers, and other persons intrusted with property," and the preamble is in the same words. Sect. 8, which is for all practical purposes identical with sect. 84 of the Larceny Act, is in these words: "If any director, manager, or public officer of any body corporate or public company shall make, circulate, &c., with intent to deceive or defraud . . . he shall be guilty of a misdemeanour." Now, I think that the language of the section shows that the words, at any rate the expression "manager," cannot be used in a technical sense. "Body corporate" is referred to, "public company" is referred to, "director" is possibly, and Lord Blackburn seems to have thought that it was, a term of art, and "public officer of any body corporate" may possibly refer to the public officers who used to act on behalf of corporate bodies. To construe in a statute of this character "public officers" even, as confined to those public officers in whose names only the company could sue or be sued, seems to me to be a very narrow construction. Probably the expression was intended to have a wider meaning. But ought the word "manager" to have the limited meaning which Mr. Isaacs contends for? He argues that an appointed officer of the company is an officer appointed—formally appointed, or at all events appointed—whether all the formalities have been complied with or not, not a person who in fact manages. It is not immaterial to note that which was pointed out in the course of the argument, that, as far as I can find out and as far as my learned brothers have been able to find

out, prior to 1857 the only technical use of the word "manager" was in connection with the official manager who was an officer of the court who could act when companies got into difficulties in connection with winding-up the affairs of the company. That cannot have been the manager referred to in this section. Therefore, we have not before us any previous legislation, or any previous state of things that would lead us to think that the word "manager" is used in any technical or limited sense, and, looking at the mischief intended to be aimed at by the section, it would seem to me at any rate that a *de facto* manager is as much a person whose conduct might be the subject of the section as a person who had been merely appointed manager upon paper. Therefore, if the case stood upon the section alone, and there was no authority, I should, speaking for myself, have a strong view that the direction of the learned judge was perfectly right that under the section a person who has in fact managed the affairs of the company is a manager within the meaning of that section. But I feel it right to say that though I have listened with the greatest attention to Mr. Isaac's argument, I cannot see that he has displaced the weight of authority which has dealt with the matter. He has criticised quite properly from his standpoint the case of *Gibson* v. *Barton*. He has adopted the reasoning, in the course of his argument, of the dissentient judge, Quain, J. He has said that the distinction is to be drawn because the particular thing purported to be done by the person whose conduct was there implicated was something which would be done by a manager, or a representative, or an officer of the company. I confess I think that the language of Blackburn, J. and the language of Lush, J., if considered, cannot be put upon those narrow terms. I need not read the section again because the terms are for this purpose identical, but here was a section which said that if any director or manager of the company was not to do an act, or was to do an act, in a certain way, he should be liable to a penalty: "And every director and manager of the company who shall knowingly and wilfully authorise or permit such default." In what sense are the words "director" and "manager" used in that section (This is Blackburn, J.): "When the section says 'director' it is plain enough a director is a director, but the words are 'and manager.' We have to say who is to be considered a manager. A manager would be, in ordinary talk, a person who has the management of the whole affairs of the company; not an agent who is to do a particular thing, or a servant who is to obey orders, but a person who is entrusted with power to transmit the whole of the affairs of the company." It seems to me that when you turn to the language of Lush, J., on p. 341, it is only possible to reconcile it with the same view. He says: "Then is he a manager within sect. 27? I think he is, and that 'manager' in that section must mean manager *de facto*. I do not think that it is competent for him to say, 'True, I acted as manager *de jure*, I can evade the liability imposed as between the public and the company by sect. 26.'" Now, it is true that this is not the same section, and if Mr. Isaacs had been able to point out either from the language of the section itself, or the character of the offence which was attempted to be defined and touched, reasons why a narrower view should have been put on the word "manager" he would have gone far to show it was not an authority upon the reasoning of which we ought to act. All I can say is he has failed, to my mind, to show any ground for applying a different principle. The case came before the Court of Queen's Bench in a case that was not cited by Mr. Isaacs, nor was it at all necessary for him to cite it. I only mention it to show that there are many judges who have considered this point. The case is *Edmonds* v. *Foster* (33 L. T. Rep. 690; 45 L. J. M. C. 41, 24 W. R. 368), and I think it is right to say that two learned judges there do not express an opinion either one way or the other, but they certainly say nothing which shows that they had any doubt as to the opinion of the majority. Lord Coleridge says: "It is unnecessary to discuss the opinions of the judges in *Gibson* v. *Barton*, but so far as it goes, the decision of the majority is very strongly in point for the respondents." Archibald, J. does not refer to it. Amphlett, B. says: "If, however, the ordinary meeting was not held in the year 1875, then, upon the principles laid down by the majority of the judges in *Gibson* v. *Barton*, the appellant being a director is liable to be convicted." I mention that not as adding much weight to the authority of *Gibson* v. *Barton*, but as showing that it came before three very learned judges, and they did not throw any doubt upon it. But, in my opinion, *Coventry and Dixon's* case (14 Ch. Div.) is much more important. There Sir George Jessel, as Mr. Isaacs pointed out when he was dealing with the matter, had certainly gone very far indeed in supporting the principles of *Gibson* v. *Barton*. He had referred to it, and he said, at p. 665: "The question, therefore, is whether a person who is then a manager *de son tort*—a manager in his own wrong—can protect himself from the liability cast upon a manager under sect. 27 by saying, 'I am not manager *de jure*.' I think he cannot." Then he cites other passages from the judgment of Blackburn, J. and Lush, J., and says, at p. 666: "I agree with the judgment of Blackburn, J., and Lush, J. agreed with it, but my late lamented friend Quain, J. did not agree with it." That case then went to the Court of Appeal. The court overruled Sir George Jessel upon the point as to whether or not the Act complained of was a misfeasance under the particular section which was then under consideration, but James, L.J. says: "It was admitted by the appellants that these persons as *de facto* directors would be liable for any act of commission or any omission on their part in the same manner and to the same extent as if they had been *de jure* as well as *de facto* directors." Baggallay, L.J. does not make any definite reference to the matter, but Lord Bramwell says: "Is it possible to hold that a man doing nothing wrong in itself, except that he acts without being qualified to do so, is within the meaning of those words? I have the strongest opinion that it is not. If he has done anything wrong as a *de facto* director, no doubt he can be got at under the clause." Then it is said by Mr. Isaacs, and I think that the observation is perfectly well founded, that having regard to the decision in the case, those opinions are to a certain extent *obiter*. I only desire to say that I certainly think that Lord Bramwell would not have hesitated to express

his opinion if he thought Sir George Jessel had been wrong in the view he took as to the position of a man who was *de facto* director or *de facto* manager, adopting, as did Sir George Jessel, the opinion of Blackburn, J. But putting it at the lowest, the case of *Gibson* v. *Barton* has been before seven or eight judges. It was considered indirectly in the case of *Western Counties Steam Bakeries Company* (*ante*), by Lindley, Smith, and Rigby, L.JJ., and I cannot agree with the view suggested by Mr. Isaacs that Rigby, L.J. did not agree with *Gibson* v. *Barton*. I think that the language of his judgment shows that he did. In that case three more of the Lords Justices considered it. It is not too much to say, therefore, that some ten judges have had this case before them, and, as far as I can see, there is nothing to indicate that they thought the judgments of Blackburn and Lush, JJ. wrong. Therefore, finding, as I do, in the first instance, the words of the section pointing to a person who is called manager, and finding no technical meaning for that word at the time the Act was passed, I decline to accede to the argument that it can only have been intended to apply to persons who might be appointed managers under subsequent legislation or under a subsequent rule. Then, finding that the offence aimed at and contemplated by the section is an offence the consequence of which might be just as serious if the *de facto* manager was guilty of the offence as if the *de jure* manager was—in fact, in some senses, more—and that the principle has been applied in *Gibson* v. *Barton* and approved of, or at least not dissented from, by a considerable number of judges, I have myself no doubt in coming to the conclusion that the direction of Lawrence, J. was right, and that the conviction must stand.

RIDLEY, J.—I am of the same opinion, and I do not see any occasion to add anything to the remarks which have fallen from the Lord Chief Justice.

DARLING, J.—I am entirely of the same opinion. I only desire to say this, my judgment does not go at all upon the ground, nor do I think does the judgment of the Lord Chief Justice, that was often pressed upon us in Mr. Isaac's argument, that this defendant was manager *de son tort*, and, therefore, for that reason properly convicted upon the indictment. To me that argument might in certain instances be a very technical one, possibly at variance with the real facts of the case. If you said simply that a person who is not a manager is a manager, a manager *de son tort*, because he has wrongly affected to act as a manager, you might decide upon a very technical ground, and, as I have said, possibly in conflict with the real facts of the case. But here the jury found upon plenty of evidence that the defendant was the person who in fact really managed the affairs of the company. That is a great deal more than being a manager *de son tort*, in the narrowest sense at all events. He was a person who was doing things which, if there had been a manager, the manager would have done. He was, so far as I can see, the only person who did them, and to hold that he was not the manager would be to take an extraordinarily technical view in his favour, whereas I think the real facts should be looked at, and that the jury having found, and properly found, that he was in fact the manager, the man who did the things a manager would have done, who did the things which only a manager could have done, that he was properly indicted as manager under this statute and properly convicted under it.

CHANNELL, J.—I also agree that this conviction should be affirmed. I want just to say that I personally agree with a considerable portion of Mr. Isaac's argument. I think that this is one of a group of sections dealing with offences which can only be committed by persons who occupy certain positions; but I think that they can be convicted if they occupy these positions quite apart from whether they happen to have been either duly appointed or appointed at all to their positions. It is necessary under this section both to charge in the indictment that the man was manager, and to prove it to the satisfaction of the jury. Of course, it is also necessary that there should be a proper direction to the jury as to what a manager within the meaning of the section is, and the only question that seems to me to be of any doubt in this case is whether this direction was quite correct. On the whole, I interpret it in the way in which I think the direction ought to have been given. It says, a person who in fact managed the affairs of the company; it does not say, managed the company. If that meant, or was understood to mean, that a person behind the scenes, who controlled the whole of the policy of the company, because the directors and all the officers of the company were his puppets, if it only meant that, I should not think that that was being a manager of the company. But if it meant, as I think it did, if you find that the defendant was the person who did the acts in the management of the company as managing its business, "its affairs" is what is said in the direction, if he did that, then it does not signify that there was no appointment of him as manager. It seems to me that it must have meant that upon a fair interpretation of it, and that therefore it is correct.

PHILLIMORE, J.—I agree, and I have nothing that I can usefully add to the observation of my Lord and my brethren. *Conviction affirmed.*

Solicitors: *Solicitor to the Treasury; Cox* and *Lafone.*

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 16 *and* 17, 1904.

(Before VAUGHAN WILLIAMS, ROMER, and COZENS-HARDY, L.JJ.)

JONES *v.* HUGHES. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Local government—National school—Teacher—Notice determining engagement given by the managers before coming into force of Education Act 1902*—Expiration of notice after Act in force—Dismissal—Consent of local education authority—Parties to action—Education Act* 1902 (2 *Edw.* 7, *c.* 42), *s.* 7, *sub-s.* 1 (*c*).

In 1899 *the plaintiff was appointed headmaster of a*

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

National school by the then managers under a trust deed, his appointment being determinable on three months' notice. On the 6th May 1904 the then managers under the trust deed gave the plaintiff notice in writing determining his engagement, which expired on the 9th Aug. The "appointed day" for the coming into operation of the Education Act 1902 in that district was the 1st July 1904. The new managing body, being the "foundation managers" under the Act, contended that the plaintiff had been dismissed, while the county council, which was the local education authority, desired he should continue as headmaster, and contended that under sect. 7, sub-sect. 1 (c), of the Act, he could not be dismissed without their consent.

Held, that, the notice being valid when the Act came into operation, the only contract with the plaintiff which was in existence was a contract to employ him for a term which expired on the 9th Aug., and it was not necessary for the managers to give any further notice or do anything which constituted a dismissal within the Act; and therefore sect. 7, sub-sect. 1 (c), of the Education Act 1902 did not apply.

Decision of Kekewich, J. affirmed.

The plaintiff brought an action against the four persons who gave him notice, who were now the "foundation managers" under the Education Act of 1902, and who continued to manage the schools with two others appointed under the Act, claiming an injunction restraining them from preventing him from exercising his duty as master of the school. It was admitted that when the notice was given it was a good notice.

Held, that the action ought not to have been brought against these four defendants, as they were neither the original contracting parties nor the whole body of management under the Act of 1902.

IN 1875 a piece of land at Gwaenysgor, in Flintshire, was, by deed-poll under the Schools Sites Acts of 1841 (4 & 5 Vict. c. 38) and 1844 (7 & 8 Vict. c. 37), conveyed to the minister and churchwardens of the parish and their successors for the purposes of those Acts, upon trust for the erection of a National school; and it was provided that the management of the school and the appointment and dismissal of the school teachers should be vested in a committee consisting of the incumbent for the time being, his licensed curate, if the incumbent should appoint him a member, and of the churchwardens, and three other persons being members of the Established Church and subscribers to the funds of the school of not less than 10s. annually; and that any vacancy on the committee should be filled up by the appointment of a subscriber qualified as aforesaid, such appointment to be vested in the incumbent for the time being. The trust deed was in the form contained in sect. 10 of the Act of 1841 as varied by the Act of 1844.

In July 1899 the plaintiff was appointed headmaster of the school by the managing body, which then consisted only of the rector and two churchwardens. No written agreement as to the terms of the appointment was produced; but in an affidavit the plaintiff stated that the terms were that he should receive a certain salary, and that his engagement should be determinable by three months' notice by either party.

On the 6th May 1904 the then managers of the school, consisting of the then rector and the two churchwardens, who were not the same managers as in July 1899, gave the plaintiff notice in writing that they would not require his services as master after the 9th Aug. 1904. The notice was not connected with the giving of religious instruction in the school.

On the 1st July 1904 the Education Act 1902 came into operation in Flintshire, that being the "appointed day" under sect. 27, and the Flint County Council thereupon became the local education authority for the county, and as such liable for the maintenance of the school; and under sect. 6, sub-sect. 2, and sect. 11 the managers consisted of four "foundation managers," who were the rector and churchwardens of the parish together with a fourth person appointed under the trust deed, and also two other persons appointed by certain local authorities.

The plaintiff then applied to the county council, as the local education authority, not to give its consent to his dismissal under sect. 7, sub-sect. 1 (c), of the Act, and a resolution was passed by a committee of the county council recommending the local education authority not to give their statutory consent.

Sect. 7, sub-sect. 1, provides:

> The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which under this Act provision is to be made by the managers; but in the case of a school not provided by them only so long as the following conditions and provisions are complied with: . . . (c) The consent of the local education authority shall be required to the appointment of teachers, but that consent shall not be withheld except on educational grounds; and the consent of the authority shall also be required to the dismissal of the teacher, unless the dismissal be on grounds connected with the giving of religious instruction in the school.

The four "foundation managers," however, took steps to appoint a new master in the place of the plaintiff, and on the 24th Aug. 1904 he issued the writ in this action against them claiming an injunction to restrain them from preventing him from exercising his duty as master at the Gwaenysgor Schools, and a declaration that he was master of the said schools until his engagement had been duly terminated by a properly constituted authority.

On the 31st Aug. an interim injunction in the above terms was granted by Bigham, J. as Vacation judge, over the second motion day in Michaelmas Sittings.

The two managers appointed by the county council, not having taken part in the proceedings complained of, were not made defendants.

The motion was heard on the 28th Oct. 1904, when the following judgment was delivered:—

KEKEWICH, J.—Notwithstanding the argument that has been addressed to me, and notwithstanding that Bigham, J. apparently thought the point deserved more consideration that he could give to it in the Vacation sitting, I cannot see any difficulty in the case at all. The plaintiff was appointed head teacher of this school by the then authority, those in whom the management of

the school was for the time vested, and, according to his own statement, on the terms that the engagement should be determinable by three months' notice. There may have been a written agreement, although it is not produced, providing for that; there may have been a verbal agreement that it should be so determinable, or some idea that a person occupying that position is entitled to three months' notice; but at any rate that is his own statement, by which he is prepared to stand. The school being still under the same course of management, the managers give through Mr. Hughes, one of the defendants, who is the rector, notice to the plaintiff on the 6th May, saying that they "will not require your services as master of the aforesaid school after the 9th day of Aug. 1904." It is not suggested that that was not a perfectly good notice, under the agreement to which the plaintiff refers, determining the engagement at the end of three months, with a day or two to spare. If nothing else had happened there could be no question that at that time the plaintiff would have been obliged to give up his position; but somewhat later the school came under the county council by virtue of the Act of 1902. Under that Act different schools may come under the county council at different times. It is for the authorities to fix a day, called "the appointed day," and that appointed day fell between the day when the notice was given and the day when the notice expired. Why was the notice not good as against the county council coming in on the appointed day and taking up this school? That is a question I see no reason at all for answering otherwise than by saying the notice was perfectly good, and that the engagement was determined. I cannot myself see any difference between that and an engagement, say, to purchase so many chairs and tables, or so much coals, or to do some repairs—repairs, perhaps, had better not be brought in—but anything in the way of pure maintenance of the school; there might have been an engagement for some person to sweep out the school on Saturday or oftener. Why is not that determinable by the managers at the time notwithstanding that the appointed day is come when some other authority is coming in? It seems to me that the county council necessarily take the school over subject to proper contracts, whatever they are. Contracts of service and contracts determining service are equally binding on the successors to the old managers. If that is the right view, there is no reason why the county council should in their character of the educational authority have acceded to the plaintiff's suggestion to make inquiry whether he was to be continued or not. What they have to consider is what the appointment is to be when the place is vacant, which, according to my judgment, it has been for some time, and is at the present time. Their consent is required in a limited way, but still their consent is required, and the appointment is vested, subject to that consent, in the foundation managers, with the addition of the managers appointed according to the Act; that is to say, by the educational authority. In this case I think the county council themselves appoint both, and there is no borough council to appoint one of them. The place is vacant. It is now a question of a new appointment, not whether an old appointment should be renewed or regarded as not having come to an end. Then it was put ingeniously by Mr. Low that giving the master notice that his services were not required after a certain date was an intimation that his services would be required until that date, and that therefore he was continued in the service until after the appointed day; that is to say, until after the county council take possession, if I may use a rather inappropriate phrase. I agree; but nothing follows from that. The only result is this. He is engaged until the 9th Aug. I follow the argument to that extent—not the 9th Aug. and afterwards—but he is engaged for a limited time. At the end of the limited time the necessity of appointment arises; that appointment must be made according to the terms of the Act. To my mind these very few observations entirely dispose of the case.

From this decision the plaintiff appealed.

Low, K.C. and *H. Lynn* for the appellant.—The notice did not terminate before the "appointed day" when the Education Act 1902 came into force, and then it was necessary that the local education authority should consent to his dismissal under sect. 7, sub-sect. 1 (*c*). He was actually a teacher when the Act came into force, and he is entitled to remain until he is dismissed in accordance with the Act. The dismissal was on the 9th Aug., when the notice terminated, not when the notice was given on the 6th May.

P. O. Lawrence, K.C. and *A. B. Nutter* for the defendants.—The Act of 1902 does not invalidate any existing contracts entered into by managers of voluntary schools with their teachers. Under that Act the new managers become managers under the trust deed: (sect. 11, sub-sect. 6; sched. 2, clause 12). The contract was entered into with the managers *quâ* managers, and is not affected by a change in the *personnel*. This contract and the dismissal are not affected by the Act at all. The action is wrong in form. The defendants are not the same persons as those with whom the appellant contracted in 1899, nor are they the whole body of managers at the present time.

Low, K.C. in reply.—If necessary, the other two managers can be joined as defendants, and leave should be given to make that amendment. They were not made parties because they do not approve of what the "foundation managers" are doing.

VAUGHAN WILLIAMS, L.J.—The plaintiff here has presented to us a statement of claim which is, to my mind, ill-conceived, and it seems to me that, whatever his rights may be under the statute, this action ought not to have been brought against these four persons, who are some of the members of the body of management as it exists under the Act of 1902. These gentlemen are not the original contracting parties, nor are they the whole of the body of management under the Act of 1902. Mr. Low says that we ought to give leave to amend. One good reason for not doing so is that, looking at the case that he tells us that he would wish to present, that case, if there was an amendment, in my judgment would also fail; so there is nothing to be gained by amendment. I thought, when this case was first presented to us, that, inasmuch as it was a case arising in

respect of a teacher of a school governed by the Education Act 1902, it was very desirable that we should consider what was the frame of that Act, and the provisions which chiefly affect the relations of the body of management with the teachers; but now I agree with Mr. Low that those are matters which do not really affect the question which we have to determine. The claim of the plaintiff is based upon a contract, and he says that the notice that was given on the 6th May—that is to say, nearly two months before the appointed day arrived when the Act was to come into force—is ineffective. It is admitted that at the moment when that notice was given it was an effective notice, and it is admitted that the effect of the notice was that at the termination of the three months mentioned in that notice the contract would come to an end by effluxion of time. Unfortunately, the written contract is not before us, but the plaintiff in his affidavit states what the contract was as against him, and that is sufficient. We learn, therefore, that this was a contract which could be terminated by three months' notice on either side. The three months' notice was given, and thereupon it would seem to follow that if the plaintiff is basing his claim on that contract he must take it as a whole, and he must take it that the contract was determined at the end of the three months limited by the notice. But he says that is not so, because the Act of Parliament provides by sect. 7, sub-sect. 1 (*c*), that the consent of the local education authority shall be required to the dismissal of a teacher. It is said here that the managers are dismissing this plaintiff, and are dismissing him at a date since the appointed day, and that they are doing so without the consent of the local education authority. It seems to me that the answer to that is that the term of service of the teacher, the plaintiff, came to an end on the 9th Aug., the day when the notice ran out, by reason of its having been given for the determination of the contract in accordance with the terms of the contract. If that is so, it seems to me that this clause (*c*) of sub-sect. 1 of sect. 7 has no application to such a case at all. I wish to guard myself from being supposed in this judgment to express any opinion as to what is the position of the new managers in respect of contracts which were made by those persons who were managers before the Act came into force. I say nothing as to how far the managers under the Act of 1902 are or are not bound by such contracts, or are or are not entitled to enforce the terms of such contracts. I say nothing as to who would be the proper parties in litigation, either as plaintiffs or as defendants, if a question arose as to the enforcement of a contract made by the managers before the arrival of the appointed day on which the Act came into force. I wish also to say that I express no opinion as to what would be the position of the new board of management if they continue to employ a schoolmaster who had been the schoolmaster before the appointed day, and continued to pay him with moneys provided by the county council, if at the time they provided the moneys the county council knew who was the schoolmaster in fact, and that he was paid out of these moneys. As to what the effect of that might be I say nothing; that is not the case which is presented to us. As presented to us to-day it is a case based entirely upon the assumption that the contract made by the old management is the only contract which is material in this case. That being so, it seems to me that the term of service under the contract is determined by the effluxion of that notice, and that the case of a contract so determined does not fall within the operation of clause (*c*) of sub-sect. 1 of sect. 7. I think this appeal must be dismissed, and dismissed with costs.

ROMER, L.J.—Even apart from the question as to the parties, which my Lord has dealt with, I am also clearly of opinion that the grounds on which this plaintiff's application is made entirely fail. The plaintiff was employed under a contract made between him and the old managers of the school. Those managers, while still managers and before the Act of 1902 came into operation in the district in which the school is situate, the managers for the time being, gave him notice determining his services at the end of a certain period. It is not in dispute that that was a perfectly valid notice rightly given; and the consequence was that, inasmuch as the notice was given before the Act came into operation and terminated after, that at the time when the Act came into operation the plaintiff was being employed for a term which would end at the expiration of the notice. Now, whatever be the effect of the Act upon the contract, it appears to me that the plaintiff's case must fail. Take first the view that by the operation of the Act the contract was rendered binding upon the new managers, and that the new managers took over the existing contracts as they stood—how do matters then stand? The only contract in this case they took over was a contract to employ this plaintiff till the expiration of the notice. On the expiration of the notice his term ceased. In that case the new managers had to do nothing. They had to give no further notice; they had to do nothing which could be held a "dismissal" within the meaning of the word as used in this Act. All that they, the new managers, had to do was, when the term of office came to an end according to the term, to appoint any person they thought fit to fill up the vacancy. Nothing they did was wrong, to my mind. They were doing nothing of which anybody could complain, neither the county council nor the plaintiff. Now, take the other view of the Act of Parliament, that upon the Act coming into operation the original contract terminated. It is common ground that no fresh contract was expressly made as between the new managing body and the plaintiff. Assuming, then, that matters went on as they did and that we are to imply some contract with the assent of the county council, if that be necessary—what was the contract? It was to continue to employ the plaintiff until the end of his term; when that term came to an end again he ceased to be teacher; then the new managing body had to appoint a new master in his place. Again they did nothing, and had to do nothing, which would amount on their part to a "dismissal" within the meaning of the Act. Again there would be nothing that either the plaintiff or the county council had any right to complain of. Whichever way, therefore, you view this Act of Parliament, it is clear to my mind the plaintiff has no right whatever as against the new managing body, and that this action, even if the defect as to the parties was cured, wholly fails.

COZENS-HARDY, L.J.—I am of the same opinion, and I should be content not to add a word except for one circumstance. I desire to state that in my view it is not necessary to express any opinion, and I do not express any opinion, on any of the points which have been argued here before us. The question whether contracts entered into before the appointed day with the old foundation managers are enforceable by or against the new body of managers created by the Act is one upon which we have heard a great deal, but I desire to keep an entirely open mind on that question until it is necessary for the court to decide it; and, in my view, it is wholly unnecessary to go into that matter now. If the rights under the old contract can be enforced by the plaintiff against the new managers, it seems to me plain that they can be only the rights under the contract which was in existence on the 1st July, when the Act came into operation, and on the 1st July the only contract which was in existence was a contract for a term expiring in August. If, however, the rights under the old contract cannot be enforced against the new managers, still less can the plaintiff have any relief in this action. There is the further ground to which I am not able to see any answer—that the plaintiff has brought the wrong defendants before the court, and on that ground also he cannot get any relief.

Solicitors: *Baker* and *Nairne*; *Crawley, Arnold,* and *Co.*

Jan. 19 *and* 20, 1905.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.)

FITCH *v.* BERMONDSEY GUARDIANS. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Lunacy—Pauper lunatic—Asylum—Expenses of maintenance of lunatics—Settlement in parish outside county or borough to which the asylum belongs—Limit of charge for maintenance—Lunacy Act 1890 (53 *&* 54 *Vict. c.* 5), *s.* 283, *sub-ss.* 1, 3.

The visiting committee of a lunatic asylum have no power under sub-sect. 3 *of sect.* 283 *of the Lunacy Act* 1890 *to fix a greater weekly sum than* 14*s. for the expenses of maintenance of out-county pauper lunatics in the asylum; the sub-section merely gives them power to make a differential charge between out-county lunatics and home lunatics, and, while charging less than the* 14*s. in respect of home lunatics, to charge a greater sum, up to the limit of* 14*s., in respect of out-county lunatics.*

Decision of Divisional Court (91 *L. T. Rep.* 655; (1904) 2 *K. B.* 709) *affirmed.*

ACTION brought by the visiting committee of the City of London Lunatic Asylum, in the name of their clerk, Mr. Charles Fitch, to recover a sum of 11*l.* 5*s.* from the guardians of the poor of the parish of Bermondsey for the lodging and maintenance in the asylum from the 30th Dec. 1903 to the 30th March 1904 of a pauper lunatic whose legal settlement was in the parish of Bermondsey.

By a resolution of the 1st Aug. 1901, under sect. 283, sub-sect. 1, of the Lunacy Act 1890, the visiting committee of the asylum fixed the weekly sum or charge for the expenses of maintenance and other expenses of each pauper lunatic in the asylum chargeable to the union of the city of London at 12*s.* 3*d.*, increasing the rate from 11*s.* 1*d.*, at which it then stood.

By a resolution of the 4th Feb. 1904, under sub-sect. 3 of sect. 283, the committee increased the weekly charge for the maintenance and expenses in the asylum of pauper lunatics chargeable to unions outside the City from 14*s.* to 21*s.*, and notice of that resolution was thereupon given to the defendants.

The defendants contended that in no case could more than 14*s.* be charged for an out-county patient.

The sum now sued for represented forty-five days' lodging and maintenance of the lunatic at 2*s.* per day (that is at the rate of 14*s.* a week) from the 1st Jan. 1904 to the 15th Feb. and forty-five days at 3*s.* per day (that is at the rate of 21*s.* a week) from the 15th Feb. to the 30th March.

The defendants paid into court the sum of 9*l.*, being 2*s.* a day, or 14*s.* a week, for the whole period of ninety days, and the action proceeded in respect of the balance. The County Court judge gave judgment for the defendants, with leave to the plaintiff to appeal, and his decision was affirmed by the Divisional Court (Lord Alverstone, C.J., Kennedy and Phillimore, JJ.), who held that the visiting committee had no power under sub-sect. 3 of sect. 283 of the Lunacy Act 1890 to fix a greater weekly sum than 14*s.* for the expenses of maintenance of out-county pauper lunatics in the asylum; and that the sub-section only gave them power to make a differential charge between out-county lunatics and home lunatics, and, while charging less than 14*s.* in respect of home lunatics, to charge a greater sum, up to the limit of 14*s.*, in respect of out-county lunatics, but leave to appeal was given.

The Lunacy Act 1890 provides:

Sect. 283. (1) Every visiting committee shall fix a weekly sum, not exceeding fourteen shillings, for the expenses of maintenance and other expenses of each pauper lunatic in the asylum . . . and such weekly sum may from time to time be altered. (3) A committee may fix a greater weekly sum, not exceeding fourteen shillings, to be charged in respect of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs.

The plaintiff appealed.

Danckwerts, K.C. and *A. Neilson* for the appellant.—The question is whether, upon the construction of sect. 283 of the Lunacy Act 1890, a county which owns a lunatic asylum can charge more than 14*s.* a week in respect of out-pauper lunatics—that is, for pauper lunatics brought in from other counties. The scheme of the section is that, if pauper lunatics maintained in the asylum have a settlement in a union in the county where the asylum is, then a certain amount can be claimed from that union; but if the pauper is settled in an out-union the question is, What sum can be charged? The previous Act, which is the Lunatic Asylums Act 1853 (16 & 17 Vict. c. 97), must be considered, as the Act of 1890 is a consolidation Act, and therefore a construction ought to be given to it, if possible, which will coincide with the older Act. Sect. 54 of that Act deals with the point, and under that section the

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

visiting committee may fix a weekly sum to which there is no limit for lunatics within the county, and then they can also fix "a greater weekly sum" for lunatics that come in from outside the county, provided that "such sum"—that is, such greater sum—"shall in no case exceed 14*s*." The corresponding provision in the Act of 1890 is sect. 283, which has introduced this alteration, that the weekly sum that can be charged to any county paupers is limited to 14*s*. under sub-sect. 1, and that applies to both classes of paupers. Then, if that sum is found to be insufficient, sub-sect. 2 gives, not to the visiting committee, but to the local authority to which the committee belongs, power to order a larger sum than 14*s*.; so that in certain circumstances for in-county patients more than 14*s*. can be charged, provided the local authority so order. Then comes sub-sect. 3, which allows a difference between the two charges of 14*s*., so that, supposing they are charging 12*s*. a week for in-patients, then they would be entitled to charge up to 26*s*. for out-patients, as was the case under the Act of 1853, where the 14*s*. was the limit of the greater weekly sum and not the limit of both sums combined. Sub-sect. 3 of sect. 283 says that the committee may fix "a greater weekly sum, not exceeding 14*s*." in respect of out-patients; that means that the excess of the amount fixed for the out-patients over the amount fixed for the home patients shall not exceed 14*s*. The greater weekly sum there means an additional weekly sum not exceeding 14*s*., and it cannot mean that the total sum is not to exceed 14*s*. Sect. 54 of the Act of 1853 included "lodging," as well as the maintenance of the lunatic in the asylum; sub-sect. 1 of sect. 283 of the Act of 1890 does not provide for the lodging of the lunatic, as the sub-section merely provides that maximum of 14*s*. "for the expenses of maintenance, and other expenses"; and the 14*s*. in sub-sect. 2 is "for the purposes aforesaid," which are "maintenance and other expenses." The expenses of the lodging of the lunatic—that is, of the buildings and their maintenance—are dealt with in other ways (sects. 238, 239, 241, 254, 266, 273). Under those sections, which come under part 9, dealing with county and borough asylums and the obligation to provide asylums, the whole of the accommodation of the buildings is to be provided by the local authority. Then part 10, beginning with sect. 283, deals with a different subject-matter, the expenses of pauper lunatics in the asylum, when the asylum has been provided, the providing of the asylum corresponding to the "lodging" in the Act of 1853. Under sub-sects. 1 and 2 of sect. 283 there is no means of making the out-lunatics contribute anything to the building fund—that is, for lodging; that is done by sub-sects. 3 and 4, and any excess created by the payment of the greater weekly sum under sub-sect. 3 may, under sect. 4, be paid over to "a building and repair fund." By reading "the greater weekly sum not exceeding 14*s*." in sub-sect. 3 in respect of out-patients as meaning an additional weekly sum not exceeding 14*s*., the whole section becomes consistent; if read otherwise, great inconsistencies would follow.

C. A. Russell, K.C. and *R. Cunningham Glen*, for the respondents, were not called upon.

VAUGHAN WILLIAMS, L.J.—I quite feel the force of the argument on behalf of the appellant, and it is quite possible that the difference between the legislation of 1890 and 1853 was accidental and was not what was intended by the draftsman. But we have nothing to do with that, and must deal with the Act as drawn. The words there used are so strong that we cannot adopt the contention of the appellant, and in my opinion the decision of the Divisional Court was quite right. I desire to add that when I spoke of the possibility of there having been a slip on the part of those who drafted the Act of 1890, I did not do so in any contemptuous spirit, for, whenever I have to deal with a consolidating Act, I am impressed with the enormous difficulty of the work of those who have to draft those Acts, and I am thankful I have not to do it.

ROMER, L.J.—I agree.

STIRLING, L.J.—I agree, but I wish to add that I am not satisfied that the true construction of sect. 54 of the Lunatic Asylums Act 1853 is such as is contended by counsel for the appellant, but, even supposing that is the correct construction, I give my decision on the Act of 1890.

Solicitors: *The City Solicitor*; *Arkcoll, Cockell*, and *Chadwick*.

Feb. 9 *and* 10, 1905.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.

KENT COUNTY COUNCIL *v.* MAYOR, &c., OF FOLKESTONE. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Limitation of actions—Damage to highway—Action against public authority—Period of limitation—Damage done by contractors—Not servants or agents—Highways and Locomotives (Amendment) Act 1878 (41 *&* 42 *Vict. c.* 77), *s.* 23 *—Public Authorities Protection Act* 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1*—Locomotives Act* 1898 (61 *&* 62 *Vict. c.* 29) *s.* 12, *sub-s.* 1.

Sect. 1 *of the Public Authorities Protection Act* 1893 *has not been impliedly repealed by sect.* 12 *of the Locomotives Act* 1898, *the existence in those sections respectively of different periods of limitation not bringing the two statutes into conflict.*

Decision of Darling, J. (91 *L. T. Rep.* 563) *on this point affirmed.*

But the Act of 1893 *was held to have no application to an action brought by a highway authority against a borough council to recover the amount of the expenses incurred by the plaintiffs in repairing the damage caused by extraordinary traffic on their highway, as the contractors who did the damage complained of were in no sense the servants or agents of the defendants; and the date from which the limitation of twelve months ran, under sect* 12, *sub-sect.* 1 (*b*), *of the Act of* 1898, *was held to be the time when the damage was done.*

Decision of Darling, J. on this point reversed.

THIS action was brought by the plaintiffs, as a highway authority, to recover the sum of 520*l*. odd, the amount of the expenses incurred by them in repairing the damage caused by extraordinary traffic on their highways by or in consequence of the orders of the defendants.

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

The damage in question was caused by traction engines being taken by a contractor employed by the defendants along the highways, hauling stone and other materials for use by the defendants for widening a highway in the plaintiffs' borough.

The work began in Dec. 1902, and was not concluded at the commencement of the action in Feb. 1904.

The damage complained of was done early in 1903, as to part of it within twelve months before the action was brought.

The expenses were incurred by the plaintiffs by virtue of sect. 23 of the Highways and Locomotives (Amendment) Act 1878, as amended by sect. 12 of the Locomotives Act 1898.

At the trial of the action before Darling, J. the learned judge found that, subject to the argument of the legal point, the traffic in question did amount to extraordinary traffic, and provisionally assessed the damages at 300*l.*, reserving the case for further consideration on points of law.

It appeared that the contract for hauling the stone and for the other general purposes of the defendants was for a year, from the 1st April 1902 to the 31st March 1903, and the work under it was completed by the 23rd March 1903.

It was decided by Darling, J. (91 L. T. Rep. 563), on the argument of the points of law, that the Public Authorities Protection Act 1893 had not been impliedly repealed by the Locomotives Act 1898; that the defendants were entitled to the benefit of the six months' limitation mentioned in the former Act; and that, therefore, judgment should be for the defendants. His Lordship also decided that, if the period of limitation was twelve months under the Act of 1898, the plaintiffs were entitled to 50*l.*, as representing the amount of the expenses incurred in respect of the damage done within the twelve months.

From that decision the plaintiffs now appealed.

Dickens, K.C. and *Theobald Mathew* for the appellants.—First, we say that the Public Authorities Protection Act 1893 has no application to the present case. The injury to the highway in question was not caused by the defendants by any "act done in pursuance, or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority" within the meaning of sect. 1 of that Act. The defendants were bringing stone for the purpose of something which they were doing under an Act, but they were not bringing that stone for the purpose of that Act, or in pursuance, or execution, or intended execution, of that Act or of any public duty. There was no public duty to bring the stone along the highway. The damage caused was only the indirect result of their doing something under their Act, which, we submit, is not enough. There was no duty to compel them to do that. They wanted stone, and they brought it in trucks drawn by the traction engine; but the authorities in support of that proposition show that it is not enough because they do something which indirectly carries out their statutory duty:

Jeremiah Ambler and Sons Limited v. *Mayor, &c., of Bradford*, 20 Cox Mag. Cas. 647; 87 L. T. Rep. 217; (1902) 2 Ch. 585;

Milford Docks Company v. *Milford Haven Urban District Council*, 65 J. P. 483;

Sharpington v. *Fulham Guardians*, 91 L. T. Rep. 739; (1904) 2 Ch. 449.

Still, further, what is the default? The action is to be commenced within six months next after the act, neglect, or default complained of. If we are right in our contention, the cause of action, and only cause of action, is the nonpayment of money; and then the plaintiffs are well within the time allowed. The time runs from the date when the cause of action first arises. There is no act complained of, no neglect complained of; the only thing is default, and that is the nonpayment of money. The statute which gives the plaintiffs a right of action is the Highways and Locomotives (Amendment) Act 1878. The authorities cited before Darling, J. in the court below by the defendants, and upon which the learned judge decided the present case, were cases of tort. All the cases are of that kind, or there is default of that character. [VAUGHAN WILLIAMS, L.J. referred to *McGowan* v. *Middleton* (11 Q. B. Div. 464).] Then, supposing that we are right that the Act of 1893 does not apply to the present case, and that the plaintiffs are entitled to recover the damages claimed by them, that brings us to the Locomotives Act 1898, and we submit that the plaintiffs are entitled to recover the whole amount which they claim. When there is a building contract or other continuing work the time must be taken to run from the date of the completion of all the operations comprised in the scheme. Sect. 12 of the Act of 1898 is based on sect. 23 of the Act of 1878. As to the meaning of the words in sect. 12, sub-sect. 1, "completion of the contract for work," see

Lord Gerard v. *Kent County Council*, 76 L. T. Rep. 8; (1897) 1 Q. B. 351; on appeal, 77 L. T. Rep. 109; (1897) A. C. 633, at p. 637.

There is one authority against the view which we contend is the right one, and that is the case of

Epsom Urban District Council v. *London County Council*, 83 L. T. Rep. 284; (1900) 2 Q. B. 751.

There was, however, in that case only a very faint argument with reference to the point, and a very brief judgment on it; but the court certainly did so hold, and we say that it was an erroneous decision.

Hume Williams, K.C. and *Hansell* for the respondents.—The judgment of Darling, J. is, we submit, correct both on the construction of the Act of 1893 and the Act of 1898. Two causes of action are contemplated by sect. 1 of the Act of 1893. We do not assert that this is an action, prosecution, or proceeding, in respect of any alleged neglect or default in the execution of an Act of Parliament or public duty or authority. It cannot be said that the demand for payment gives rise to the execution of a public duty. There is no public duty in payment in such a case. The default here was nonpayment. The section is only intended to be applicable to neglect or default—some error of commission or omission—in performance of a public duty. These are the cases that are intended to be hit by the words of the section. The act done by the defendants was the widening and repairing a highway, and incidentally bringing stone for that purpose. That act was done in pursuance of a public duty.

This, therefore, is an action against a person—which includes a corporation—for an act done in pursuance of a public duty. The leading authority on the point is

Hill v. *Thomas*, 69 L. T. Rep. 310; (1893) 2 Q. B. 333.

The defendants come exactly, as the learned judge in the court below has held, within the terms of sect. 1 of the Act of 1893. [ROMER, L.J. expressed doubt whether the Act of 1893 had any application to the present case, for the reason that the contractor who performed the work of bringing the stone and did the damage to the road complained of by the plaintiffs was not the servant or agent of the defendants.] Then as to the Act of 1898, s. 12, sub-s. 1, the damage done to the highway was in consequence of a particular work extending over a long period, and the action had to be commenced within six months after the completion of the contract or work, and, as it was not, the action is out of time. On this point Darling, J. followed his own decision in the case of *Markey* v. *Tolworth Joint Isolation Hospital District Board* (83 L. T. Rep. 28; (1900) 2 Q. B. 454). The second part of sect. 12, sub-sect. 1, of the Act of 1898 cuts down the limit of twelve months in the first part of that sub-section to the more limited period of six months where the damage is in consequence of any particular building contract or work extending over a long period, which was the case here. They also referred to

Whitebread v. *Sevenoaks Highway Board*, 65 L. T. Rep. 855; (1892) 1 Q. B. 8.

Theobald Mathew, in reply, was only called upon on the question arising under the Acts of 1878 and 1898.

VAUGHAN WILLIAMS, L.J.—We have had read to us the judgment of Darling, J. in this case, and with a great deal of that judgment I agree entirely. I agree entirely with him that the Public Authorities Protection Act 1893 is not repealed, as to public authorities, by the Locomotives Act 1898. And I entirely agree with him that the introduction in these Acts respectively of different periods of limitation does not cause the two Acts to conflict in any manner whatsoever. The fact that, with regard to members of the general public, the limitation may be fixed at one time, and that with regard to members of the special public—whom the Legislature has thought fit to protect with a particular limitation which has nothing to do with the Locomotives Act 1898—it has fixed a different and a shorter limitation does not make those two Acts conflict. Of course, when Darling, J. had once decided the case upon this point, so far as he is concerned he does not give a judgment on any other point; and I have not got to consider his judgment with reference to other matters. But with reference to this particular point upon which Darling, J. really disposed of the action I cannot agree with him, not because I differ with the observations to which I have just referred, but because, in my judgment, the Public Authorities Protection Act 1893 has no application to this case at all. My reason for saying that is this: The contractor who acted in this case was, in no sense, the servant of the local authority, the defendants, the Folkestone Corporation. Under those circumstances, if the old Act of 1878 had stood unaltered, which used the word "by," it is plain that no proceedings whatsoever could have been taken against this local authority for the damage which was done to the road in question. They require no protection because the act which was done was not done by them, or done by their servants. Therefore, in my judgment, we have nothing to do with the Public Authorities Protection Act 1893. That being so, we must now dispose of the points which were not discussed by Darling, J. at all. That really raises a question as to the date from which the statutory limitation here will run. When one looks at the Act of 1898, one finds this state of things: First, that by sect. 12 there are various amendments made of sect. 23 of the Highways and Locomotives (Amendment) Act 1878. The remedy, under that Act of 1878, was a wholly different remedy. The remedy was a remedy by summary proceedings before the magistrates, and the sole object of those proceedings was the recovery of certain expenditure incurred by the road authority. Sect. 12 of the Locomotives Act 1898 amends all this. The first alteration that I may call attention to is this: Sub-sect. 1 (*c*) of sect. 12 says that "there shall be substituted for the words 'by whose order' the words 'by or in consequence of whose order.'" It seems to me, therefore, that the circumstances under which the remedy can be applied are altered. The alteration is an alteration from the court of summary jurisdiction to the High Court, and the remedy is really an action brought by the plaintiffs to recover damages for the injury done to the road, and not merely an action to recover a certain amount of expenditure. It is quite true that the certificate as to the amount of the expenditure is a condition precedent to recovering a verdict or a judgment in the action. But, nevertheless, it is plain that not only is the court altered, but the remedy which can be obtained by legal proceedings is altered also. That being so, I proceed to look at the other two sub-sections of sect. 12. Sub-sect. 1 (*a*) says: "Expenses under that section"—that is, sect. 23 of the Highways and Locomotives (Amendment) Act 1878—"shall cease to be recoverable in a summary manner, but may be recovered if not exceeding 250*l.* in the County Court, and if exceeding that sum in the High Court." Then sub-sect. 1 (*b*) says: "Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work." First I will deal with the view which was put to us on behalf of the plaintiffs by Mr. Mathew, in his reply, as to the meaning of the words "work extending over a long period" in this sub-sect. 1 (*b*) of sect. 12. I cannot accept his view that the work extending over a long period entitles the plaintiffs in this case to say that the statutory limitation does not begin to run until the end of all the works comprised in the scheme. I do not think it is necessary to deal with this at any length, because, in my opinion, whatever might or might not be potentially included in the words "extending over a long period," everyone takes the

view that the work thus mentioned must be one work—that there must be a unity of work. And in my judgment on the facts here, and particularly having regard to the date when the contract for the carrying of the stone was entered into, it is quite plain that the work which was necessitated and contemplated in the carrying out of the scheme was not one work. Under those circumstances I have now to consider from what date the statutory limitation ought to run. *Primâ facie*—and here I am taking the view which it is obvious Darling, J. took all through his judgment—the limitation runs for twelve months from the time at which the damage has been done. If it runs from that period, then Mr. Hume Williams tells me that the amount of damage recoverable would be 50*l*. But Mr. Hume Williams says that it does not run from that date. He says that that limitation, within twelve months from the time the damage was done, has no application to a case where the damage is in consequence of any particular building contract, or in a case of the work extending over a long period. He says, therefore, that the statutory limitation will be for a period within six months after the completion of the contract or work, and he says the plaintiffs are entitled to recover nothing. I cannot agree with that contention. I think that the statutory limitation is intended to be from a period within twelve months of the doing of the damage, and I think that these subsequent clauses are introduced merely for the purpose of extending the twelve months to a further period in cases where the period of twelve months is the limitation which would operate as a condition precedent. Under these circumstances, in my judgment, it is not right to say that the plaintiffs here can recover nothing. I think that they are entitled to recover the 50*l*. in respect of the damage done within the twelve months. I have only to add one word about the argument that Mr. Mathew put forward in his reply. He suggested that the latter part of sub-sect. (*b*) of sect. 12 was only meant to apply to a case where the action was brought, not against the person by whom the damage was caused, but against the person in consequence of whose order the damage resulted. I do not see anything whatever in this sub-section which would justify us in so reading it. But thus far I agree with Mr. Mathew that I have no doubt that these words were introduced into the Act of Parliament very much for the reason that the Legislature considered that when they were introducing into this Act of Parliament a liability by a man who had not done the acts which caused the damage, either by himself or his servants, it might be convenient in such cases that there should be an extension of the time within which the action must be brought. That, I dare say, was the motive. But I cannot limit the words of the section in the way Mr. Mathew has suggested. The result of all this will, I repeat, be that the plaintiffs will be entitled to recover damages to the extent of 50*l*. We think that the result of this as to costs ought to be that the appellants will have the costs of this appeal. We do not think there ought to be any costs of the trial before Darling, J. on one side or the other. The appeal will, therefore, be allowed with costs, and judgment entered for the plaintiffs for 50*l*.

ROMER, L.J.—I am of the same opinion as my Lord in this case. In the first place it is to me clear that the Public Authorities Protection Act 1893 has no application to this case. It was admitted, and rightly admitted, on behalf of the respondents that they could not say that this was an action, prosecution, or proceeding in respect of any alleged neglect or default in the execution of an Act of Parliament, or of a public duty or authority. But they contended that it was an action, prosecution, or proceeding against a person —which includes a corporation—for an act done in pursuance or execution, or intended execution, of the defendants' public duty or authority. When the facts of the case are considered, it is clear that this action does not fall at all within those words which I have just read. The damage done to the road in question was done by certain contractors, and those contractors were not the servants or agents of the defendants in doing that damage. The contractors were simply persons who contracted to deliver certain stone and material within the limits of the defendants' borough; and the way they should do that was for them and not for the defendants to consider. Therefore it certainly could not be said that these acts were anything done by the defendant corporation in pursuance or execution, or intended execution, of any Act of Parliament or any public duty or authority. And I need scarcely point out that it certainly cannot be said that the contractors, when they did the damage, were acting in pursuance or execution, or intended execution, of any Act of Parliament, or in consequence of any public duty and authority, for they had none. That shows, to my mind, that the Act of 1893 has no application to the present case. This point does not appear to have been brought to the attention of Darling, J. At any rate he has not dealt with it in his judgment. He appears to have only considered the point whether, assuming the Act of 1893 applied, it had been repealed, and, if at all, to what extent, by the Locomotives Act 1898. Having decided that the Act of 1893 has no application to this, then we have to consider whether the plaintiffs, in bringing this action, are within the limitations of time imposed by sect. 12 of the Locomotives Act 1898. Speaking for myself, I must say that that section is a troublesome one to construe, and I can see that many questions may arise upon it hereafter of great difficulty. If I look at sect. 12, sub-sect. 1 (*b*), of that Act, and only look at the first words of that sub section, it is clear that the plaintiffs would be entitled to recover something in this action—namely, a sum, I believe, of about 50*l*.—in respect of damage done within twelve months before the time of action brought. But it was said on behalf of the defendants, as against that view, that that limited right the plaintiffs would have was cut down by the subsequent words of sub-sect. 1 (*b*)—namely, it was said that the damage was in consequence of work extending over a long period, and therefore the action had to be brought not later than six months after the completion of the work. I should hesitate for a long time before I should come to the conclusion that any items that were in respect of damage caused within twelve months before action brought were ousted in consquence of being done in pursuance of work which would curtail the right to bring the action. I should hesi-

tate to say that the work could be said to be work extending over a long period within the meaning of the words used in sub-sect. 1 (*b*). But, though it does appear to me a difficult point, I cannot help thinking that the real effect of sub-sect. 1 (*b*) is this, that all items of damage, which were done within twelve months before action brought, are recoverable by the action, and that the second part of sub-sect. 1 (*b*) was intended to give an extended time within which an action may be brought to recover expense in respect of damage done, and not to curtail any limitation of action imposed by the earlier portion of sub-sect. 1 (*b*). I gather that from the wording of the sub-section, and the use of certain expressions in it; and, in particular, in the use of the expressions "or where the damage is the consequence of any particular building contract or work extending over a long period." The words "long period," to my mind, show that what the Legislature was aiming at was to give a right to recover expenses in respect of damage which would otherwise have been barred by the earlier part of the sub-section. They clearly contemplated the work extending over so long a period that, but for the added words, the earlier part of the sub-section would apply. At any rate that is the view I take of this sub-section, although, speaking for myself, I cannot say for a moment that the sub-section is perfectly clear. That being so, it appears to me there is no answer to the plaintiffs' claim in this action to the extent of the 50*l*. With regard to the balance of the claim, I think the plaintiffs are barred, because they do not fall within the earlier portion of sub-sect. 1 (*b*); and they cannot bring themselves within the latter part of sub-sect. 1 (*b*) unless they can make out that the work—following the words used, and applicable to this case, in that part of the sub-section—was not completed within six months before action brought. That leads me to consider what is really, to my mind, in all these cases a question of fact: What was the work in the present case which was being done and in respect of which the consequences of the work was that damage was done to the highway? On that matter of fact I come to the conclusion in this case that you cannot regard the whole of the work that was being done by the defendants, in respect of any portion of their improvements, as constituting for the purposes of this case one work. I think, in the circumstances of the present case, the real work was that which was being done by the contractors under the separate contract between the contractors and the defendant corporation in respect of which the cartage occurred from which damage was caused to the highway. I think that was a separate work. It was that work, and that work alone, which necessitated the cartage which caused the damage, and that cartage clearly came to an end long before the six months before the commencement of the action, and due notice of that was given to the plaintiffs by the defendants. Accordingly, almost immediately after, if not on the very day, the cartage ceased, and the contract with the contractors came to an end. I think that is the true view to take on the question of fact arising in this case, and that therefore the plaintiffs, beyond the 50*l*., can recover nothing in this action.

Stirling, L.J.—I have come to the same conclusion as my brethren. The first point is whether the Public Authorities Protection Act 1893 applies. I think not. The material facts are these, that the defendants, the Folkestone Corporation, being about to repair certain roads, in respect of which they were the highway authority, entered into a contract with the contractors for the supply of stone to enable them to do so. The contractors brought the stone from a distance over roads beyond the district of the Folkestone Corporation, and within the authority of the Kent County Council, and damaged those roads. Now, the Folkestone Corporation are called upon, under the Acts of 1878 and 1898, to pay the expenses occasioned to the Kent County Council by the damage which has been done in that way to the roads. The contractors were not the servants of the corporation at all. They were independent contractors, and they acted as they did simply in order to carry out the contract which they had entered into with the corporation of Folkestone, and not in the exercise of any public authority whatever. It is said that the Act of 1893 applies, and it is contended that this is an action brought for an act done in pursuance or execution, or intended execution, of an Act of Parliament or a public duty or authority—an act done, it is said, by the corporation of Folkestone. Inasmuch as the contractors were not the servants of the corporation it certainly was not done by the corporation, and, in my judgment, it was done by the act of the contractors, and they were not acting in the execution of any public duty or authority, but, as I have already said, simply in performance of the private obligation which arose from the contract they entered into with the Folkestone Corporation. Therefore, in my judgment, the Act of 1893 does not apply at all. We then have to consider whether sect. 12 of the Locomotives Act 1898 applies. That provides in sect. 12, sub-sect. 1 (*b*): "Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work." Both sides attempted to bring the case within the second alternative. It was contended that the damage was the consequence of work extending over a long period. But the contentions of the plaintiffs and defendants, as to what that work was, were different. It was said on behalf of the plaintiffs that that work was a scheme of improvement within the borough of Folkestone. That scheme commenced to be executed in the year 1902, and continued to be executed until Sept. 1903, and the action was brought in Feb. 1904, and consequently was brought within six months of the completion of that work. In my judgment the work of which the damage was the consequence was not that scheme of improvement, but was the work done in pursuance of the contract with the contractor for the supply of the stone, and the stone, it appears, was ordered not exclusively for the purpose of that scheme of improvement, but also for other purposes of the corporation, and the contract came to an end not later, at any rate, than the

31st March 1903, and consequently the six months' period had long elapsed before the action was brought. Then, that being so, it was said that the plaintiffs were limited to bringing their action, under sect. 12, sub-sect. 1 (*b*), to the period of six months from the 31st March 1903, and were not entitled to bring it in respect of damage which was done within twelve months of the time the action was brought. In other words, the periods within which the action was to be brought were said to be divided by that portion of the sub-section into two classes: One as to which there was a six months' limitation, and the other as to which there was a twelve months' limitation, and that an action could not be brought within both of them. I do not so read the section. It seems to me the meaning of the section was that the authority complaining might bring the action within six months after the damage had been done, and recover in respect of damage which was done within that period; and that further, and in addition to that, the authority might recover damages which had not been caused within the twelve months, providing it was damage which was the consequence of a building contract or work extending over a long period; and in that case the action was to be commenced not later than six months after the completion of the contract. I think, therefore, that the defendants have not shown a good defence in respect of the damage which resulted during the period between Feb. 1903 and the 31st March 1903, when the contract expired, and in respect of which the learned judge in the court below has assessed the damages at 50*l*. Consequently there must be judgment for the plaintiffs for 50*l*.

Appeal allowed.

Solicitors for the appellants, *Church, Adams*, and *Prior*, agents for *Charles Turner*, Maidstone.

Solicitors for the respondents, *Holt-Beever* and *Crowdy*, agents for *A. F. Kidson*, Folkestone.

Monday, Feb. 13, 1905.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.)

MAYOR, &C., OF HAMPSTEAD *v.* MIDLAND RAILWAY COMPANY. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Metropolis — New street — Paving expenses — "Owners"—Land abutting on street—Statutory restriction on uses of land in favour of individuals—Exemption from paving expenses—Metropolis Management Act 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Management Amendment Act* 1862 (25 *&* 26 *Vict. c.* 102), *s.* 77 —*Midland Railway Act* 1900 (63 *&* 64 *Vict. c. cxliii.*), *s.* 18.

By the defendants' private Act of 1900 *certain additional powers were conferred upon them, and in particular it was provided that for the protection of persons named therein who were the owners of land adjoining the defendants' railway the defendants should acquire all the land up to a certain road and should leave a strip of that land* 20*ft. wide along the whole length of such road, and plant and maintain the same with shrubs and trees, and fence off the land from the road by an iron fence. The defendants duly acquired the land and complied with the provisions aforesaid.*

The plaintiffs, under the Metropolis Management Acts, resolved to pave the remaining private portion of the road as a "new street," and they apportioned the estimated expenses, part of which they claimed from the defendants as being the "owners" of the land "bounding or abutting" on the new street within the meaning of sect. 77 *of the Metropolis Management Amendment Act* 1862, *and were therefore liable to contribute to the estimated expenses of paving the same.*

Held that the defendants were liable.

Wright *v.* Ingle (54 *L. T. Rep.* 511; 16 *Q. B. Div.* 379) *applied.*

Decision of Bigham, J. (91 *L. T. Rep.* 661) *affirmed.*

SPECIAL case stated by agreement under Order XXXIV. for the opinion of the court upon a question of law arising in an action.

The dispute between the parties was as to the liability of the defendants to the plaintiffs to contribute to the estimated expenses of paving a certain portion of a "new street" known as Westbere-road in the metropolitan borough of Hampstead.

The plaintiffs were by virtue of the Metropolis Management Act 1855, and the Acts amending the same, and the London Government Act 1899, the local authority for the metropolitan borough of Hampstead, and the body charged with the duty of paving new streets in that borough.

By sect. 105 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120) it is provided as follows:

In case the owners of the houses forming the greater part of any new street laid out or made or hereafter to be laid out or made which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate be desirous of having the same paved as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same either throughout the whole breadth of the carriage-way and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair, and the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board), and in case such estimated expenses exceed the actual expenses of such paving then the difference between such estimated expenses and such actual expenses shall be repaid by the said vestry or board to the owners of the houses by whom the said sum of money has been paid, and in case the said estimated expenses be less than the actual expenses of such paving then the owners of the said houses shall on demand pay to the said vestry or board such further sum of money as together with the sum already paid amounts to such actual expenses.

By sect. 77 of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102) it is provided as follows:

Where any vestry or district board shall, under the powers given by the 105th section of the first recited

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister at-Law.

Act, have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do, and any such costs or expenses, including the costs of paving at the points of intersection of streets and all other incidental costs and charges, shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced or during its progress or after its completion; and it shall be lawful for the vestry or district board at their discretion to accept payment of the amount apportioned or charged in respect of each house or premises by instalments spread over a period not exceeding twenty years, and any such amount shall be recoverable from the present or any future owner of the premises, either by action at law or in a summary manner before a justice of the peace at the option of the vestry or board.

By sect. 250 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120) it is provided as follows:

The word "owner" shall . . . mean the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent.

By the Midland Railway Act 1900 (63 & 64 Vict. c. cxliii.) certain additional powers were conferred upon the defendants, the Midland Railway Company, in the Act referred to as "the company," and particularly by sect. 18 of the Act it was provided as follows:

The following provisions shall, unless otherwise agreed, apply and have effect for the protection of Percy Horace Gordon Powell-Cotton and his trustees (in this section called "the owners"): (1) The company shall not use any part of the sidings to be placed upon the land to be acquired from the owners . . . for any purpose except for the standing of empty passenger trains. (2) The company shall acquire all the land of the owners up to Westbere-road, and shall lease a strip of land 20ft. wide along the whole length of such Westbere-road, and shall at their own expense plant and maintain the same with shrubs and trees to the reasonable satisfaction of the owners, and shall at the like expense and to the like satisfaction fence off the said land from the Westbere-road by an open unclimbable iron fence 7ft. high, such planting and fencing to be carried out within one year from the company obtaining possession of such lands and to be maintained by the company.

In accordance with the provisions of subsect. (2) of the above section of the Act the defendants duly acquired the land therein referred to, and left a strip of land 20ft. wide along and contiguous to the whole length of the west side of Westbere-road aforesaid, and planted and dealt with the same in manner in the section provided.

They also fenced off the lands from the Westbere-road by an open unclimbable iron fence 7ft. high in pursuance of the section, and planted a quick-set hedge immediately inside the fence along its whole length.

On the other side of the strip the land sloped down to the edge of their railway, a cutting having been made for the purpose of constructing the same.

On the 4th June 1903 the plaintiffs, pursuant to the provisions of the Metropolis Management Acts 1855 and 1862, duly passed a resolution in the following terms:

That, inasmuch as the remaining private portion of the new street in this borough called and known as Westbere-road is not paved to the satisfaction of this council, this council deem it necessary and expedient that the same should be paved in manner following [then followed the specified way in which the footways, kerbs, channels, and roadway should be made up and paved], and that the estimated expenses, amounting to 2364*l.* 12*s.*, of providing and laying such pavement be and the same are hereby apportioned to and charged upon the respective owners of the houses and lands forming, or bounding, or abutting on the said portion of the said new street in manner following, and be demanded and recovered accordingly.

The apportioned amount of the above sum of 2364*l.* 12*s.*, being the estimated cost as determined by the surveyor for the time being to the council of paving the road and footways in accordance with the above resolution of the council, chargeable according to the determination of the council upon the owners of the land in Westbere-road was 1200*l.* 12*s.*

By a notice dated the 25th Sept. 1903 and signed by the town clerk to the plaintiffs, which was served on the defendants on the same day, the sum of 1200*l.* 12*s.* was duly demanded of the defendants.

The plaintiffs contended that the defendants were "the owners" of the land "bounding or abutting" on the new street known as Westbere-road aforesaid within the meaning of the Metropolis Management Act, and were liable to contribute to the expenses or estimated expenses of paving the same the above sum of 1200*l.* 12*s.*

The defendants contended (*a*) that the land was not land bounding or abutting on the street within the meaning of sect. 77 of the Metropolis Management Amendment Act 1862; (*b*) that the land was subject in perpetuity to the burden of public and private rights which deprived it of all beneficial value to the defendants, and was not such land as was intended by the section; and (*c*) that the defendants were not owners of the land within the meaning of the enactments mentioned in the case, and that they were therefore not liable to contribute to the paving expenses.

It was decided by Bigham, J. (91 L. T. Rep. 661) that, as the provision of the private Act was for the protection of individuals, and the incapacity of the strip of land to yield a rack rent was created, not for a public purpose but for the benefit of individuals, the land was not thereby made *extra commercium*; and that, therefore, the defendants were "owners" of the land within the meaning of sect. 250 of the Metropolis Management Act 1855, and were liable under sect. 77 of the Metropolis Management Amendment Act 1862 to contribute to the expenses of paving the new street.

From that decision the defendants now appealed.

William Wills (*Montague Lush*, K.C. with him) for the appellants. — The defendants are not "owners" within the meaning of sect. 250 of the Metropolis Management Act 1855, for they cannot let the land in question at a rack rent. The governing case on which I rely is *Great Eastern Railway Company* v. *Hackney District Board of*

Works (49 L. T. Rep. 509; 8 App. Cas. 687, at p. 692) as having laid down the principle that where by statute—and the same will apply to a case at common law, but I am dealing with the case of a statute here—land has been lost *extra commercium*, to use the language of Lord Watson, and the owner is deprived of the power of raising a rent from it, and it is, so to speak, sterilised, it does not come within the statute. It is not "land" within the meaning of the Act, and the owner is not such an owner of land as the Act contemplates, inasmuch as he neither does, nor can, receive a rack rent for it. There are various classes of cases in which it has been held that land is placed *extra commercium*, and then ceases to be liable to make a contribution of this kind. [STIRLING, L.J.—Must not it be for ever?] It is for ever in one sense, but it is not necessary in order to claim exemption from the contribution that the bar to the use of the land should be absolutely perpetual. Referring to cases where it has been held that the assessment is not payable: For example, a church of the Church of England undoubtedly cannot be brought *intra commercium* except by an Act of Parliament. Another instance is that of a public highway. Land over which a right of highway exists has been held to be *extra commercium*:

Plumstead Board of Works v. *British Land Company*, 32 L. T. Rep. 94; L. Rep. 10 Q. B. 203.

With regard to that the sterility need not be one in perpetuity, it is only perpetual in the same sense as it is in the present case; that is to say, that it exists until by some act or other it is removed. It can be removed by certain formalities—an order of magistrates made after certain formalities. It does not require a statute. The right of public user can be removed, and the land can be brought *intra commercium* without the interference of Parliament. The third case in which the principle has been applied is that of a metropolitan common which by statute is dedicated to the public use, and in respect of which no profits can be made. In the case of a church and in the case of a common the sterility cannot be removed except by statute. Therefore the case is not to be decided merely by consideration of whether there might be a release without the formality of an Act of Parliament. [ROMER, L.J.—The case of *Great Eastern Railway Company* v. *Hackney District Board of Works* (*ubi sup.*) merely decided that under the circumstances there the railway company not unnaturally had no land abutting on the highway.] Except the wall itself; the horizontal section of the wall would of course be on land. [ROMER, L.J.—That is what caused the difficulty in that case. The House of Lords came to the conclusion that it was not land at all. STIRLING, L.J. referred to *Hornsey District Council* v. *Smith* (76 L. T. Rep. 431; (1897) 1 Ch. 843).] Here is an obligation imposed upon the defendants, not voluntarily submitted to them as in the case of a founder of a chapel or school who dedicates his land to a special purpose at his own will. The sterilisation has not been brought about by the defendants with their own land for their own purposes; but the obligation has been imposed upon them as a condition of their being able to deal with any part of the land at all. There are many cases in which it has been held that the exemption from the contribution does not hold good. See (*inter alia*)

Wright v. *Ingle*, 54 L. T. Rep. 511; 16 Q. B. Div. 379.

That is a good example of the cases where the court has acted upon a different principle from that which I am now presenting. But I submit that cases of that class are distinguishable from the present in this way, that there is here by an Act of Parliament imposed upon the defendants the disability to make any use whatsoever of the land in question. Unless they can obtain the consent of persons whom they do not know and cannot ascertain, and purchase the land from them upon any terms which such persons choose to require the defendants have no power to deal with the land. There is no presumption that this burden, which renders the land useless for commercial purposes, will ever be removed from the land, and the case comes therefore within the principle of

Great Eastern Railway v. *Hackney District Board of Works* (*ubi sup.*).

The principle upon which the learned judge in the court below acted—viz., that it must be shown that nothing short of an Act of Parliament can restore the land to its capacity to yield a rent in order to obtain the exemption from the contribution—is not the true principle. But the court must look at the character of the case and see whether the land is or is not practically rendered *extra commercium*, and, so far as can be seen, is likely to remain so.

Macmorran, K.C. and *Courthope Munroe*, for the respondents, were not called upon to argue.

VAUGHAN WILLIAMS, L.J.—I think that the judgment of Bigham, J. is perfectly right. It really seems to me that if the arguments that Mr. Wills has addressed to us were well founded the case of *Wright* v. *Ingle* (54 L. T. Rep. 511; 16 Q. B. Div. 379) ought to have been decided differently, because in that case, as in the present case, unless and until there was a release, there was the land *extra commercium*: it could not be dealt with for any other than the purpose in view. The whole difference between that case and the present one is that in the present the agreement is embodied in an Act of Parliament, and the agreement in *Wright* v. *Ingle* (*ubi sup.*) was not. I do not think that there is any substance in that difference at all, because one has only to look at the agreement in this case to see that it was an agreement arrived at by the parties, and afterwards embodied in an Act of Parliament. In my opinion, therefore, this appeal must be dismissed with costs.

ROMER, L.J.—I agree.

STIRLING, L.J.—I agree. *Appeal dismissed.*

Solicitors for the appellants, *Beale* and *Co.*

Solicitor for the respondents, *Arthur P. Johnson.*

Feb. 13, 14, 15, *and* 16, 1905.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.)

MAGUIRE *v.* MAYOR, &C., OF CITY OF LIVERPOOL. (*a*)

APPEAL FROM THE LIVERPOOL COURT OF PASSAGE.

Highway—Non-repair—Accident causing damage—Liability of public authority for nonfeasance—Liability enforceable only by indictment—Liverpool Improvement Act 1846, *ss.* 36, 37, 38, 58.

By the Liverpool Improvement Act 1846 *the Liverpool Corporation were made the surveyors of the highways within the borough, and were invested with all the powers and made subject to all the liabilities of surveyors of highways, and with the control and management of the streets and pavements; and they were to cause the streets to be repaired from time to time as might be required, and were declared liable to be indicted at common law for the want of sufficient repair of any public highway within the borough in the same manner as any person or persons liable to the repair of such highway was or were before the passing of the Act.*

Held, that the liability imposed by the statute was of the same nature as that placed on the inhabitants of a parish by the common law which could only be enforced by the Crown by means of an indictment, and was not enforceable also by a civil action; and that therefore the corporation were not liable to be sued by an individual for damage caused to him by reason of non-repair of a highway any more than the inhabitants of a parish would have been.

Hartnall *v.* Ryde Commissioners (4 *B. & S.* 361) *disapproved as being inconsistent with* Cowley *v.* Newmarket Local Board (67 *L. T. Rep.* 486; (1892) *A. C.* 345).

Decision of the judge of the Liverpool Court of Passage reversed.

THE plaintiff's horse and trap were, on the 5th Nov. 1903, being driven down Brownlow-hill, a public highway in the city of Liverpool.

At a point in Brownlow-hill where it is entered by Blake-street there is a crossing made of slabs of stone placed in the roadway.

On the lower side of the crossing, near one of the slabs of stone, a hole had been formed, described as being "5in. in depth, and shelving up to 3in., and 9in. across."

Into this hole the plaintiff's horse put its foot, fell on its knees, and received such injuries that it had to be destroyed, with consequent agreed loss to the plaintiff of 24*l.*, which amount this action was brought to recover.

The driver of the trap and a man who saw the accident were the only witnesses called for the plaintiff at the trial of the action before Judge Taylor in the Liverpool Court of Passage.

They said that the hole was caused by rain water descending the hill, and by the traffic, and they described the material near the hole as loose shingle.

They said that similar holes existed at other crossings in Brownlow-hill.

It was not contended by the defendants that the driver had been careless.

The jury were discharged, and the plaintiff's counsel contended that the defendants were liable under the Liverpool Improvement Act 1846.

It appeared that down to 1830 some of the roads in Liverpool were repairable by the corporation, and the others were repairable by the inhabitants of the parish.

By a Highway Act passed in 1830 the duty of repairing all the roads was transferred to commissioners appointed by the Act.

That Act was repealed by the Liverpool Improvement Act 1846.

By sect. 36 of the Act of 1846 the mayor, aldermen, and burgesses of Liverpool were made the surveyors of the highways within the borough, and invested with all the powers and made subject to all the liabilities of surveyors of highways.

Sect. 37 vested in them the control and management of the streets and pavements and the materials of the footways and carriage-ways.

Sect. 38 enacted that it should be lawful for the council to cause all the streets so vested to be formed, paved, and flagged, and the ground thereof to be raised, lowered, or altered in such manner and with such materials as they should think proper, and to cause such streets, &c., to be repaired from time to time as might be required.

The provisions of the foregoing sections are similar to those of the Public Health Act 1875.

It was not contended by the defendants that these sections did not impose upon them the absolute duty of repairing the street, although it might be contended that the language of sect. 38 gave the defendants discretion as to the material and the manner of repair.

But the Act of 1846 enacted also by sect. 58 that the mayor, aldermen, and burgesses of Liverpool should be liable to be indicted at common law for the want of sufficient repair of any public highway within the borough, in the same manner as any person or persons liable to the repair of such highways was or were before the passing of the Act.

The following written judgment was delivered by

Judge TAYLOR.—[After stating the facts of the case substantially as above set forth, he continued as follows:]—Mr. Oulton, who appeared for the defendants, admitted the want of repair to Brownlow-hill, but submitted that the evidence was evidence of nonfeasance and not of misfeasance, and that the defendants were entitled to judgment. Mr. Stewart Brown, subject to a point arising on the Liverpool Improvement Act 1846, admitted that, so far as the liability of the defendants rested upon the Public Health Acts, evidence of misfeasance was necessary in order to impose liability on them, but contended there was evidence of original bad construction of the roadway. I held there was no evidence of misfeasance. The argument for the plaintiff was that the defendants had a statutory duty cast upon them to keep the road in question in repair, and had been guilty of a breach of that duty directly causing injury to the plaintiff, and that, inasmuch as the defendants were made liable to be indicted for such want of repairs, the case was brought within the decision of *Hartnall* v. *Ryde Commissioners* (4 B. & S. 361). That case appears to have decided that where the management of streets is vested in commissioners and they are made surveyors of highways, and are to be guilty of misdemeanour for neglect to repair, a private person who suffers special damage

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

from omission to repair can recover against them. And it would appear that the present case is within the decision of Compton, J. and Blackburn, J. There is this distinction, that by sect. 48 of the statute in that case —viz., the Towns Improvement Clauses Act 1847—the liability of the inhabitants of the parish to do the repairs was held to be extinguished, and there is no such express provision in the Liverpool Improvement Act 1846. The sections of that Act above mentioned are hardly consistent with the continuance of liability in the inhabitants of the parish, and, if this is so, then *Hartnall* v. *Ryde Commissioners* (*ubi sup.*) appears to govern the present case. It seems clear that the inhabitants of the parish are not liable in an action for want of repair, although liable to indictment, nor is a surveyor on whom the duty to repair is imposed, because he is the servant of the parish and is made subject to penalties, and because, the duty of the parish remaining, the surveyor's duty is to the parish and not to the public: (*Young* v. *Davis* (7 H. & N. 760; on appeal, 2 H. & C. 197). Then it would seem that the corporation in the present case, so far as they are surveyors only, are officers of the parish and not liable to an action, and, so far as they represent the parish, their liability should be a reflection of the liability of the parish, and therefore not subject to an action. This is what is said in *Parsons* v. *Vestry of St. Matthew, Bethnal Green* (17 L. T. Rep. 211; L. Rep. 3 C. P. 56), and yet Wills, J. in that case distinguished and does not disapprove of the case of *Hartnall* v. *Ryde Commissioners* (*ubi sup*). Moreover, in *Gibson* v. *Mayor of Preston* (22 L. T. Rep. 293; L. Rep. 5 Q. B. 218) the judgment, while deciding that the defendants were not liable to be sued in a civil action for breach of their duty under the Public Health Act in not repairing a highway, carefully distinguished the case of *Hartnall* v. *Ryde Commissioners* (*ubi sup.*), pointing out that the liability of the parish was taken away and the commissioners made liable to be indicted. The case of *Hartnall* v. *Ryde Commissioners* (*ubi sup.*) is an instance of the proposition that any person injured by the non-performance of a statutory duty is entitled to recover against the person on whom that duty rests: (*Couch* v. *Steel*, 1 Ell. & Bl. 402). That proposition has been questioned in the case of *Cowley* v. *Newmarket Local Board* (67 L. T. Rep. 486; (1892) A. C. 345), and the application of it in any particular case is stated to depend on the purview of the Legislature in the particular statute and the language there employed. In that case the statute considered was the Public Health Act 1875. In the cases decided on the liability of the inhabitants of the parish for non-repair, the surveyor and corporation were examined, and it was held that the breach of the particular statutory duty in question did not entitle the person injured by it to bring an action against the local board. *Hartnall* v. *Ryde Commissioners* (*ubi sup.*) was discussed and distinguished. It is true that Lord Halsbury doubted whether *Hartnall* v. *Ryde Commissioners* (*ubi sup.*) was consistent with the principles upon which cases of that class have been decided, adding, "the language of the statute was different, and the ground of the decision was that a new and peculiar right had been given." Lord Herschell appears to doubt the decision, but it was not in terms overruled. In *Municipal Council of Sydney* v. *Bourke* (72 L. T. Rep. 605; (1895) A. C. 433) the headnote states "*Hartnall* v. *Ryde Commissioners* (4 B. & S. 361) overruled." But the judgment, while intimating strong doubts of the case as a warrant for the broad proposition that whenever persons can be proceeded against by way of indictment for non-repair an action will lie at the suit of anyone sustaining special damage, does not state that the decision on the statute in that case was wrong. I confess that I do not clearly see why a provision extinguishing the liability of the parish and imposing that liability on a corporate body should fix that body with a further liability under which the parish never suffered. If the true reason that the parish was not liable to an action be that the inhabitants could not be sued collectively, that ground does not exist when the liability is transferred to a corporation. But that reason was not the exclusive foundation of the leading case of *Russell* v. *Men of Devon* (2 T. R. 667): (see *McKinnon* v. *Penson*, 8 Ex. 319; 9 *Ib.* 609; and per Lord Herschell in *Cowley* v. *Newmarket Local Board*, 67 L. T. Rep. 486; (1892) A. C. 345, at p. 353). A further reason is explained in *Gibson* v. *Mayor of Preston* (*ubi sup*) as being that an injury arising from the neglect of the public is only ground for the interference of the Crown, and I think that reason subsists when the duty of the public is transferred to a corporation. However, as I think that *Hartnall* v. *Ryde Commissioners* (*ubi sup.*) is in point and has never been overruled, I consider that I am bound by that decision, and therefore give judgment for the plaintiff for the amount agreed upon, with costs. If the corporation desire to appeal, there will be a stay of execution until the appeal is disposed of. The corporation must give notice of appeal within a reasonable time.

From that decision the defendants now appealed.

Pickford, K.C. (with him *Oulton*) for the appellants.—The learned judge in the court below decided the present case on the authority of *Hartnall* v. *Ryde Commissioners* (4 B. & S. 361), by which he felt himself bound. That case was decided on the construction of the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34). But that case has never been previously followed except once in the same year in a case on the same statute as is there dealt with, the court considering itself bound by the earlier decision thereon:

Ohrby v. *Ryde Commissioners*, 5 B. & S. 743.

On the other hand, it has been distinguished in several cases and mentioned without approval, even if without actual disapproval, in others. But whenever the present point has come up for decision during the past fifteen years that decision has always been disapproved. The principle upon which it was founded was that enunciated in

Couch v. *Steel*, 3 Ell. & Bl. 402.

The cases in which *Hartnall* v. *Ryde Commissioners* (*ubi sup.*) has been distinguished without being disapproved are

Gibson v. *Mayor of Preston*, 22 L. T. Rep. 293; L. Rep. 5 Q. B. 218;
Parsons v. *St. Matthew, Bethnal Green*, 17 L. T. Rep. 211; L. Rep. 3 C. P. 56.

It has been discussed and disapproved not only as to particulars, but also as to principle, and not treated as a binding authority, in

Cowley v. *Newmarket Local Board*, 67 L. T. Rep. 486; (1892) A. C. 345;
Municipality of Pictou v. *Geldert*, 69 L. T. Rep. 510; (1893) A. C. 524;
Atkinson v. *Newcastle Waterworks Company*, 36 L. T. Rep. 761; 2 Ex. Div. 441;
Municipal Council of Sydney v. *Bourke*, 72 L. T. Rep. 605; (1895) A. C. 433;
Saunders v. *Holborn District Board of Works*, 71 L. T. Rep. 519; (1895) 1 Q. B. 64.

In the case last mentioned, which was heard before Mathew and Charles, JJ., both learned judges treated *Hartnall* v. *Ryde Commissioners* (*ubi sup.*) as of no authority in consequence of the remarks that had been made in respect to it in other cases. The general principle that whenever a statutory duty is imposed in regard to the repair

of highways there is also a right of action open to any person who has suffered damage by reason of a breach of that duty is not a right one. There must be words in the statute imposing a greater liability than already exists where the obligation to repair highways is transferred from one person to another. If there are no words in the statute transferring such obligation to repair which impose a greater liability than already exists, then the liability remains the same as it was in connection with a breach of the obligation which is transferred. It is well-established law that no action will lie against a parish or county for non-repair of a highway. It might lie for misfeasance, but not for nonfeasance. That has been the law ever since the decision in the case of

Russell v. *Men of Devon*, 2 T. R. 667.

Although he might be liable to be indicted, a surveyor of highways could not have an action brought against him for nonfeasance. That was not regarded as a breach of duty for which an action would lie. The successors to surveyors of highways, like the defendants in the present case, are in the same position. As to the difference between misfeasance and nonfeasance, when that distinction was established by the old cases the courts had regard to the general doctrine that an action would not lie against a highway authority for non-repair. But when an act is done such as leaving a heap of stones or an open excavation or sewer, that is not mere non-repair, but it is doing something. Therefore it did not come within the old doctrine that an action will not lie for non-repair, and hence the old distinction was drawn. Sects. 36, 37, and 38 of the Liverpool Improvement Act 1846, which repealed the Act of 1830, upon which sections the point arising in the present case actually turns, are in substance precisely the same as those of the Public Health Act 1848 (re-enacted in the Public Health Act 1875), as to which it has been held that a public authority is not liable to an action for nonfeasance in connection with the non-repair of highways. The specific section—sect. 58—in the Act of 1846 which is relied upon by the respondent in the present case says that the corporation shall be indicted at common law for the want of sufficient repair of any public highway within the borough in the same manner as any person or persons liable to the repair of such highway was or were before the passing of that Act. But that section does not assist the respondent. For the remedy there mentioned, and that remedy alone, is the one to be resorted to. My proposition is the same as that which was laid down in

Municipal Council of Sydney v. *Bourke*, 72 L. T. Rep. 605; (1895) A. C. 433, at p. 443.

The Privy Council in that case disapproved of *Hartnall* v. *Ryde Commissioners* (*ubi sup.*), and also *Couch* v. *Steel* (*ubi sup.*), as being against that general proposition.

Danckwerts, K.C. (with him *E. Stewart Brown*) for the respondent.—The authorities cited of *Gibson* v. *Mayor of Preston* (*ubi sup.*), *Parsons* v. *St. Matthew, Bethnal Green* (*ubi sup.*), and *Cowley* v. *Newmarket Local Board* were all cases where the defendants occupied the position of surveyors of highways and nothing else. The decision upon which the present point turns is

Young v. *Davis*, 7 H. & N. 760; on appeal, 2 H. & C. 197.

That disposes of the authorities relied upon by the appellants, including the cases in the Privy Council which have been cited by them. The case of *Mayor, &c., of Lyme Regis* v. *Henley* (5 Bing. 91; 3 B. & Adol. 77; 8 Bli. N. S. 690) traverses all the appellants' propositions. Other cases material to be considered are:

Mayor of Lynn v. *Turner*, Cowp. 86;
McKinnon v. *Penson*, 8 Ex. 319; 9 *Ib.* 609;
Sutton v. *Johnstone*, 1 T. R. 493, 510, 784;
Guardians of Holborn Union v. *St. Leonard's, Shoreditch*, 35 L. T. Rep. 400; 2 Q. B. Div. 145;
Nitro-Phosphate and 'Odam's Chemical Manure Company v. *London and St. Catherine Docks Company*, 39 L. T. Rep. 433; 9 Ch. Div. 503;
Gorris v. *Scott*, 30 L. T. Rep. 431; L. Rep. 9 Ex. 125;
Mersey Docks and Harbour Board Trustees v. *Gibbs*, 14 L. T. Rep 677; L. Rep. 1 E. & I. App. 93, at p. 110;
Wilson v. *Mayor, &c., of Halifax*, 17 L. T. Rep. 660; L. Rep. 3 Ex. 114;
Reg. v. *Mayor and Corporation of Poole*, 57 L. T. Rep. 485; 19 Q. B. Div. 602, 683;
Borough of Bathurst v. *Macpherson*, 41 L. T. Rep. 778; 4 App. Cas. 256;
Rex v. *Mayor &c., of Liverpool*, 3 East, 86.

The text-books throwing light on the point are:

Clerk and Lindsell's Law of Torts, 3rd edit., pp. 31, 32;
Maxwell on the Interpretation of Statutes, 2nd edit., p. 504;
Pratt's Law of Highways, 13th edit., pp. 72, 319.

The authorities are summarised in the last-named work (at p. 319, note (*b*), and bear out the statement there made as to the law, which, I submit, is a correct statement. Sect. 58 of the Act of 1846 imposes an original liability on the defendants, and it was clearly intended to apply not merely to existing highways, but also to future ones. If under that action there is power to indict, there is power to bring a civil action. In the case of *Reg.* v. *Mayor and Corporation of Wakefield* (20 Q. B. Div. 810) there is an explanation of the meaning of the phrase "indictment at common law." On the question whether the injury to the plaintiff was caused by the defendants' misfeasance or whether it was caused by mere nonfeasance on their part, see

Mayor and Corporation of Shoreditch v. *Bull*, 90 L. T. Rep. 210.

He referred also to

Highway Act 1835, ss. 92, 95;
Highways and Locomotives (Amendment) Act 1878, s. 10.

Pickford, K.C. replied.

VAUGHAN WILLIAMS, L.J.—This is an appeal from the decision of Mr. Taylor, the judge of the Liverpool Passage Court. We have before us a transcript of his judgment, and, looking at it, we find that what Mr. Taylor says is this: "I consider that I am bound by that decision"—that decision being the case of *Hartnall* v. *Ryde Commissioners* (4 B. & S. 361)—"and therefore give judgment for the plaintiff for the amount agreed upon with costs." It is obvious from that observation that the learned judge would have arrived at a different conclusion if he had not felt himself bound by the decision of the Court of Queen's Bench in the case of *Hartnall* v. *Ryde Commissioners* (*ubi sup.*). Now, it is said that that case, if

it has not been actually overruled, has at all events been commented upon in the House of Lords—and particularly by Lord Herschell—in such a way as to cast grave doubt upon its authority. I do not myself think that we need go the length of saying that *Hartnall* v. *Ryde Commissioners* (*ubi sup.*) has been overruled. It is a decision that is based upon a particular Act of Parliament, and it may be doubted whether the Court of Queen's Bench in that case intended to lay down the general principle that has been attributed to them, or intended to say that the general principle so laid down by them applied universally in the case of a liability to repair highways imposed by an Act of Parliament. If, however, the Court of Queen's Bench did mean to lay down such a general principle, why, then, it would seem to be inconsistent with the subsequent decision of the House of Lords in the case of *Cowley* v. *Newmarket Local Board* (67 L. T. Rep. 486; (1892) A. C. 345), for that was a case which turned upon the liability of the local board —the local board established by the Public Health Act 1875—in respect of non-repair of a highway. The result was in that case that the House of Lords, affirming the decision of the Court of Appeal, held that no action would lie in such a case against a local board created under the statute of 1875. But it is difficult to see how the House of Lords could have come to that conclusion to which they did come consistently with the case of *Hartnall* v. *Ryde Commissioners* (*ubi sup.*) if *Hartnall* v. *Ryde Commissioners* really did lay down the principle which it has been suggested it did lay down in respect to highways generally. Now, as I have said, I think that we, having regard to the decision in *Cowley* v. *Newmarket Local Board* (*ubi sup.*), may at all events act upon the assumption that *Hartnall* v. *Ryde Commissioners* (*ubi sup.*) is not good law if it is right to assume that it did lay down a general principle in regard to the liability in respect of repair of highways in cases of nonfeasance. I take it that our duty in this case is to look at the Acts of Parliament—or, rather, the Act of Parliament of 1846—and consider what is the liability of the corporation of Liverpool in respect of actions brought against them for damages for injuries sustained by reason of the highway being out of repair. Now, I think that it is right to say here that, notwithstanding the observations that Mr. Danckwerts addressed to us at the conclusion of his argument, I am clearly of opinion that there is no evidence whatsoever which the court ought to consider, or which, if the action had been tried by a jury, ought to have been left to the jury, of any act of misfeasance on the part of the corporation. Mr. Danckwerts called our attention to a case of *Mayor and Corporation of Shoreditch* v. *Bull* (21 Cox Mag. Cas. 444; 90 L. T. Rep. 210), in the House of Lords on the 16th Feb. 1904, in which it was suggested that there was something in that case to lead us to say that there is evidence in this case of an act of misfeasance by the defendants causing the accident the subject of the action. I do not find anything in that decision compelling us to come, or which ought to induce us to come, to any such conclusion at all. It is quite true, and nobody will dispute it, that there may be cases in which an act of misfeasance by the body liable to repair has thrown the road into a condition which amounts to a nuisance and would make it dangerous for the public to use it. If by an act of misfeasance a road has been reduced to such a condition, it is not possible then for the defendants to say that what the plaintiff is really complaining of is nonfeasance in not putting the road right and not whether the defendants by an act of misfeasance had put the road wrong. Of course they do not do that. The decision in *Mayor and Corporation of Shoreditch* v. *Bull* (*ubi sup.*) did show that acts of misfeasance on the part of those who had the obligation to repair had reduced the road to a condition which made it unfit to use. As I understand it, they could not then say that the fact that they had omitted to remedy the wrong done entitled them to treat the action as an action for nonfeasance as distinguished from an action for misfeasance. Having said that, I will now proceed to deal with the only question which really is left for us to deal with. We have to consider what was the intention of the Act of Parliament of 1846. I do not propose to say very much about the previous history of the obligations to repair in the borough of Liverpool, although Mr. Danckwerts did dwell considerably upon their history. Shortly, it may be said that there was a time prior to 1830 during which the streets in the town of Liverpool were partly repairable by the inhabitants of the parish in that town, although there were other streets which were repairable by the corporation of the borough, such liability being really a prescriptive liability. The fact that boroughs frequently do incur a liability by prescription to repair streets or certain streets within the limits of the borough is undoubted. I see that the fact is mentioned on p. 700 of the 2nd volume of Coke's Institutes, and that was the state of things. Then came the legislation under the Act of 1830, and afterwards the legislation under the Act of 1846. Some suggestions were made that under the Act of 1830 the liabilities were really definitely imposed upon the commissioners. Another suggestion was that, according to the true construction of that Act of 1830, that was not so. But I do not think that we need take that into consideration here. We have to construe the Act of 1846, and, construing the Act of 1846, the first thing that we find that it deals with is liability to repair, which by the common law, independently of other special legislation or the existence of some liability *ratione tenuræ* or some prescriptive liability, would be thrown upon the inhabitants at large. And it is that liability which is dealt with in this Act of Parliament, and which is put upon the corporation. We have to say whether the liability which is thus put upon the corporation ought, according to the true construction of the Act of Parliament, to be held to be a liability of the same nature as the liability of the inhabitants to repair by the common law, or whether it ought to be treated as a different liability and a larger liability. Or, coming to the particular question that we have to deal with here, one has to ask oneself whether the liability imposed upon the corporation by the Act of 1846 is a liability which, so far as nonfeasance is concerned, can only be enforced by the Crown by indictment, not by the subject by action at all; or are we to treat the liability which is imposed upon the corporation as a liability coming within the rule that where statutory

duties are laid upon a public body then in the case of any individual member of the public sustaining injury by reason of the neglect of such public body to perform the duties which are thrown upon it by the statute an action will lie by the individual who has suffered damage as the resul tof that injury? We have to decide within which of those two rules, according to the true construction of this Act of Parliament, the corporation must be held to come. In my opinion the corporation come within the former proposition, and not the latter. I think that, according to the true construction of this Act of Parliament, there has been transferred to the corporation the same duty of repair and the same liability which, ordinarily speaking, is incurred by the inhabitants of a parish in respect of the maintenance of roads in repair. I do not think that we ought to so construe this Act of Parliament as that we should hold that there is a statutory duty thrown upon the corporation here which would render them liable to an action at the suit of a subject who has sustained injury by the neglect of the corporation to perform the duty of repair which is cast upon them by this Act of Parliament. But it is necessary to refer a little at length to the provisions of this Act of Parliament. The Act of Parliament in its first section sets forth that it is desirable for the construction and maintenance of drains and sewers, and for the paving and flagging of the streets, that power should be granted that such purposes should be combined under one management, and should be uniform throughout the whole of the borough. Then, having said that I pass at once to sect. 36, which is a section which throws on the mayor, aldermen, and burgesses the duties of surveyors of the highways—a section which it is worth while to notice is almost identical with sect. 144 of the Public Health Act 1875, in respect of which the decision in the case of *Cowley* v. *Newmarket Local Board* (*ubi sup.*) was given. No one has argued that if you look at sect. 36 alone that would impose upon the defendants the liability to be sued in such an action as the present. Then comes sect. 37, which gives the control of the streets vested in the mayor, aldermen, and burgesses to them. And it is said that the effect of that section and sect. 38, which deals with the paving of streets and other matters, is to impose upon the corporation a primary duty to repair, and that they are not entitled to the benefit of the undoubted doctrine of law which has been established in respect to inhabitants of parishes when the liability to repair was thrown upon them. However, here again one gets an answer from *Cowley* v. *Newmarket Local Board* (*ubi sup.*), because, if one looks at the later sections in the Public Health Act 1875, and in particular at sect. 149, one finds that there is the vesting of the streets in the urban authority, and also the provision as to the control of such streets. There is really in substance no difference between the effect of sect. 149 of the Public Health Act 1875 and the provisions of sects. 37 and 38 of this Act of 1846. Undoubtedly, in the case of *Cowley* v. *Newmarket Local Board* (*ubi sup.*) the decision of the House of Lords and also of the Court of Appeal was that, notwithstanding provisions with regard to the vesting of the streets to which I have called attention, yet the case fell exactly within the same limits of liability as had always existed by the common law in cases where the obligation to repair was the obligation of the inhabitants at large. Therefore, so far as that is concerned, the condition thus far of the provisions of the Act of 1846 seem to necessitate the same conclusion as to the meaning of that statute as the House of Lords arrived at in construing the Public Health Act 1875. Now, I should like, before dealing with the 58th section of this Act of 1846, to say a word or two upon what was the ground of the decision in *Cowley* v. *Newmarket Local Board* (*ubi sup.*). I observe that both Lord Halsbury (the Lord Chancellor) and Lord Herschell assume that under the Public Health Act 1875 the primary obligation to repair was imposed by that Act upon the urban authority, and they assume that notwithstanding the fact that in sect. 144 that which is said to be imposed upon the local board are the offices and duties of a surveyor of highways just as it is under this Act of 1846. But it is assumed, and I assume, with reference to this Act of 1846 that the primary duty to repair is by the Act of 1846 thrown upon the corporation of Liverpool. That statutory obligation having been created, how is it that by the decision in *Cowley* v. *Newmarket Local Board* (*ubi sup.*) escape is made from the general proposition that where a statutory duty is created of such a nature that an indictment would lie or a remedy by criminal law be good for neglect to perform the statutory duty an action will lie at the suit of a subject sustaining particular injury? I say, how is it that that undoubted general principle is escaped from in the decision in *Cowley* v. *Newmarket Local Board* (*ubi sup.*)? According to my understanding of the judgments both of Lord Halsbury and Lord Herschell, it is really escaped from by going back to what is the liability which is thrown upon the inhabitants of the parish in respect of liability to repair roads and the limitation of procedure for neglect to perform that duty to procedure by the Crown. And I arrive at the conclusion that by this Act of 1846—an Act which is really, in my judgment, mainly passed for purposes of convenience of remedy and convenience of performing the duties in respect of a large accretion of houses and streets that one finds in the case of the city of Liverpool—the object of the legislation was to create that sort of convenience. The object was that, and that alone, and by no means to alter the liability of those upon whom for convenience the carrying out of this work is thrown. The object was to leave the liability exactly as it was in the case when the obligation to repair was thrown upon the inhabitants of the parish. If one looks at the judgment of Lord Herschell (at p. 353 of (1892) A. C.), one finds this passage: "In *Young* v. *Davis* (7 H. & N. 760; on appeal, 2 H. & C. 197) it was held in the Exchequer Chamber that a surveyor of highways was not liable to an action for injuries resulting from the breach of his duty to keep the highways in repair. It was argued in *Gibson* v. *Mayor of Preston* (22 L. T. Rep. 293; L. Rep. 5 Q. B. 218) that the Public Health Act 1848 did something more than impose upon the corporation the duties and subject them to the liabilities of surveyors of highways, and that under the provisions of that statute they were liable to a person suffering through the non-repair of a highway. The Queen's Bench, how-

ever, in a considered judgment rejected this argument, and held that the defendants were not liable. The provisions of the Public Health Act 1875, on which the appellant now relies, are precisely similar to those upon which the judgment in *Gibson* v. *Mayor of Preston* (*ubi sup.*) proceeded. Your Lordships are asked to overrule that decision. I am not prepared to do so. The Legislature in 1875 re-enacted unaltered the provisions upon which the construction had been placed, and I cannot think that it was intended by the Legislature to impose the liability now contended for. The only case which can be relied upon as affording any support to the appellant's contention is *Hartnall* v. *Ryde Commissioners* (*ubi sup.*). But the legislation on which that case turned was not precisely the same, and the arguments which were so carefully considered and which prevailed in *Gibson* v. *Mayor of Preston* (*ubi sup.*) do not appear to have been insisted upon. For it appears to be assumed in the judgment that, if the defendants were liable to be indicted for the non-repair of the highway as for a misdemeanour, an action would lie by anyone specially aggrieved. No reasons are given for this conclusion, which seems to have been treated as a necessary consequence. I think the judgment appealed from ought to be affirmed." Now, the judgment of Lord Herschell is followed by a judgment of Lord Hannen, who was a party to the judgment in *Gibson* v. *Mayor of Preston* (*ubi sup.*). Lord Hannen says (at p. 355 of (1892) A. C.): "This principle"—the learned judge was speaking of the principle that exempted both the surveyor of highways and inhabitants from a civil action"—is equally applicable where the duties and liabilities of the surveyor have been transferred to other bodies, unless a distinct intention on the part of the Legislature can be inferred from the particular statute under consideration to create a new liability. This was laid down in 1870 in the case of *Gibson* v. *Mayor of Preston* (*ubi sup.*)." It seems to me, therefore, that as we have here the provisions of a statute—viz., that of 1846—which are substantially the same as the provisions of the Public Health Act 1875 and the Public Health Act 1848, we ought, under those circumstances, to say, as was said in *Cowley* v. *Newmarket Local Board* (*ubi sup.*) and in *Gibson* v. *Mayor of Preston* (*ubi sup.*), that we do not find any distinct intention on the part of the Legislature by this Act of 1846 to create any new liability. If one applies that principle, the result here is that we ought to say that the corporation are not liable to be sued by the individual for those damages resulting from nonfeasance any more than the inhabitants of the parish would have been. Of course I am not forgetting that when anyone sought to sue the inhabitants of a parish in a civil action there were technical difficulties. But, without lengthening my judgment by referring to the cases upon that subject, it is perfectly plain that that technical answer to the action was not the only ground upon which it was held that there was no such liability to a civil action. The only other matter which I have to now deal with, and which I said I would deal with, is this question: Does it make any difference that there is here sect. 58, which contains the following provisions: "And be it enacted that the said mayor, aldermen, and burgesses shall be liable to be indicted at common law for the want of sufficient repair of any public highway within the borough in the same manner as any person or persons liable to the repair of such highway was or were before the passing of this Act"? It was said, as I understood him, by Mr. Danckwerts that those words "person or persons" would cover the liability of persons who were liable to repair not by the common law, but, say, by *rationæ tenuræ*. And he suggested that, by reason of the provisions in that section, there was to be found a distinct intention on the part of the Legislature to impose upon the corporation of Liverpool a liability to be sued in civil actions when an individual had sustained damage by reason of the non-performance of the obligation to keep the roads in proper repair. I cannot agree that there is anything in that section to make it right that we should find a distinct intention on the part of the Legislature to that effect. I think that, having regard to the legislation that has taken place and to the various decisions which have been given thereon, we ought in construing this Act of 1846 to start with a *primâ facie* presumption that in the transfer of the obligation to repair —the common law obligation lying upon the inhabitants at large of a parish and on other bodies for the purpose of the public convenience —it must be assumed that the Legislature did not by such a transfer intend to impose any greater duty or any greater obligation upon the persons or bodies to whom the obligation was transferred than that which would have existed before the transfer. If one starts with that *primâ facie* presumption, then the Act of Parliament has to contain something that shows a distinct intention on the part of the Legislature to throw upon the transferee of the obligation a larger liability. In my opinion we cannot do so from anything that appears in this Act of 1846. On the contrary, I think that this Act of 1846 is an Act which was manifestly passed merely for convenience in carrying out all these duties by the public body for the public, and under these circumstances the presumption that I have spoken of is rather stronger than otherwise. I think for these reasons that the judgment of the learned judge in the court below must be set aside, and judgment entered for the defendants.

ROMER, L.J.—I have arrived at the same conclusion. No case was proved or made by the plaintiff at the trial of this action that the highway in question was one of the ancient or special streets which the corporation of Liverpool were liable to repair by prescription as stated in the preamble to the Act of 1830. Therefore I need not consider whether, if that fact had been proved by the plaintiff, the corporation before the Act of 1830 would have been liable to an action for damages for non-repair, or whether, if that corporation had been so liable, that liability passed first by the Act of 1830 to the commissioners thereby appointed, or, secondly, under the Act of 1846 to the present defendants. It was admitted in the court below, and on the appeal before us it was argued on the same footing, that the case is to be determined on the hypothesis that the highway in question was one originally repairable by the inhabitants of the parish of Liverpool. Now, clearly those inhabitants would not have been liable to an action for damages

for non-repair. That was finally determined by the case of *Russell* v. *Men of Devon* (2 T. R. 667). That being so, the next question that arises is, Were the commissioners appointed by the Act of 1830 there made liable to such an action? Of course, in considering that question, the fact of there being such ancient streets as stated in the preamble to the Act is to be borne in mind so far as relevant in construing the Act. But, before coming to the special provisions of the Act of 1830, I desire to make some observations on some questions of principle governing the construction of such Acts as those of 1830 and 1846. Now, in the first place it has been said that the reason why the inhabitants of a parish were held not liable for non-repair was really because, as a matter of form, they could not be sued by a member of the public injured by the want of repair. It was said that if you find the liability to repair which was formerly placed on the inhabitants of a parish transferred by an Act of Parliament to a new corporation or body created for the purpose of taking over the liability to repair, then, inasmuch as the new body or corporation could be sued, there was no longer any reason why an action should not lie against that new body for non-repair of the highway. That view, however, has long since been shown to be wrong, although from time to time the contention crops up again and is freshly urged. In *Cowley* v. *Newmarket Local Board* (*ubi sup.*) Lord Halsbury deals with the point, after referring to the case of *Russell* v. *Men of Devon* (*ubi sup.*). At p. 350 of (1892) A. C. his Lordship said: "That that has been considered to be the law for now more than a hundred years is certain, and, as has been pointed out, the objection in point of form to an action against the surveyor of the highways was not only an objection of form, but underlying it there was the objection of substance. The question of whether it was form or substance came before the Court of Exchequer in *McKinnon* v. *Penson* (8 Ex. 319; 9 *Ib.* 609). The effort there had been to argue that inasmuch as the county could not in point of form be sued, and that previous judgments had referred to that fact, 43 Geo. 3, c. 59, s. 4, which enacted that the county might be sued in the name of its surveyor, disposed of the objection of form, as indeed it did. But the court went on to say that that statute did not give, and was not intended to give, an action for such an injury against the county, but that in cases where rights could be maintained against the county an action might be brought against them in the name of their surveyor. That was, therefore, distinct authority that no new right of action was intended to be created, and, so far as I am aware, that has continued to be the state of the authorities down to the present time." Furthermore, I think that certain other principles are now established with reference to the Acts of Parliament which create new bodies with duties and obligations cast upon them to do the repair of highways in lieu of the inhabitants of the parish. Modern authorities show that the question whether in such cases the liability to an action for damages for non-repair is thrown upon the new body created by an Act of Parliament such as I have mentioned—and such as those of 1830 and 1846 in the present case—is one to be gathered from the words of the special Act. And it was pointed out in the case of the *Municipality of Pictou* v. *Geldert* (69 L. T. Rep. 510; (1893) A. C. 524, at p. 527) by Lord Hobhouse, who delivered the judgment of the Privy Council in that case, that "It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere nonfeasance. In order to establish such liability it must be shown that the Legislature has used language indicating an intention that this liability shall be imposed." I need not go through these modern authorities in detail. I think the result of them, and in particular of the case of *Cowley* v. *Newmarket Local Board* (*ubi sup.*), is accurately summed up by Mathew, J.—as he then was—in the case of *Saunders* v. *Holborn District Board of Works* (71 L. T. Rep. 519; (1895) 1 Q. B. 64), where he says (at p. 68 of (1895) 1 Q. B.): "The result of these decisions is plain." He is referring to some of the authorities which have been discussed in the course of the arguments before us in the present case. "It is that, in order to establish that a public body of this description is liable to an action for default in performing a duty imposed by statute, it must be shown that the Legislature has used language indicating the intention that this liability should be imposed, and, unless such an intention on the part of the Legislature is clearly disclosed, no action will lie." As I have said, those observations appear to me to sum up accurately the recent authorities, treating the observations of Mathew, J. as being confined, as I think they were intended to be, to the question of the construction of such an Act of Parliament as those that I have been referring to. But I ought, before parting with the question of principle, to say a word about the case of *Hartnall* v. *Ryde Commissioners* (*ubi sup.*), for, as I understand the judgment of the learned judge of the court below in the present case, he seemed to feel himself constrained to decide the case in the way that he did, contrary to his own judgment, because he thought he was bound to do so by the authority of that case. Now, with regard to the case of *Hartnall* v. *Ryde Commissioners* (*ubi sup.*), I must say that that case cannot now be regarded as law, if and so far as it seems to indicate an opposite view on the question of principle to that which I have previously expressed, or to lay down as a general proposition that the mere fact of a new body being created with the duty and liability to repair in itself makes that new body liable to an action for non-repair. That case, if it is to be supported at all at the present day, must be treated merely as a decision on the special wording of the Act there in question. I must, however, say that, guided by the light of more recent authorities to which I have referred, I think that I should not myself now, if obliged to construe the Act there in question, arrive at the same conclusion as that arrived at by the judges who decided that case. Now, applying those principles to the Acts in the present case, it seems to me to follow that in the present case the defendants are not liable in the way suggested by the plaintiff. When I turn to the Act of 1830, though I bear in mind the preamble to which I have previously referred, I find that in sects. 75 and 76 the general scope of the duties of the commissioners is referred to as being that of the surveyor of highways. I find a special pro-

vision at the end of sect. 76 with regard to the liability to repair, and it is noticeable that it runs in this form—namely, that it provides that such of the streets and highways as were theretofore repaired or repairable by the mayor, aldermen, and burgesses—that is to say, the ancient and particular streets to which I have previously referred—shall from and after the passing of this Act be repaired and repairable and have sewers made therein and kept in repair by the commissioners. In other words, their express liability to repair is not extended to the streets repairable by the inhabitants of the parish on the construction of that Act. Therefore, I have no doubt that the commissioners would not by virtue of that Act have been placed in the position of being liable to an action for non-repair of the highways repairable by the inhabitants of the parish of Liverpool. That brings me to the last question on this point—the point of law—namely, the question of the construction of the Act of 1846. With regard to that Act, I may say shortly that, when I look at the preamble and the provisions of it, and especially when I look at sects. 36 and 37, I should come to the conclusion that, speaking generally, the Act of Parliament intended to impose upon the new body created by that Act to repair the highways only limited liabilities. Sects. 36 and 37 generally say that the new body shall be subject to all the liabilities to which surveyors of highways are now by law subject or may hereafter be subject. Now, surveyors of highways certainly would not be liable as such—merely as surveyors—to an action for damages for non-repair. And one certainly cannot gather from sects 36 and 37 any intention to cast upon the new body any such general obligation as that now insisted upon by the plaintiff. The only other section which avails the plaintiff at all is sect. 58. That has already been read by my Lord, and all I will say is that, in my opinion, not only does it clearly not carry the liability of the new body beyond indictment so as to extend the liability to an action for non-repair, but I cannot help thinking that on the true construction it shows that it was intended that the liability of the new body beyond the general liability to which the surveyors of highways would be liable was to be limited to the remedy by indictment. That ends the case, and the conclusion, therefore, I arrive at is that the defendants are under no liability to the plaintiff in this action for non-repair. On the mere question of fact which has been raised at the last moment or as a second string to their bow by counsel who argued the case on behalf of the appellants, I need only say that, in my opinion, on the facts there was no evidence against the defendants of misfeasance by them as distinguished from nonfeasance. I think that it is clear that the accident occurred to the plaintiff merely by reason of non-repair, and for no other real reason. It follows that, as I have said, in my opinion the appeal should be allowed.

STIRLING, L.J.—I am of the same opinion. I agree with what has been said by my brethren, and I will add but very few words. The action is brought against the corporation of Liverpool to recover damages caused by the non-repair of a street within the borough. Now, if this street was to be taken upon the admissions made in the court below, and in the course of the arguments before us here, to have been a street which orginally was repairable by the parish simply, no action could be maintained against that parish by reason of nonfeasance on their part. I think that it must be taken in this case, and as I understand the learned judge to have found, that no misfeasance was proved, and therefore it is simply a case of nonfeasance. The duties which originally fell upon the parish of Liverpool have been transferred to the corporation of Liverpool by a statute, and the action is based upon the provisions of that statute. I think the law to be as it is stated by Lord Hannen in the passage which has already been read by my Lord from the report of the case of *Cowley* v. *Newmarket Local Board* (*ubi sup.*), that in dealing with a statute of this kind it is not to be inferred that a new liability is created unless distinct intention on the part of the Legislature can be found in the terms of the Act. That brings us to consider the terms of the Act. Now, we start with this, that in the year 1830 an Act was passed which appointed certain commissioners to control the highways within the parish of Liverpool, some portion of which were at that time repairable part by the parish and part by the corporation by prescription. The corporation were by that Act released from their obligations of repair upon the terms of paying a sum of 5000*l.* per annum to the parish for purposes of the Act. The Act of 1846, with which we have to deal, repealed that Act of 1830, and the main ground on which it was passed was the great growth which had taken place in the intervening time in the development of Liverpool. After reciting the various Acts, the preamble goes on to recite that "the borough of Liverpool and part of the said extra parochial place of Toxteth Park," also various other townships there specified, had become extremely populous, and that it was expedient that a provision should be made for dealing with streets and the sewage—reading it shortly—and also expedient, it finally says, that these places should be combined under one management, and should be uniform throughout the whole of the borough. Then as regards the streets, the provisions which deal with them are those in sects. 36, 37, and 38, which, as was pointed out in argument, and I think correctly pointed out, resemble sects. 144 and 149 of the Public Health Act 1875. These sections, standing by themselves, certainly do not, read in the light of the decision of the House of Lords in *Cowley* v. *Newmarket Local Board* (*ubi sup.*), impose any new liability. Then we come to sect. 58, which has already been referred to, and I will also refer to sect. 160, which shows that, though the various parishes and townships which then constituted the borough were brought under the control of the corporation for the purposes mentioned, yet it was provided that they should be but one district. And it was also provided that the mayor, aldermen, and burgesses should continue out of the borough fund to pay the sum of 5000*l.* as to which a liability was imposed by the Act of 1830. Are we to infer, looking at the Act as a whole, that these provisions—more particularly those which I have enumerated, and reading all the sections together—intended to impose a new liability on the corporation and to make the corporation liable for nonfeasance where the parish would not have been liable? I am

unable to arrive at that conclusion. It seems to me that sect. 58 was merely intended to provide convenient machinery by which the remedy of indictment might be put in force, and that the person who complained of non-repair should not be driven to consider what person or persons of the corporation or parish or township were the proper parties to be indicted, and that the indictment should lie in such a case against the corporation. But I cannot see under sect. 58 any intention on the part of the Legislature to impose a liability which previously did not exist. For these reasons I agree with my brethren that the appeal ought to be allowed.

Appeal allowed.

Solicitors for the appellants, *F. Venn* and *Co.*, agents for *Edward R. Pickmere*, Town Clerk, Liverpool.

Solicitors for the respondent, *Charles Russell* and *Co.*, agents for *T. P. Maguire*, Liverpool.

HIGH COURT OF JUSTICE

CHANCERY DIVISION.

Dec. 14, 15, *and* 16, 1904.

(Before JOYCE, J.)

ATTORNEY-GENERAL *v.* STAFFORDSHIRE COUNTY COUNCIL. (*a*)

Highways—Main road—Vested in county council—Supporting and retaining walls—Repair—Mandatory order—Local Government Act 1888 (51 *&* 52 *Vict. c.* 41), *s.* 11.

The court will not make a mandatory order upon a county council to repair a main road vested in the council under sect. 11 *of the Local Government Act* 1888.

ACTION by the Attorney-General at the relation of the trustees of Lord Macclesfield's settled estates and by such trustees.

Upon certain lands forming part of the settled estates was a highway known as the Leek and Macclesfield main road.

This highway was vested in the defendant county council by virtue of sect. 11 of the Local Government Act 1888, whereby it was provided that every road in a county, which was for the time being a main road within the meaning of the Highways and Locomotives (Amendment) Act 1878, should after the appointed day be wholly maintained and repaired by the council of the county in which the road was situate.

The road in question where it passed through the Macclesfield estates was in places constructed upon or cut into the side of a hill or sloping ground, and in such places was supported upon and by means of embankments or supporting walls, and was protected from the adjoining lands above by means of retaining walls.

These embankments and walls, the plaintiffs alleged, had been repaired and maintained by the highway authorities until the Local Government Act 1888 came into operation, and had since then been repaired and maintained by the defendants until the year 1902, when the defendants disputed their liability to continue to maintain the embankments and walls.

(*a*) Reported by SYDNEY DAVEY, Esq., Barrister-at-Law.

The plaintiffs further alleged that certain of the embankments and supporting walls were out of repair and were insufficient to prevent the highway from slipping on to the adjoining lands, and that certain of the retaining walls were out of repair and were insufficient to protect the highway from the adjoining lands slipping thereon; and that the embankments and walls were a nuisance to the highway, and that the part of the highway where they were situate was in a dangerous condition and unsafe for public use.

The plaintiffs claimed accordingly: (1) A declaration that the defendants were liable to repair and maintain the said embankments and walls; (2) that the defendants be ordered forthwith to repair such of the embankments and walls as were in need of repair.

The defence was a denial that the walls or embankments were out of repair; a denial of liability; and, further, that the statement of claim disclosed no ground for the interposition of the Attorney-General, nor any right of action or ground of relief in the plaintiff trustees.

Hughes, K.C. and *R. C. Glen* for the plaintiffs.—Under sect. 11 of the Local Government Act 1888 the duty is cast upon the county council to maintain and repair the highway now in question; and this includes the maintenance and repair of such works as are necessary for the preservation of the road:

Sandgate Urban District Council v. *Kent County Council*, 79 L. T. Rep. 425.

It is the duty, therefore, of the defendants to maintain and repair the embankments and walls which support and protect this highway. See also the case of

Reg. v. *Watson*, 2 Ld. Raym. 856.

Danckwerts, K.C. and *John Leslie* for the defendants.—The court will not make a mandatory order to repair a road, it being left to the discretion of the local authority as to how repairs shall be effected:

Rex v. *Claxby Inhabitants*, 3 C. L. R. 986;
Sandgate Urban District Council v. *Kent County Council*, 79 L. T. Rep. 425;
Loughborough Highway Board v. *Curzon*, 55 L. T. Rep. 50; 17 Q. B. Div. 344;
Reg. v. *Oxford and Witney Road Trustees*, 12 A. & E. 427;
Reg. v. *Gresenhow Inhabitants*, 35 L. T. Rep. 363; 1 Q. B. Div. 703.

This action is misconceived, and the plaintiffs have mistaken their remedy. Moreover, the county council are merely, under the Local Government Act 1888, the successors of the highway boards; and no action will lie against the county council.

JOYCE, J.—This is ostensibly an action to compel the Staffordshire County Council to perform the statutory duties imposed upon them by sect. 11 of the Local Government Act 1888 to maintain and repair a certain main road, it being alleged that default has been made by the council in the performance of that duty by their failing to keep in repair certain retaining walls by the side of that road. In my opinion, the real object of this action is to compel the Staffordshire County Council to keep up the retaining walls on land on the Macclesfield estate where it adjoins the road from Leek to Macclesfield, and where the

adjacent ground is on a higher level than the road. Now, the plaintiffs seek to get what they want in this way. They say that sect. 11 of the Local Government Act 1888 imposes upon the county council the statutory liability to maintain and repair the road. Then next they say, as a sort of corollary to this, that they are therefore bound to keep in repair every work or every thing that may be made necessary for the maintenance of the road. They say that the existence of such retaining walls as I have mentioned is necessary, and that, therefore, the county council are bound to maintain and repair those walls; and I suppose they must go to the extent of saying that the council must keep them in a perfect condition as to repair. Well, now, it seems to me impossible to impose such a liability in terms upon the county council without really extending their liability beyond that which is expressed in the statute. That would be really adding a clause to the statute. Now, what do the plaintiffs claim in this action? They claim, or did claim, a declaration that the defendants are "liable to repair and maintain the said embankments and walls," meaning thereby, as has been explained to me, the embankments and walls mentioned or referred to in the particulars that have been delivered in the action; and, secondly, they ask that the defendants may be ordered "forthwith to repair such of the embankments and walls as are in need of repair." In my opinion no such mandatory order as that which is asked could be granted. Further, in my opinion, it is the necessary requisite on every injunction and every mandatory order that it should be certain and definite in its terms; and it must or ought to be quite clear what the person, against whom the injunction or order is made, ought to be refrained from doing. Now, a mandatory order, as I understand the practice of the court, will not be made to direct a person to repair. As we all know, the court will not superintend works of building or of repair. Feeling this difficulty, I suppose, when the case was opened, such part of the claim as asks for a mandatory order was practically dropped; and I am asked now to make a declaration that the Staffordshire County Council is liable to maintain and repair walls at points marked on a certain plan, without saying anything about the height or length of the walls, or as to the extent or amount of the repairs to be executed or as to the time when such repairs ought to be executed—as to all of which matters there may be a considerable difference of opinion. How can I possibly say that these particular walls, retaining walls, even if the height and length, and so on, had been specified, are necessary for the maintenance and repair of this main road? At all events, it does appear to me upon the evidence that it is impossible to come to the conclusion that the repairing of these particular walls is necessary for the maintenance of the main roads. Now, in the case of *Sandgate Urban District Council* v. *Kent County Council* (79 L. T. Rep. 425) in the House of Lords, to which I have been referred, of course the matter had gone beyond the stage of determining whether it was necessary to do the work or not. It was a question simply of repayment by the person liable to pay for what had been necessary to be done. The facts were all found, and there was no escaping from them. The question was merely whether a certain person had to pay when the facts had been found by reference to arbitration; but even in that very case, as was pointed out to me, Lord Davey says, and I think correctly: "There is no liability upon the road authorities, which could be enforced either by indictment or otherwise, to do any particular work. Their liability, either at common law or by statute, is general—to repair and maintain the highway, leaving it to them to find out the best or adequate means of discharging that liability." No case has been cited to me in which the court has taken upon itself to say what the local authority is to do—that is, to particularise what has to be done. I do not hesitate to say that I am unable, and I decline, to prescribe what particular works are necessary, or where, or when they may be necessary for the maintenance of this main road; and I equally say that I am unable, and decline, to prescribe what repairs are necessary for the purpose of maintaining this main road, or where, or when, such repairs are to be made. As in the case cited to me of *Reg.* v. *Oxford and Witney Road Trustees* (12 A. & E. 427) it is plain that under the old law, and it was so decided, no *mandamus* would lie against a local authority, in a case as similar to this as could be, to do any particular works. If this main road, or any part of it, should be allowed to go actually out of repair, the person, or the body, whoever it may be that is responsible, will be liable on appropriate legal proceedings at the instance of anyone who is entitled by law to proceed against them. At present, as it seems to me, the road is maintained, and it is not suggested that the road is out of repair. If I am wrong in that, and it be suggested that it is out of repair, all I can say is that I hold, on the evidence adduced before me, that the road is not out of repair at present. Then, again, something was said to me about a nuisance. It was suggested that the state of the road was a public nuisance. Upon the evidence this is certainly not proved before me to be the case; and I am of opinion upon the evidence, weighing the evidence on both sides, that these walls in their present condition are not dangerous; nor do I think there is anything amounting to a public nuisance or anything of the kind. Then, further than this, an elaborate argument has been addressed to me by Mr. Danckwerts on behalf of the defendants, the county council, with the object of showing that the legal liability, if any, to the public in respect of this work, or any works on these roads, is on the inhabitants of the parish, and that the only liability of the county council is as successors to the highway board, or surveyor of highways, and that the real liability is on the inhabitants of the parish alone; in other words, that the defendants are under no liability to the plaintiffs; further, that there is a particular procedure pointed out by the Act to be taken in such a case as this, and that such an action as this under the circumstances would not lie. I must say that I am very considerably impressed by that argument. It does not appear to me to be necessary for this case to decide whether it is right or wrong, because, for the reasons I have already mentioned, apart from this, I am of opinion that this action is misconceived, and I am also of opinion that this action fails on the merits. It must therefore be dismissed, with the usual consequences.

Solicitors for the plaintiffs, *Lawrence, Graham, and Co.*

Solicitor for the defendants, *H. M. Davis*, for the *Clerk of the Staffordshire County Council.*

KING'S BENCH DIVISION.

Wednesday, Jan. 18, 1905.

(Before Phillimore, J.)

County Council of the County of Southampton (apps.) *v.* Commissioners of Inland Revenue (resps.). (*a*)

Revenue — Stamp duty — Agreement by county council with district council to maintain main roads — Proper stamp on — Agreement made "pursuant to the Highway Acts"—"Deed of any kind not described in schedule"—Local Government Act 1888 (51 *&* 52 *Vict. c.* 41), *s.* 11, *sub-ss.* 1, 4—*Stamp Act* 1891 (54 *&* 55 *Vict. c.* 39), *schedule.*

When a county council make an agreement under seal with a district council under sect. 11, *sub-sect.* 4, *of the Local Government Act* 1888, *for the repairing, maintaining, and keeping in repair main roads in their district, such an agreement is not an agreement "made or entered into pursuant to the Highway Acts for or relating to the making, maintaining, or repairing of highways" within the meaning of the schedule to the Stamp Act* 1891, *which would require a* 6d. *stamp, but comes within the heading in that schedule, "Deed of any kind whatsoever not described in this schedule," and therefore requires a* 10s. *stamp.*

Case stated by the Commissioners of Inland Revenue, pursuant to sect. 13 of the Stamp Act 1891.

In the month of Feb. 1901 an instrument was presented on behalf of the County Council of the Administrative County of Southampton (the appellants) by their solicitors to the Commissioners of Inland Revenue, under the provisions of sect. 12 of the Stamp Act 1891, for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

The question was whether the instrument should be stamped with a 6*d.* stamp, as being an "agreement or contract made or entered into pursuant to the Highway Acts for or relating to the making, maintaining, or repairing of highways" within sched. 1 of the Stamp Act 1891, or should be stamped with a 10*s.* stamp as being a "deed of any kind whatsoever not described in this schedule."

The agreement was entered into under and pursuant to sect. 11, sub-sect. 4, of the Local Government Act 1888, and was duly executed under the seals of the parties thereto.

A copy of the instrument was set out in the schedule and was as follows:

County of Southampton. Contract for the maintenance and repair of main roads (including footpaths) and roadways over and adjoining county bridges in the line of main roads in the rural district of South Stoneham for the year ending the 31st March.—This agreement, made the 19th of Feb. 1901, between the county council of the administrative county of Southampton (hereinafter called the county council) of the one part, and the district council of the rural district of South Stoneham in the said administrative county (hereinafter called the district council, which expression shall be deemed to include their successors in law, where the context so admits or requires) of the other part.—Whereas the county council have empowered their main roads and bridges committee (hereinafter called the committee) to enter into a contract with the district council for the repair of the main roads within their district during the current year. And whereas the committee have caused to be prepared a specification upon, in accordance with and under and subject to which each estimate of expenditure on the said roads and footpaths should be made, and maintenance and repair of roads and footpaths done, and directed that a copy of the said specification should be supplied to the district council, and requested the district council to submit to them an estimate (based upon such specification) of expenditure on each of the main roads and footpaths respectively within their district (being the roads specified in the schedule hereto), during the year ending on the 31st day of March next, showing in such estimate the description, quantity, and cost of the materials to be used, the amount of labour, and the miscellaneous expenditure. And whereas the district council have submitted to the committee preliminary and approximate estimates of expenditure in accordance with the terms and requirements of the committee, and such estimates have been approved by the county surveyor on behalf of the committee, and the aggregate amount thereof is set out in the said schedule. And whereas the cost of the establishment charges to be paid by the county council to the district council in respect of the said roads and footpaths has been fixed at the sum mentioned in the said schedule. Now it is hereby agreed that in consideration of the payments to be made by the county council to the district council as hereafter mentioned, the district council hereby agree with the county council to repair, maintain, and keep in repair during the year ending on the 31st day of March next, to the satisfaction of the county surveyor for the time being, the roads and parts of roads specified in the schedule hereto, including footpaths by the side of such roads and parts of roads, and also the approaches and roadways to and over such county bridges within the district of the district council as are specified in the schedule in accordance with the specification hereunder printed (the modifications in writing therein contained having been previously agreed to and made), and to perform and fulfil all things required by the said specification to be by them respectively performed and fulfilled. And further, that if the district council shall neglect, or omit to carry out, perform, or fulfil the directions contained in the specification hereto annexed in any particular, the county surveyor may give notice in writing to the clerk of the district council of such neglect or omission, and thereupon the district council shall take steps to carry out and perform the directions which shall have been neglected or omitted within fourteen days after receiving such notice. And the county council hereby agree with the district council that on and subject to the performance by the district council of their part of this contract, and on the county surveyor certifying in writing that the same has been performed by them the district council shall be entitled to be paid out of the county fund such sum or sums as shall appear to be the sum or sums actually expended by the district council during the year aforesaid for materials, labour, and miscellaneous expenditure, including cost of establishment charges fixed as aforesaid, the amount of such expenditure to be fixed by audit or in such other manner as the committee shall approve, and to be paid within one month after having been so ascertained, provided that if the amount actually expended by the district council in the year aforesaid on any item in the estimate shall exceed the amount set down for such item in the estimate, the district council shall not be

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

entitled to be paid the excess of expenditure unless the county surveyor shall certify the same to have been properly incurred, and no variation in the description or quantity of materials or labour shown in the estimate shall be made without the previous approval of the county council. Provided always, and it is hereby agreed, that if the district council shall on or after the expiration of the first month of the said year deliver to the county surveyor a statement of the sum expended by them during that period, they shall be entitled to receive within one month of the delivery of such statement a payment on account of the total sum which shall finally become payable equal to 90 per cent. on the sum actually expended by them as aforesaid. And if the district council shall on or after the 31st day of March next deliver to the county surveyor a statement of the sum expended by them during the said year, they shall be entitled to receive within one month after the delivery of such last-mentioned statement a payment on account of the total sum which shall finally become payable equal to 80 per cent. on the sum actually expended by them as last aforesaid, less any payment on account previously made, together with the cost of establishment charges, fixed as aforesaid, such payments to be ascertained and certified by the county surveyor, and to be made as instalments and without prejudice to the amount of the sum which shall finally be ascertained to be payable under this contract, but no payment shall be made unless the county surveyor shall certify that the said roads and footpaths have been properly repaired, maintained, and kept in repair during the period to which the payment relates. And it is further agreed that, inasmuch as a period of some weeks must necessarily intervene between the expiration of this contract and a contract for the repair of the said roads for the year from the first day of April next can be entered into, the district council will repair, maintain, and keep in repair to the satisfaction of the county surveyor for the time being the said roads or parts of roads, including the footpaths by the sides of such roads, and the approaches and roadways to and over the said county bridges, from the said first day of April next until another contract for the repair and maintenance for the said roads and footpaths shall be entered into between the county council and the district council for the maintenance and repair of the said roads and footpaths, and the amount of any expenditure incurred by the district council during the said last-mentioned period shall be taken as part performance of the agreement for repair of the said roads and footpaths for the year commencing on the first day of April next, and be included both in the estimate of expenditure to be incurred and in the statement of expenditure incurred by such authority for such year, and be paid as part of the expenditure on the maintenance and repair of the said roads and footpaths during such year. In witness whereof the said parties hereto have caused their common seals to be affixed the day and year first herein above mentioned.

The schedule above referred to:

Name of Road.	Length of Road.		Amount of Estimate.		
	Miles.	Yards.	£	s.	d.
Fordingbridge, Lyndhurst, and Southampton	1	247	—		
Tanners Bridge		105	321	0	0
Romsey and Southampton		827	38	10	0
Romsey, Swathling, and Botley (1)	3	1568	173	15	0
ditto ditto (2)	5	174	—		
Botley Mansbridge bridges		426	227	12	6
Winchester and Botley	2	947	97	0	0
Swathling and Southampton		1366	151	15	0
Winchester and Southampton	2	1590	445	6	8
Totals	17	210	1454	19	2
Footpaths			£39	12	6
Establishment charges (exclusive of improvements)			74	15	0
Improvements 50 per cent of cost			130	0	0

The seal of the County Council was affixed hereto in the presence of . . .

The "specification" above referred to contained twenty-eight clauses dealing with various matters connected with the repairing of the roads, such as the cleansing, watering, scraping, draining, metalling, rolling, and so on, which were imposed on the district council.

The following clauses of the specification were referred to during the argument:

20. All county bridges, culverts, drains, fences, &c., are to be frequently inspected by the district surveyor, and in the event of defects being found in such county bridges, &c., or of a slip occurring in the bank or ditch by the side of a main road, or of any contingency not provided for, the district surveyor is at once to take such measures as are necessary for the proper protection of the public. Notice of the damage and of the estimated cost of making good the same is to be forwarded to the county surveyor without delay.

22. All encroachments on, and interference with, main roads and wastes are to be immediately reported to the county surveyor. No posts and rails, faggot stacks, heaps of compost, manure, or any other obstructions, excepting materials for the repair of the road, are to be allowed on the roadside wastes. No sanction for encroachments or any other interference with the road or wastes is to be given by any other than the county authority.

23. All placards and advertisements unauthorised by the county council on bridges, signposts, milestones, &c., belonging to the county are to be at once removed or obliterated by the roadmen.

27. All damage done to roads by "extraordinary traffic" to be at once reported to the county surveyor.

The appellants contended that the instrument was chargeable with 6*d.* only by reference to the heading "Agreement or contract made or entered into pursuant to the Highway Acts for or relating to the making, maintaining, or repairing of highways" in schedule 1 of the Stamp Act 1891. The commissioners were of opinion that the agreement was (having regard to the case of *County Council of Cumberland* v. *Commissioners of Inland Revenue*, 78 L. T. Rep. 679) not within that heading, but was within the heading "Deed of any kind whatsoever, not described in this schedule," and assessed it accordingly with 10*s.*

The appellants being dissatisfied with the assessment required the commissioners to state and sign this case, which the commissioners stated accordingly.

The questions for the opinion of the court were (1) whether the instrument was rightly assessed as liable to 10*s.*, (2) if not, to what duty it was liable.

The Local Government Act 1888 (51 & 52 Vict. c. 41), provides:

Sect. 11. (1) Every road in a county, which is for the time being a main road within the meaning of the Highways and Locomotives (Amendment) Act 1878, inclusive of every bridge carrying such road if repairable by the highway authority, shall, after the appointed day, be wholly maintained and repaired by the council of the county in which the road is situate, and such council, for the purpose of the maintenance, repair, improvement, and enlargement of, and other dealing with such road, shall have the same powers and be subject to the same duties as a highway board, and may further exercise any powers vested in the council for the purpose of the maintenance and repair of bridges, and the enactments relating to highways and bridges shall apply accordingly; and the county council shall have the same powers as a highway board for preventing and

removing obstructions, and for asserting the right of the public to the use and enjoyment of the roadside wastes; and the execution of this section shall be a general county purpose, and the costs thereof shall be charged to the general county account. (2) Provided that any authority may, within twelve months after the appointed day, or in case of a road in the district of such authority becoming a main road at any subsequent date then within twelve months after that date, claim to retain the powers and duties of maintaining and repairing a main road within the district of such authority, and thereupon they shall be entitled to retain the same, and, for the purpose of the maintenance, repair, improvement and enlargement of, and other dealing with such road, shall have the same powers and be subject to the same duties as if such road were an ordinary road vested in them, and the council shall make to such authority an annual payment towards the cost of the maintenance and repair, and reasonable improvement connected with the maintenance and repair of such road. (3) The amount of such payment shall be such annual sum as may from time to time be agreed on, or in the absence of agreement may be determined by arbitration of the Local Government Board. (4) The county council and any district council may from time to time contract for the undertaking by the district council of the maintenance, repair, improvement, and enlargement of, and other dealing with any main road, and, if the county council so require, the district council shall undertake the same, and such undertaking shall be in consideration of such annual payment by the county council for the costs of the undertaking as may from time to time be agreed upon, or, in case of difference, be determined by arbitration of the Local Government Board; and for the purposes of such undertaking the district council shall have the same powers and be subject to the same duties and liabilities as if the road were an ordinary road vested in them.

Sect. 100. The expressions "district council" and "county district" mean respectively any district council established for purposes of local government under an Act of any future session of Parliament, and the district under the management of such council, and until such council is established mean respectively—(a) as regards the provisions of this Act relating to highways and main roads, a highway authority and highway area. . . . The expression "highway area" means, as the case may require, an urban sanitary district, a highway district, or a highway parish not included within any highway or urban sanitary district: The expression "highway authority" means, as respects an urban sanitary district, the urban sanitary authority, and as respects a highway district, the highway board, or authority having the powers of a highway board, and as respects a highway parish, the surveyor or surveyors of highways or other officers performing similar duties.

Sect. 52 of the Highway Act 1864 (27 & 28 Vict. c. 101) provides:

The highway board may and is hereby authorised to contract for purchasing, getting, and carrying the materials required for the repair of the highways, and for maintaining and keeping in repair all or any part of the highways of any parish within their highway district, for any period not exceeding three years.

Foote, K.C. (*J. A. Simon* with him) for the appellants (the Southampton County Council).—The question is whether this agreement between the county council and the district council, for the repair by the district council of certain main roads, is rightly described by the words "agreement or contract made or entered into pursuant to the Highway Acts for or relating to the making, maintaining, or repairing of highways." The expression used is "agreement or contract," and it is sufficiently wide to include a contract under seal, as this contract was, as the word "contract" includes not only a parol contract, but also a contract under seal. The point intended to be raised is whether this contract was entered into pursuant to the Highway Acts, and we submit that it was. It is a contract made under sect. 11, sub-sect. 1, of the Local Government Act 1888, a section dealing with main roads, and giving to county councils the powers of highway boards. Taking sub-sects. 1, 2, and 3, two sets of things may arise—first, under sub-sect. 1 the county council may have the ordinary powers of a highway authority for the repair of a main road, and may contract with any person or body of persons for the doing of that work; and secondly, if the urban council have retained the road, then the only duty of the county council in respect of it is to make them a payment. This case admittedly falls within sub-sect. 1, which gives the county council the same powers as a highway board, and by sect. 52 of the Highway Act 1864 a highway board are authorised to contract for the repairing and keeping in repair the highways, so that it is not at common law, but under that section that a county council can so contract. The case of *Cumberland County Council* v. *Commissioners of Inland Revenue* (78 L. T. Rep. 679), relied on by the Crown, is clearly distinguishable. There the agreement was entered into under sub-sect. 3, in a case where the urban district had claimed to retain the road, and the only obligation on the county council was to make such annual payment towards the cost of the repair of the roads as should be determined upon, and the decision was that such an agreement was not made under the Highway Acts for the repair of the roads. That case is not an authority against the appellants. The difference between cases coming—as this does—under sub-sect. 1, and those coming under sub-sects. 2 and 3, is that as regards agreements coming under sub-sects. 2 and 3 they are plainly not cases where the agreement is made pursuant to the Highway Acts. There is no reference in those sub-sections to the Highway Acts, and, although the payments to be made by the county council under those sub-sections may have been in respect of agreements relating to the repair of the highways, those agreements were not "made pursuant to the Highway Acts." That is the distinction between the two classes of cases. No doubt in one sense the county council were acting under the Act of 1888, but as soon as that Act was passed they were by sub-sect. 1 clothed with the authority of a highway board and were acting under the Highway Acts, and any act done by them under the sub-section was an act done pursuant to the Highway Acts. Sub-sect. 1 is the primary section, and sub-sect. 4 is merely ancillary to that and does not cut down its operation, and its real object was to provide that a district council, when it came into existence, should be a body with which the county council could contract, and, secondly, to give compulsory powers. With regard to the point that, as this agreement contains also a reference to "improvements," it is taken out of the class of agreements made under the Highway Acts, as not coming within "making, maintaining, or repairing" of highways, whatever force that objection may have had when *Leek Improvement Commissioners* v. *Staffordshire Justices* (20 Q. B. Div. 794) was decided, is now removed as sect. 11 of the Act

of 1888 expressly includes improvements, as well as maintenance and repair; and, even if it did not, "improvements" would come within the "making" of highways.

The *Solicitor-General* (Sir Edward Carson, K.C.) (*Rowlatt* with him) for the respondents.—The assessment by the commissioners was correct. We submit that this is not a contract entered into pursuant to the Highway Acts; and, further, that it is not really a contract for the making, maintaining, and repairing of the roads in question. If this were a contract which, under sub sect. 1 of sect. 11, had been made by the county council with a contractor under any of the sections of the Highway Acts, and had been so made by them, as representing the old highway authorities, we should at once concede the appellants' argument that they stood in the place of the old highway authorities, and had all the powers which the old highway authorities had under the various Highway Acts of 1835 and 1864. There are a number of sections, particularly in the Act of 1864, and one certainly in the Act of 1835, which specify the class of contract which can be entered into by the highway authorities for the purpose of maintaining and repairing the highways, such matters as the purchase of gravel, and various matters of that kind: (sect. 46 of the Act of 1835, and sects. 20, 22, and 52 of the Act of 1864). If this were a contract of that kind, we should not contest the appellants' argument, the answer to which is that if there were not sub-sect. 4, then this contract could not be made, and this contract is made, not under the general powers transferred to the county council by sub-sect. 1 at all, but under the specific directions given by sub-sect. 4, because sub-sect. 4 is needed to enable each party to contract, at any rate to enable the district council to contract. That sub-section is much wider than a mere contract to maintain the road entered into by a contractor under the Highway Acts, because it is compulsory on the district council. They have no voice in the matter; they must enter into a contract—some contract—for the maintenance of the roads. The sub-section goes a great deal further than that, because the contract is not only for "the maintenance, repair, improvement, and enlargement of" the roads, but also includes "and other dealing with any main road." In the present contract there are a number of things altogether outside improvement, maintenance, and repair. The agreement itself says that the district council are "to perform and fulfil all things required by the said specification to be by them respectively performed and fulfilled." Then, if we look at the specification, we find—as, for instance, in clauses 20, 22, 23, and 27—certain matters which, although they may be all ancillary to the proper keeping of the roads, yet are all very much wider than the mere maintenance and repair of the roads, and they come in under these words, "and other dealing with any main road." The district council are bound to undertake the same, so that there comes under the sub-section not merely the repair, but also whatever becomes necessary for the other dealing with the roads. The sub-section says that the district council are to have the same powers and be subject to the same liabilities as if the road were an ordinary road vested in them. Therefore the effect of entering into this contract is not merely to create the ordinary duties and relations as between two contracting parties, but it is to give to the district council the same powers as if the road were vested in them as a highway authority. A contract of that kind, which is simply carrying out the terms of the Act, cannot be said to be a contract made pursuant to the Highway Acts, and the fact that the roads are to be repaired, &c., does not make it a contract under the Highway Acts. The language used by Phillimore, J. in *Cumberland County Council* v. *Commissioners of Inland Revenue* (*ubi sup.*) accurately expresses the matter, and shows that this was an agreement for fixing who was to be liable for the repair, &c., of the roads under the Act of 1888, and, without insisting on the argument as to the "improvements," there is enough to show that this was an agreement entered into in pursuance of the Local Government Act of 1888, and not in pursuance of the Highway Acts.

Foote, K.C. in reply.

Phillimore, J.—In this case I have to decide whether an instrument under seal of both parties between a county council and a district council relating to the main roads within the territorial ambit of the district council is to bear a 10*s.* stamp, as a deed not otherwise charged, or only a 6*d.* stamp, as being an agreement or contract made or entered into pursuant to the Highway Acts for or relating to the making, maintaining, or repairing of highways. An additional point is also taken by the Crown that, even supposing it is such an agreement as that, there are also covenants in the instrument which are not portions of such agreement, and which therefore must bear a separate stamp. Now, the whole origin of agreements of this class is the Local Government Act of 1888. That Act provided by sect. 11 that certain main roads should be deemed county roads and should after the appointed day be wholly maintained and repaired by the council of the county in which the road was situate, and it proceeded to give such councils, "for the purpose of maintenance, repair, improvement, and enlargement of and other dealing with such roads," the same powers and duties as a highway board. Sub-sect. 2, with sub-sect. 3, gave to any urban authority within the county power to require of the county council that the county council should let such urban authority make, maintain, repair, and deal with that portion of the main road which was within the limits of the urban authority, the county council in that case paying the urban authority for what it did. Sub-sect. 4 is rather a converse case. It enabled the county council to require of what is there called the district council that the district council should undertake the maintenance, repair, improvement, and enlargement of and other dealing with the main road—that is, that the county council could require the district council to take over that portion of the main road which was within its territorial ambit; and then there was a provision for the county council to pay the district council a sum to be agreed upon or determined by arbitration. Sub-sect. 4, like sub-sect. 2, is compulsory upon the requirement of one of the parties. Under sub-sect. 2 the urban authority can claim to take its road off the county council. Under sub-sect. 4 the county council can claim to thrust upon the district council the portions of main road

in its district. In those circumstances this agreement is unquestionably made under the provisions of sub-sect. 4. It is an agreement by a county council with a district council for the maintenance of those portions of the main road which belong to the county council and which are situated within the territorial, ambit of the district council. Without sub-sect. 1 the county council could not so contract; without sub-sect. 4 the district council could not so contract; and without sub-sect. 4 the county council could not compel the district council—as in the event of there being a disagreement it could—so to contract or so to deal. I may observe, for the sake of historical accuracy, that, oddly enough, when the Local Government Act of 1888 was passed there were no such entities as district councils in existence, nor were they created by the Act. Obviously it had been intended that they should be created by the Act, but, under stress probably of Parliamentary exigencies, they had to be omitted from the body of the Act. Then the somewhat clumsy contrivance which we find in sect. 100 was provided, that the expressions "district council" and "county district" should mean respectively any district council established for purposes of local government under an Act of any future session of Parliament, and the district under the management of such council, and that until such council should be established they should mean, (*a*) "as regards the provisions of this Act relating to highways and main roads, a highway authority and highway area." Later, district councils were created by Parliament, but in the meantime this provision would have to be read as a provision relating on the one hand to the county council and on the other hand to the then highway authority for the particular district which had to be dealt with. It is contended on behalf of the appellants that the main thing to look at is sect. 11, sub-sect. 1, and the provision there that the county council are to have the same powers and be subject to the same duties as a highway board; and I am referred to sect. 52 of the Highway Act of 1864, as enabling a highway authority to make contracts with what I may call an industrial contractor, either to repair the road, to supply materials, or to do work for the repair of a portion of the road. When I say "repair," I am not excluding maintenance, improvement, or enlargement. I quite agree with the argument, which, indeed, is conceded by the Solicitor-General, that if the county council here were merely using the power of sub-sect. 1, and were merely contracting with an industrial contractor that he should provide so many tons of granite or a steam engine, or even that he should repair and keep in repair or enlarge or make a piece of main road, such an agreement, though under seal of the county council, would be exempt from the ordinary rule with regard to deeds not otherwise charged, and be "an agreement made or entered into pursuant to the Highway Acts for or relating to the making, maintaining, or repairing of highways." But for the purpose of this agreement we have not merely to look at sect. 11, sub-sect. 1, which would carry us a very little way, but we have to look at sub-sect. 4. This is not an agreement between a highway authority and an industrial contractor; this is an agreement between two public bodies. The first public body is given the power, independently of this sub-section, of contracting with an industrial contractor, and, if a district council is capable of so contracting with it, can contract with a district council; but without sub-sect. 4 the district council would have no power to make this contract with the county council. A district council has its duties, and may, I assume, enter into contracts with industrial contractors for the purpose of having those duties performed; but a district council is not entitled to turn itself into an industrial contractor or a tradesman or undertake to do work for some other public body for reward in that behalf. To enable the district council to do this special work as industrial contractor with the county council, sub-sect 4 was required, and we must not also forget that sub-sect. 4 is a compulsory section, and the county council could have compelled the district council to do this work. Therefore, in my opinion, this is not a contract made or entered into pursuant to the Highway Acts, which, indeed, though they may be referred to, are not in the least required for this sub-section. They might all be swept away and leave this sub-section still operative. This agreement is an agreement made under sub-sect. 4, and therefore this case is exactly within the decision of my brother Wright and myself in the case of *Cumberland County Council* v. *Commissioners of Inland Revenue* (*ubi sup.*). I may add that, having been helped by counsel, I have now got the history of this particular exemption, and the history is that which I anticipated it would be. In olden times highways were repaired (excluding certain reparation) by each parish, or locality equivalent to a parish, through its surveyors, and those surveyors were enabled, by the old Highway Act of 1835, to contract under hand with anybody who would undertake the repairs or a portion of the repairs. Then come a series of enactments which create local boards with larger areas for the purpose of dealing with highways—that is, local boards for certain districts. Then, under the Highway Acts of 1862 and 1864, in many instances highway boards, which were bodies corporate, were created, and, until the Stamp Act of 1870, deeds which were not otherwise charged were subject to a considerable stamp duty—35*s.*; and as every one of those corporate bodies would have to contract under seal, and as apparently it is law—though I once slightly hesitated as to whether it was to be entirely accepted—that every contract under seal by a corporate body is thereby a deed, it would have been the case that every one of those highway authorities with every contract which they might make with an ordinary workman, contracting, as they would have to contract, under seal, would have a considerable duty, almost a prohibitive duty, to face. It is not otherwise than noteworthy that the last of those Highway Acts, being in 1864, we find in the Revenue Act of 1865, to which the Solicitor-General has referred, in sect. 34, apparently for the first time, this particular exemption given which has been repeated in the subsequent Stamp Acts. All that appears to strengthen the argument on behalf of the Crown, that what is intended by this sub-section is not such a contract as the one we are dealing with, but an ordinary contract between an authority responsible for the maintenance of a road and an industrial contractor who is *sui juris*

and requires no Parliamentary authority to enable him to enter into such a contract. Upon those grounds my judgment must be for the Crown. I make one or two observations on the second point which has been taken by the Crown, and that divides itself under two heads. It was thought that the observations of my brother Wright in the case of *Cumberland County Council* v. *Commissioners of Inland Revenue* (*ubi sup.*) showed that any contract for improvements—any contract which had in it any covenants as to improvements of a road—was *ipso facto* outside this exemption, as such improvements were neither "making, maintaining, nor repairing." I do not intend to pass judgment upon that matter; and I merely observe that, especially having regard to the decision of the Court of Appeal in the case of *Leek Improvement Commissioners* v. *Staffordshire Justices* (*ubi sup.*), my inclination is to say that an improvement is *pro tanto* a "making." The other point taken by the Solicitor-General was that both sub-sect. 1 and sub-sect. 4 of sect. 11 give to the county council and enable the county council to pass on to the district council not merely powers of maintenance, repairs, improvement, and enlargement, but also powers of "other dealing," which he suggests are not powers touched by the exemption in the Stamp Act, and the Solicitor-General went on to say that those powers of "other dealing" were contracted for under the instrument in question. He especially made a point of clauses 20, 22, 23, and 27 of the specification. Without going too precisely and too minutely into the matter, I think that some of those clauses—though not all of them—do relate to matters which are neither maintenance, repair, improvement, nor enlargement. I think the first words of clause 22, the whole of 23, and most strongly the whole of 27, might be said to be matters which were neither making, maintaining, improving, nor enlarging, but at the same time I must observe that the words "other dealing with such roads" in sect. 11 must have a limited construction put upon them, because it evidently only applies to such dealings as a highway board could have, inasmuch as the county council are merely to have the same powers and to be subject to the same duties as a highway board. It may be said that though the highway board gets these powers as a highway board, still if it contracts to have these powers exercised for it, then the case does not come within the exemption of the Stamp Act. There may be certain powers in the nature of police powers given to a highway board, which therefore fall to a county council under sect. 11, sub-sect. 1, and which may be passed to a district council under sub-sect. 4, but which are not powers a contract for the exercise of which is privileged under the Stamp Act. I do not think it necessary now to decide that, nor do I think it necessary to decide whether these are such police powers, or whether these are maintenance or repairing powers. I rest my judgment upon the first ground on which I have put it, and I give judgment for the respondents with costs.

Judgment for the respondents.

Solicitors for the appellants, *Robbins, Billing, and Co.*, for *Henry Barber*, Winchester.

Solicitor for the respondents, *Solicitor of Inland Revenue.*

Wednesday, April 5, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

WILKINSON (app.) v. BURY WATER BOARD (resps.). (a)

Water rate—On "annual rack rent or value" of premises — Rate payable by owner — Owner paying other rates—Gross or net.

By the Bury and District Joint Water Board Act 1903 *the respondents were to supply water at specified rates—viz., "where the annual rack rent or value of such house shall not exceed* 20*l.*, *at a rate per centum per annum not exceeding* 10*l.*"

The appellant was the owner of three cottages let to tenants, and the appellant paid all the rates on such cottages.

Held, that, in order to arrive at the "annual rack rent or value," upon which he was liable to pay the water rate, the appellant was entitled to deduct the rates so paid by him.

CASE stated on a complaint preferred by the appellant against the respondents, under sect. 68 of the Waterworks Clauses Act 1847, for that a dispute had arisen between them as to the proper basis for the assessment of the water rate by the respondents under their special Act in respect of three cottages of which the appellant was the owner, and which were let by him to weekly tenants, the respondents claiming under such special Act to assess the appellant in respect of the three cottages on the gross sums received by him as such owner from the several tenants, and the appellant claimed that he should only be assessed upon the net sums received by him—that is to say, less tenants' local rates.

By sect. 32 of the Bury and District Joint Water Board Act of 1903 (3 Edw. 7, c. ccxxxiv.) (so far as material to this case) it is enacted as follows:

> The board shall at the request of the owner or occupier of any house or part of a house in any street in which any pipe of the board shall be laid, or any person who under the provisions of this Act or any Act incorporated herewith shall be entitled to demand a supply of water for domestic purposes, furnish to such owner or occupier or other person a sufficient supply of water at the rates per annum hereinafter specified (that is to say): Where the annual rack rent or value of such house shall not exceed 20*l.*, at a rate per centum per annum not exceeding 10*l.*

Sect. 3 of the special Act incorporates the Waterworks Clauses Act 1847 so far as the same is applicable for the purposes and not inconsistent with the provisions of the special Act.

By sect. 68 of the Waterworks Clauses Act 1847 it is enacted as follows:

> The water rates, except as hereinafter and in the special Act mentioned, shall be paid by and be recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices.

The appellant was the owner of the three cottages in respect of which the complaint arose, and the same were let by him to separate weekly tenants at a weekly rent of 5*s.* 11*d.*, or 15*l.* 7*s.* 8*d.* per annum each.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

In the urban district of Radcliffe what is known as the compounding system obtains as regards weekly tenants, under which the landlord pays the rates and the local authorities allow him a discount.

The appellant accordingly was required and had to pay to the local authorities in respect of each of the cottages the general district rate and the poor rate, and, under sect. 35 of the special Act, also had to pay to the respondents the water rate for such cottages.

The gross assessment to the poor of each of the cottages was 9*l.* 10*s.*, and the net assessment 7*l.* 10*s.*

The amount which the appellant had to pay out of the rent received by him from his tenants in respect of all the rates on each of the cottages was 3*l.* 11*s.* 5*d*, which reduced the actual amount left in the pocket of the appellant as landlord in respect of each of the cottages to 11*l.* 16*s.* 3*d.* per annum.

The water rates are, under the special Act, due one quarter in advance, and on the 4th June 1904 the respondents' collector demanded of the appellant the sum of 19*s.* 9*d.* for the water rate of the three cottages for the quarter ending the 24th June 1904. This demand was based upon a weekly rent of 5*s.* 7½*d*, and was correct if the respondents were entitled to base the assessment upon that amount, the same being the actual sum received by the appellant from each of his tenants at the date of the assessment.

The appellant disputed this demand, and formally tendered the collector 17*s.* 8*d.* in respect of the demand of 19*s.* 9*d.* This sum was based upon the net rent, and was correct if the appellant was right (for the purposes of basing the assessment) in deducting from the gross sum received by him from his tenants the amounts disbursed by him as aforesaid in rates.

The collector, acting upon the instructions of the respondents, declined the tender.

The respondents contended that the expression "annual rack rent or value," as used in the special Act, meant the actual sum received by the appellant from his tenants, no matter what the same included, and that accordingly they had a right to assess the appellant in respect of each of the three cottages on the gross rent without any deductions for the rates paid by the appellant as aforesaid, but allowing a deduction of the 10 per cent. on the respondents' own rate.

The appellant contended that the expression "annual rack rent or value," as used in the special Act, meant what went into his pocket as rent—namely, what was left of the gross sum received by him from his tenants after the appellant had paid thereout the local rates and the water rate. The basis of the appellant's contention was that "rack rent" meant the true rentable worth of the cottages in question, the tenant paying the rates. He therefore claimed that he should only be assessed on 11*l.* 16*s.* 3*d.*

At the close of the appellant's case the respondents, in addition to their contention upon the merits as to the construction to be placed upon the expression "annual rack rent or value," raised the objection that the justices had no jurisdiction to entertain the complaint on the grounds that (*a*) sect. 68 of the Waterworks Clauses Act 1847 was not incorporated in the special Act as it was inconsistent with and therefore excluded by sect. 32 of the special Act, and that (*b*), even if sect. 68 of the Waterworks Clauses Act 1847 was incorporated in the special Act, it did not authorise the justices to determine the meaning of the expression "annual rack rent," but only annual value, which would not decide the present dispute.

In answer to this objection the appellant contended (*a*) that "annual rack rent" and "annual value" were used and intended as equivalent expressions, and (*b*) that as sect. 3 of the special Act incorporated the Waterworks Clauses Act 1847 so far as the same is applicable for the purposes of and not inconsistent with the provisions of the special Act it must incorporate sect. 68 of the Waterworks Clauses Act 1847, and so constitute the justices the tribunal to determine a dispute as to the meaning of the expression "annual rack rent or value" as used in the special Act, and he pointed out that, if sect. 68 was not incorporated by the special Act, there was no tribunal appointed to settle a disputed assessment under the special Act.

The justices were of opinion that the respondent's objection to their jurisdiction to entertain the complaint was a good one, and accordingly allowed it; but, in case their decision on this point should be held to be erroneous, they held that the words "annual rack rent," as used in sect. 32 of the special Act, meant the rent paid by the tenant to his landlord without any deduction in respect of rates, and that the demand of 19*s.* 9*d.* for the water rent of the three cottages for the quarter ending the 24th June 1904 was right, and they dismissed the complaint accordingly.

Avory, K.C. (*Biron* and *Guy Lushington* with him) for the appellant.—The water rate is to be assessed on the "annual rack rent or value." The words are interchangeable, and mean that the water rate is to be paid on the net sum received by the person paying the rate after these outgoings have been disbursed. In *Smith* v. *Birmingham Corporation* (49 L. T. Rep. 25; 11 Q. B. Div. 195) it was provided by a water Act that the charge to be made for the supply of water should be at a rate varying according to the "annual rent." The appellant was the owner of certain houses let at weekly rents, the appellant paying all rates charged thereon, and it was held that, in order to arrive at the "annual rent" upon which the water rate was to be computed, the actual amount of the rates paid by the appellant was rightly deducted. In *Stevens* v. *Barnet Gas and Water Company* (57 L. J. 82, M. C.) the terms of the Act were "on the annual rack rent of the house . . . if the same be let at a rack rent, and on the annual value if and while the same is not let at rack rent." It was there held that the words "annual rack rent" and "annual value" must be treated as equivalent. He referred to

Sheffield Waterworks Company v. *Bennett*, 28 L. T. Rep. 509; L. Rep. 7 Ex. 409; L. Rep. 8 Ex. 196;

Bristol Waterworks Company v. *Uren*, 52 L. T. Rep. 655; 15 Q. B. Div. 637.

Langdon, K.C. for the respondents.—The cases decided on other private Acts are not in point. The words that govern this case are "rack rent," and that means the gross amount received from the tenant without deductions. "Rent" is

defined by sect. 35 of the Act as the sum paid by the tenant to the landlord, and "rack rent" in this section ought to have the same meaning. The words in the cases that have been cited are different to the words in this case. The justices were therefore quite right.

Lord Alverstone, C.J.—We need not trouble you, Mr. Avory. Some years ago I was a good deal more familiar with these cases than I am now, but I think it is quite impossible to maintain that the position which Mr. Langdon has contended is the right one. In the charging section of this Act the words are "annual rack rent or value." It is plain, for obvious reasons which I need not enlarge upon, that the two words are intended to bear the same signification, "annual rack rent" or "annual value"; therefore no question arises, as it does in some cases, as to whether the words "rack rent" are to be used with a special meaning. They must have for this purpose the same meaning as "value." In the case of *Sheffield Waterworks Company* v. *Bennett* (28 L. T. Rep. 509; L. Rep. 7 Ex. 409; L. Rep. 8 Ex. 196), which went to the Exchequer Chamber, it was held that "annual value" as the charging standard entitled the consumer to deduct the rates, and, unless Mr. Langdon is able to make out before us that the words are used in a different sense, that is an authority binding upon us for the purposes of to-day. But I think it goes a good deal further, because in the case of *Bristol Waterworks Company* v. *Uren* (52 L. T. Rep. 655; 15 Q. B. Div. 637), where the words are "annual rack rent or value," the same line of argument was at any rate assumed by the court, and, though Mr. Langdon is quite right in saying that the courage of the counsel who then appeared did not go so far as contending that which might possibly have been contended, yet it is certainly assumed in that case that the words "annual rack rent or value" had at least a meaning which may be roughly put as corresponding to "gross estimated rental," and that means the rates and taxes being deducted. I desire to point out that "gross estimated rental" has been a term known to the law as embodying the fact that the rates and taxes were deducted ever since the Union Assessment Act 1862, where that definition was expressly given to it. To my mind it is almost impossible to say, in the absence of what I may call special circumstances either appearing on the face of the Act of Parliament itself, or in some contract which controls the matter, that we are to lay down to-day, after all these number of years, that these words have a different meaning. Mr. Langdon says that we ought to do so, because in a later section—sect. 35—the word "rent" is used as the sum of money actually going from the tenant to the landlord. It could have no other meaning there, because it is the right of the tenant to deduct something from what he is going to pay over. But that, surely, is no ground for contending that the words "annual rack rent or value" must be used in the same sense as money actually paid by the tenant to the landlord in the face of all these authorities. I only desire to say that Mr. Avory has indicated that he is going to contend some day that the counsel in the case of *Bristol Waterworks Company* v. *Uren* did not know their business, because they did not go far enough. If that is so, we will wait till the time comes; but it seems to me that, outside of that, all that can be said to-day is that a long series of authorities have construed the words "annual rack rent or value" as being the standard where the rates of the district are to be deducted. I am therefore of opinion that this appeal must be allowed.

Kennedy, J.—I agree.

Ridley, J.—I agree.

Appeal allowed.

Solicitors: *Nicol, Son,* and *Jones* for *Pickstone* and *Jones,* Radcliffe; *John Haslam,* Bury.

Wednesday, April 5, 1905.

(Before Lord Alverstone, C.J., Kennedy and Ridley, JJ.)

East Ham Urban District Council (apps.) *v.* Aylett (resp.). (*a*)

Local government — Paving, &c., highway not repairable by inhabitants—Notice to do work —Purchase after notice given, but before works completed—No service on purchaser—Service of notice of apportionment—Public Health Act 1875 (38 *&* 39 *Vict. c.* 54), *ss.* 150, 257.

Under sect. 150 *of the Public Health Act* 1875 *a local authority served notices upon the owners and occupiers of premises fronting a certain street requiring them to pave, &c., the street, and, upon the notices not being complied with, carried out the works and apportioned the expenses.*

The respondent was not the owner of certain premises fronting the street when the notices were served, and he was not served with such notice. He subsequently bought the premises, and was the owner when the works were completed, but had sold them and ceased to be the owner when the cost of the work was apportioned, and when the notice of apportionment and demand for payment was served upon him.

Held, that the respondent was liable for the amount so apportioned upon him in respect of these premises.

Case stated on an information preferred on behalf of the appellants against the respondent under sects. 150 and 257 of the Public Health Act 1875 for the recovery of 94*l.* 16*s.* claimed to be due to the appellants from the respondent.

Upon the hearing of the information it was proved that the part of Nelson-street to which the matter of the information related is situate in the East Ham Urban District, and is not a highway repairable by the inhabitants at large, and that it was not sewered, levelled, paved, metalled, flagged, channelled, and made good and lighted to the satisfaction of the urban authority.

It was proved that in 1900 the appellants caused plans and sections and estimates to be made and deposited in accordance with sect. 150 of the Public Health Act 1875, and that notices, dated the 28th Aug. 1900, were served on behalf of the East Ham Urban District Council addressed to the owner and occupier of the premises in that street, giving them notice in pursuance of sect. 150 of the Public Health Act 1875 to level, curb, pave, &c., the same in

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

accordance with certain directions therein set out.

On the 28th Aug. 1900 a copy of this notice was served by registered letter, as prescribed by sect. 267 of the Public Health Act 1875, on C. A. Nichall as owner, he being then in receipt of the rack rents of the premises as agent for some other person not the respondent.

The notice was addressed to C. A. Nichall by name.

A copy was also served upon the occupier of each house, on the 28th Aug. 1900, addressed to each occupier by name, and served by hand upon the premises.

It was admitted that no copy of the notice or of any other notice to do the work was served upon the respondent, who was then not owner of the premises or any part of them.

It was proved that neither the owner nor the occupier complied with the notices.

The respondent became the owner of the premises by purchase on the 27th March 1901, and he sold the premises on the 25th June 1902.

The appellants carried out the works and completed the same in July 1901, and the cost of such work was duly apportioned by the surveyor to the appellants in July 1903, and notice of such apportionment and demand for payment of the apportioned sum was duly served upon the respondent on the 10th March 1904, the amount apportioned against the respondent being 94*l.* 16*s.*, and that amount was still unpaid.

No notice disputing the apportionment was served by the respondent on the surveyor to the appellants as provided by sect. 257 of the Public Health Act 1875.

It was admitted both by the appellants and the respondent (*a*) that the respondent was not the owner of the premises in Nelson-street at the time when the notice to do the work mentioned above was served; (*b*) that he was the owner of the premises in July 1901, the date when the works were completed; and (*c*) that he was not the owner at the date of the apportionment and demand for payment—viz., the 10th March 1904.

It was proved that the respondent had not received any notice, and was not aware of any notice having been served, relating to the premises prior to the notice of apportionment and demand for payment on the 10th March 1904.

The respondent contended (*a*) that the service of the notices to do the work was bad inasmuch as one was addressed to the agent in receipt of the rack rent by name, the agent not being the agent of the respondent, and one to each of the tenants by name; and (*b*) that he was not liable as he was not the owner at the date when the apportionment was made and the money demanded.

In support of the contentions the following cases were cited: *Jarrow Local Board* v. *Kennedy* (L. Rep. 6 Q. B. 128), *Farnworth Local Board* v. *Compton* (34 W. R. 334), *Wallsend Local Board* v. *Murphy* (61 L. T. Rep. 777), *Wirrall Rural Council* v. *Carter* (89 L. T. Rep. 171; (1903) 1 K. B. 646), and *Millard* v. *Balby-with-Hexthorpe Urban District Council* (90 L. T. Rep. 489)

The appellants contended (*a*) that the notices served were good; and (*b*) that the respondent was liable as the owner at the time when the work was completed under sect. 257 of the Public Health Act 1875.

The justices decided in favour of the respondent upon his contentions above set forth, and they dismissed the information accordingly.

Macmorran, K.C. and *Temple Martin* for the appellants.—There are two points in this case—the first, whether the preliminary notice was properly served, and, secondly, whether the respondent is liable, he having been the owner at the time when the works were completed, but not the owner at the time when the original notice was served. In *Millard* v. *Balby-with-Hexthorpe Urban District Council* (91 L. T. Rep. 730; (1905) 1 K. B. 60) the appellant was the owner at the time when the notice was served upon him under sect. 150 of the Public Health Act 1875, and he was also the owner at the time when the work was completed. He then ceased to be the owner before the expenses were apportioned and demanded from him, and it was held that, being the owner at the time when the works were completed, he was the person liable. They referred to

Re Bettesworth and Richer, 58 L. T. Rep. 796; 37 Ch. Div. 535;
Stock v. *Meakin*, 82 L. T. Rep. 248; (1900) 1 Ch. 683;
Re Allen and Driscoll's Contract, 91 L. T. Rep. 676; (1904) 2 Ch. 227.

Symmons for the respondent.—Sect. 257 provides for the local authority two methods of enforcing their rights for getting back the money that they have laid out. First of all, it provides a summary remedy by proceedings before the justices, and it provides a remedy by way of putting a charge on the property. The two remedies are distinct, and authorities on one are not authorities on the other. He referred to

West v. *Downman*, 42 L. T. Rep. 340; 14 Ch. Div. 111.

With regard to the former remedy, all the cases show that it is against the owner in default, and that is the person who has not done the work on receiving the notice. He also referred to

Millard v. *Balby-with-Hexthorpe Urban District Council* (*sup.*).

Lord Alverstone, C.J.—Without saying the point is exactly covered by *Millard* v. *Balby-with-Hexthorpe Urban District Council* (91 L. T. Rep. 730; (1905) 1 K. B. 60), it is absolutely necessary for Mr. Symmons to displace, as he has very cleverly sought to do, the reasoning of the Master of the Rolls in the passage that has been so often referred to, because, speaking of sect. 257 and of the person liable under that section, he says in terms at p. 64: "Whether on the terms of that section alone the owner making default in doing the works required by the notice would remain permanently liable, although he did not continue to be owner at the time of the completion of the works, it is not necessary to consider. For, when we come to sect. 257, we find that, in absolutely unambiguous terms, it makes the person who is owner when the works are completed liable. Whether any other person would also be liable it is not necessary to consider." Therefore, even although we might say that that was absolutely unnecessary for the judgment or was not a point for the Master of the Rolls to construe, it would have, of course, properly very great weight with us. I only desire to say, looking back to

sect. 257, that I repeat what I think I said in the previous case of *Millard* v. *Balby-with-Hexthorpe Urban District Council*, which went up to the Court of Appeal. As it stood alone, sect. 257 seems to fix the liability upon the person who is owner at the time of the completion. It refers to expenses incurred whereof the owner of the premises is made liable under this Act, and so clearly refers to the person upon whom a notice might be served under sect. 150, and who would be supposed to be going to do the work, and then, instead of saying "such expenses may be recovered from such person," it puts in the expression "from any person who is the owner of such premises when the works are completed." Therefore it contemplates a different state at a certain period of time—namely, at completion, as distinguished from the default to obey the notice, and possibly a different person by bringing in the words "any person" who happens to be owner at that time. Further than that, although I quite agree with Mr. Symmons that for the purpose of considering the liability under summary proceedings under sect. 150 and sect. 257 the equitable cases to charge have been held not to be ruling authorities, and although the vendor and purchaser cases may not of necessity be authorities, I think *Allen and Driscoll's Contract* (91 L. T. Rep. 676; (1904) 2 Ch. 227) shows that for the purpose of ascertaining when the actual liability arises the period of completion of works under sect. 257 is the date to be taken, because in that case the person in default, according to Mr. Symons' argument, was the vendor and the person who was the owner at the time of the completion was the purchaser, and it was held that the expense fell upon him. I therefore think that, whether we take the section itself or the principle applied in these cases, the decision of the magistrates cannot be supported in the face of *Millard's* case, and I further think the Master of the Rolls has used an argument which is a strong authority in favour of the view we are taking, though I think possibly it is quite true that Stirling, L.J. did not go quite so far. It is only fair to the magistrates to say that they decided this case when, as far as they were concerned, *Reg.* v. *Swindon New Town Local Board* (40 L. T. Rep. 424; 4 Q. B. Div. 305) was binding upon them, and certainly, whatever may have been done, I have no doubt Mr. Symmons did mean to raise the first point. The other ground on which they decided was that there was no liability when the apportionment had taken place, which, of course, has disappeared now since the decision of the Court of Appeal. I therefore think this appeal must be allowed.

Kennedy and Ridley, JJ. concurred.

Appeal allowed.

Solicitors: *Wilson* and *Son*; *Surtees* and *Surtees*.

Friday, April 7, 1905.

(Before Lord Alverstone, C.J., Kennedy and Ridley, JJ.).

Barr, Moering, and Co. (apps.) *v.* London and North-Western Railway (resps.). (*a*)

Railway—Carriage of goods—Tolls—False account to avoid payment—Demand—Railway Clauses Act 1845 (8 *Vict. c.* 20), *ss.* 98, 99.

The appellants delivered at the respondents' station three cases of goods for conveyance by railway to B., and at the same time handed three consignment notes filled in containing particulars of their contents which were described as "hardware." Unless the notes were filled up with the description of the goods sent, the respondents would decline to receive the goods for conveyance, and this was known to the respondents.

As a fact the cases did not contain "hardware," but other goods, the rates for the carriage of which were higher, and it was found that the goods were so described to avoid payment of these higher rates.

Held, that the appellants had committed an offence within sects. 98 and 99 of the Railway Clauses Act 1845, *and the "demand" necessary by the former section was satisfied under the circumstances.*

Case stated on three informations preferred by the respondents against the appellants under sects. 98 and 99 of the Railway Clauses Act 1845, for that they, being persons having care of certain goods passing upon and being on the respondents' railway, unlawfully gave to the collector of tolls for the respondents a false account of the goods with intent thereby to avoid payment of tolls in respect of such goods.

Upon the hearing of the informations the following facts were proved or admitted. The appellants have for many years carried on business as carriers and as agents for importers of goods from the Continent, and have for many years sent goods for conveyance by the London and North-Western Railway.

The practice of the parties in these transactions was as follows:

The appellants, when they sent goods by the railway, made out consignment notes containing (*inter alia*) the description of the goods sent, and delivered such notes by their carmen to the railway company's servants at the goods station where the goods are received for conveyance.

Unless such consignment notes duly filled up are sent, the railway company declines to receive the goods for conveyance, and this fact was well known to the appellants.

The rates charged by the railway company for the conveyance of goods vary in amount according to the nature of the goods conveyed, as the appellants knew.

On many prior occasions in which the respondents had complained of similar misdescriptions, the appellants had on demand paid the higher rates, or the difference had been mutually arranged between the parties.

The appellants on the 7th July 1904 delivered at Broad-street Station three cases amongst others containing goods for conveyance by the

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

London and North-Western Railway Company to Birmingham.

The appellants' carman at the time he delivered the three cases at Broad-street Station handed to one of the respondents' servants three consignment notes containing entries and particulars relating to the three cases.

The goods contained in the three cases had prior to the 7th July been sent by the appellants to the Great Northern Railway for conveyance described as "hardware," and the Great Northern Railway had refused to take them under that description, and had informed the appellants that it was a misdescription. The appellants removed the goods from the premises of the Great Northern Railway Company and immediately sent them to the London and North-Western Railway Company, with the same misdescription on the consignment notes above referred to.

The appellants in describing the goods intended to avoid payment of the rates, which to their knowledge the railway company was entitled to charge for the carriage of leather goods, brushes, and toys, and the appellants so described the goods as "hardware" in order to secure their conveyance at a lower rate per ton than if they had been described according to their true description, and thus gave a false account of the goods.

The respondents had a credit account with the appellants, and in the ordinary course of business the amount due from the appellants to the respondents for the conveyance of the cases to Birmingham was entered in the respondents' books at Broad-street. The amount due for carriage of the three cases was entered in the books in accordance with the above consignment notes as if the three cases contained "hardware." In the ordinary course of business the accounts containing the entries and charges relating to the three cases was afterwards delivered to the appellants.

The three cases were in ordinary course conveyed to Birmingham, and it was there discovered by the respondents that none of the cases contained "hardware" as alleged in the column headed "Article" in each of the consignment notes. In fact and to the knowledge of the appellants one case contained "leather goods," another contained "brushes," and another "toys," and the contents of each of the cases ought respectively to have been so described.

The rate of tolls payable under the railway classification book and the rate book by the appellants to the respondents in respect of the conveyance from Broad-street Station to Birmingham of "hardware" is 25*s.* per ton, of "leather goods" is 40*s.* 10*d.* per ton, of "brushes" is 34*s.* 2*d.* per ton, and of "toys" 34*s.* 2*d.* per ton. These rates were well known to the appellants.

Upon behalf of the appellants it was contended that under sects. 98 and 99 of the Railway Clauses Act 1845 the appellants were not liable to any penalty unless the railway company had first in accordance with the sections made a demand upon the consignors for an account of the goods, and that the respondents in the present case had made no such demand, and that each of the informations should therefore be dismissed.

Upon behalf of the respondents it was contended that as regards the offences alleged in these informations it was not necessary for the railway company to make any such demand, and that if any such demand was necessary then that the fact (in accordance with the regular practice, and well known to the appellants) that the goods would not have been received by the railway company unless a consignment note containing necessary particulars had been handed to the railway company with them constituted a sufficient demand within the meaning of the sections.

The magistrate was of opinion that it was necessary that a "demand" should be made for the account, and that no specific demand had been made in either of these three cases, but he was further of opinion that the demand was satisfied by the general requirements according to the ordinary course of business that the consignors should hand the respondents the consignment notes stating amongst other particulars what the cases contained, and that the delivery by the appellants and the taking by the respondents of the consignment notes under the circumstances hereinbefore mentioned showed that a demand had been made by the railway company sufficient to comply with the requirements of the statute. Under these circumstances he held that a demand had been made, and he convicted the appellants.

Danckwerts, K.C. (*Kays* with him) for the appellants.—The conviction is wrong. No offence has been committed within sects. 98 and 99 of the Railway Clauses Act 1845. By sect. 98 "Every person being the owner or having the care of any carriage or goods passing or being upon the railway shall, on demand, give to the collector of tolls at the places where he attends for the purpose of receiving goods or of collecting tolls for the part of the railway on which such carriage or goods may have travelled or be about to travel, an exact account in writing signed by him, of the number or quantity of goods conveyed by any such carriage, and of the point on the railway from which such carriage or goods have set out or are about to set out, and at what point the same are intended to be unloaded or taken off the railway, and if the goods conveyed by any such carriage, or brought for conveyance as aforesaid, be liable to the payment of different tolls, then such owner or other person shall specify the respective numbers or quantities thereof liable to each or any of such tolls." Here your Lordships will notice that each consignment was homogeneous, one was purely leather goods, the other was purely brushes, under that head, and the third was purely toys, therefore the concluding words do not apply. The demand must be made upon a person who is owner of goods or the carrier of goods which are upon the railway. That cannot apply until after the carriage is passing on the railway, or the goods are upon the railway, and it is then the demand can be made. Obviously if you look at the whole of the section it looks like the kind of case which would occur where either a person has a carriage running along the railway, or where another carrier than the railway company has goods upon the railway which they are carrying. These are two of that group of sections where the word "tolls" is used, and one of that group of clauses where I submit tolls do not include charges for carriage. The original idea of railways was that people would use the

railways like a highway with their own engines and carriages, and tolls were fixed for that. Under sect. 97 the word "tolls" has certainly been held to include only tolls in the sense which I am putting it, and not charged as carriers. Then by sect. 99: "If any such owner or such other person fail to give such account or produce his way-bill or bill of lading to such collector, or other officer or servant of the company demanding the same, or if he give a false account, or if he unload or take off any part of his lading or goods at any other place than shall be mentioned in such account"—there again those words are appropriated to where a railway company is not a carrier—"with intent to avoid the payment of any tolls payable in respect thereof, he shall for every such offence forfeit to the company a sum not exceeding," &c. The group of sections begins with sect. 86, and the heading is, "With respect to the carrying of passengers and goods upon the railway and the tolls to be taken thereon be it enacted as follows." He referred to

Railway Clauses Act 1845 (8 Vict. c. 20), ss. 86 to 96.

Then by sect. 97: "If, on demand, any person fail to pay the tolls due in respect of any carriage of goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or, if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the moneys arising," and so on. That section has been construed by the Court of Exchequer in *Wallis* v. *London and South-Western Railway Company* (21 L. T. Rep. 675; L. Rep. 5 Ex. 62). Kelly, C.B. says: "The defendants' claim to detain these goods is placed on sect. 97 of 8 Vict. c. 20. But on looking on that section it is clear that it refers, not to charges due to the company for the conveyance by them of goods as carriers, but to the case of goods conveyed in the carriages of the owners, who bargain only for the use of the company's line. This is clear, if sect. 97 is read in connection with the immediately preceding sects. 95 and 96, which relate evidently to such tolls only. No doubt the word "tolls" may sometimes have a more extensive signification given to it, but it here means only tolls in the proper sense of the word—that is, tolls paid for the use of the railway. The section has, therefore, no application to the case stated on the record, and the demurrer must be allowed." Then Martin, B. says: "I am of the same opinion. The word 'tolls' in sect. 97 obviously means that which the Lord Chief Baron has stated—that is, tolls for the use of the railway by persons carrying goods in their own carriages, as, for instance, in the case of coals. It is for such tolls only, being the tolls mentioned in the previous sections, that sect. 97 gives a lien to the company. But it is obvious that the tolls mentioned in the plea are not such tolls, but reasonable charges for the conveyance of goods by the defendants as carriers. The plea is, therefore, no answer to the declaration." Channell, B. says: "The defendants rely upon their statutory lien, but the Act does not apply to goods received by them as carriers." Pigott, B. concurred. There you have the unanimous opinion of those four judges, that sects. 95, 96, and 97, obviously, they say, relate to tolls properly, and not to charges for conveyance of goods as carriers. He also referred to

Brown v. *Great Western Railway Company*, 47 L. T. Rep. 216; 9 Q. B. Div. 744;
Caledonian Railway Company v. *Guild*, Ct. Sess. Cas., 4th series, 1 Rettie, 198;
Peebles v. *Caledonian Railway Company*, Ct. Sess. Cas., 4th series, 2 Rettie, 346.

Sects. 97, 98, and 99 go together, and if that is the proper construction of the 97th section, as I am entitled to say on the two preceding sections, then you get at once an explanation of the introductory part of sect. 98: "Every person being the owner, or having the care of any carriage or goods passing or being upon the railway." Here, before the demand can be made upon him, he must be a person who answers that description. He must either be the owner, or having the carriage of goods passing or being upon the railway. That can occur where the man uses the railway with his own carriage and carrying his own goods, or the case where some other carrier uses the line for the purpose of carrying the goods. It is not at all appropriate to the ordinary case of where somebody sends goods to the railway company, to their station, and they take possession of them at the station, and then deal with them afterwards as they like, put them upon the line where they please, and take them off the line where they please, provided they arrive at their destination. There has been no demand at all of any sort or kind in fact with reference to these goods. [Lord Alverstone, C.J. — Even though the magistrate is right in saying the goods would not be received without a paper which contains the description. You say it is not a good demand.] Yes, it is not such a matter as is authorised by the section, because the goods must be on the railway before the demand can be made. And all that happened here was the goods were sent to the railway station, and they never were upon the railway at any time before the offence was committed. But even so the offence has not been committed, because there are two essential conditions. There must be a demand and a demand not only generally, but a demand when the goods are upon the railway, and the false account must be given after the goods are upon the railway. I submit neither of those conditions was satisfied here. My last point is that this section does not apply to the case where the company is a carrier.

Shearman, K.C. and *J. P. Grain*, for the respondents, were not called upon to argue.

Lord Alverstone, C.J.—Upon the point raised in the case, that there was no demand, which I will deal with first, that the demand has been satisfied by what was done here, I have no doubt whatever. I will not refer to the facts again, because Mr. Danckwerts most properly said he did not justify them, of the goods having been sent to one railway company and afterwards sent to the North-Western Railway Company, having been refused by the Great Northern Company, and in this case the person having the care of the goods knowingly made a false account to the railway company for the purpose of getting the goods carried at a lower rate. If the major point which I am coming to in a moment is not

good, if the section applies, the learned magistrate has held that a person who anticipates a question and gives a false account, knowing an account has to be given, is liable under the section. Here there has really been an implied demand, because the magistrate finds as a fact the goods would not be received without the paper, and therefore the paper really is delivered in reply to what I may call a standing inquiry. The magistrate has thought, under those circumstances, the words "Giving a false account" are satisfied, and that the offence was committed under the section. In my opinion, the line of argument taken by the magistrate was right. In my judgment, for reasons which I will explain in a moment, it is not necessary at that moment that the goods shall be upon the railway. I doubt whether any demand is necessary if a false account is tendered; certainly it is not necessary in a case in which the goods would not have been received unless the paper had been handed in. Therefore, upon the points raised by the magistrate, I have no doubt whatever that the conviction was right. In that state of things we have listened to a most interesting argument by Mr. Danckwerts, and a most refreshing argument. The only criticism I have to make as to Mr. Danckwerts' argument is that he has completely overlooked the words of the section. These are two of the groups of sections numbered 86 to 107. No one who has ever studied these sections can have any doubt that in some cases the word "tolls" is used in a limited sense. In some cases it must be used in a more extended sense. That Mr. Danckwerts, of course, has not for a moment disputed. He has argued, for reasons I will deal with in a moment, that under sect. 98 they must be dealt with in the limited sense. I only refer, of course, to the interpretation clause, which shows "tolls" may be used in the wider sense as including rates and charges. I further agree with Mr. Danckwerts that, technically, the expression which was ordinarily used before 1845 and since, and in the later Acts, for charges and carriage for goods, are rates and charges such as are referred to in those later Acts. In this group of sections, taking 86 to 107, and taking 98 and 99, is it reasonable it should only be limited, and do the words apply only to the people who are using the railway for carriage of goods in their own waggons or trucks, or another railway company using that line of railway for passing these trucks along which occurs thousands and thousands of times every day, as Mr. Danckwerts has properly put, under running powers, under agreements, through rates, and a number of different circumstances which are almost countless in their variety. Now, that it would be curious if the section were so limited, I think is plain, but that is no answer if Mr. Danckwerts has made good his argument. Let us read the words of the section, which I have watched most carefully and attentively, and Mr. Danckwerts' argument does not deal with it, in my opinion: "Every person, being the owner or having the care of any carriage, or goods passing, or being upon the railway, shall on demand give to the collector of tolls at the places where he attends for the purpose of receiving goods. . . ." Now, in the sense Mr. Danckwerts has been arguing, the man who collects the tolls never receives the goods at all. He may possibly be said to receive the truck, though that would be rather a strained meaning, but certainly where the railway company, or, say, the Great Northern Company, runs over the North-Western under what I will call the toll clause, the running power clause, with its own engine, it would not be even true to say the collector in that case receives even the truck. Therefore it is quite plain to my mind the opening words of this section contemplate a case where the person going to collect the money receives the goods, or, in other words, those words are only applicable in that part of the section to the case of a man who is receiving the goods, and no part of Mr. Danckwerts' argument touched that construction as to what those words should mean. But let us see whether the other words of the section do not confirm that view. The person who is the owner of any goods is to give an exact account in writing signed by him of the number or quantity of the goods. I quite agree the words "conveyed by any such carriage" are applicable mainly, as I pointed out further, according to Mr. Danckwerts' view, to the case of a person who was bringing a truck load of goods which contains what are called mixed consignments. But when we come to the last words, the meaning of the earlier words which I called attention to is made even more abundantly clear: "And if the goods brought for conveyance be liable to the payment of different tolls, then such owner or other person shall specify the respective numbers or quantities thereof liable to each or any of such tolls." That, in my opinion, clearly points to the position of a person who brings goods for conveyance which are liable to different tolls, meaning thereby different rates of charge. Now Mr. Danckwerts supported his argument by saying that the demand in this case, or the information in this case, was what a man need not have given. Was that so? If it is a mixed parcel, as Mr. Danckwerts described it, what is to be given is not only the number and character but the number and quantity of the goods, in other words, it means the character of the goods must be given, or else, saying I have got twenty barrels and forty cases, but without saying what the twenty barrels and forty cases contain, would not show whether they were or not to be liable to each or any of such tolls. We know of course that the tolls vary with regard to the goods as well as the rates, therefore it is perfectly obvious that the section, when construed fairly and properly, is a section out of this group, in which, in my opinion, fairly, "tolls" cannot be used in the narrower sense Mr. Danckwerts contended for before us. I am well aware there are sections in which "tolls" can only be used in the narrow sense, as for instance in the milestone clause. It is quite plain a milestone clause cannot be used to differentiate for this purpose so as to include what I may call rates and charges. But I desire to say, although I am bound by the case of *Wallis* v. *London and South-Western Railway* (*sup.*) in this court, if that case ever does come to be reviewed by the Court of Appeal, I think it will require to be considered whether it is right. It was a very peculiar case, because the lien was attempted to be placed against goods coming either from a foreign consignor, or consignee, I do not remember exactly which, but there was a foreign element in

the case. It was a curious case in that respect, but taking it as binding on me, I am bound to say if the question arose before me under sect. 97, "tolls" do not include rates and charges. I think no part of that argument can be applied under sects. 98 and 99, and therefore, with regard to the meaning of the sections, I am of opinion the objection does not prevail. I have dealt with it, although it was not taken in the court below, or even indicated in the remotest way in the case. If it had been what I must call a root objection to this conviction we should of course have given effect to it.(a) In my opinion the appeal must be dismissed.

Kennedy, J.—I am of the same opinion, and I confess, with all deference to the very interesting and ingenious argument we have heard, it seems to me to be a clear case. The subject of the proceedings before the magistrate was, according to his finding in the case, the dishonest sending of goods under a misdescription by rail, the misdescription being given by the sender of the goods no doubt for the purpose of not paying the rate which he would have had to pay if the goods had been truly described. The point which was raised, as appears by the case, was that whereas the statute for certain purposes unquestionably requires a demand, there had been nothing which the magistrate was entitled to treat as such a demand, that is, a demand in satisfaction of the requirements of the statute, proved on behalf of the prosecution. Here the magistrate has, in fact, held, and I think rightly held, that under these circumstances there was a demand, because, according to the usage known well by the particular persons proceeded against here, by their sending the goods by this railway, the railway company would require the production of the account which is here impeached, or an account of that nature before the goods would be accepted for carriage. I merely wish to add this for myself: I wish to hold myself free, if the question ever arises, to say that the word "demand" in sect. 99, on the question of where the offence is created, applies no doubt to a procedure in which the party proceeded against was sought to be made liable for failing to give an account, and it would be, to my mind, unreasonable and unjust, that the mere failure to deliver an account, and a correct account, should render a person liable to a penalty if there has been no request for it. But when the section goes on to say, "or if he give a false account," it does seem to me to be unreasonable to say that there must be an express demand when the necessity, or indeed the opportunity, for the demand is taken away by the act of the person acting fraudulently, who says: "Here is the account which I am required to give under sect. 98, the exact account." I am not prepared to say that the demand, supposing it had been the first occasion of sending any goods, would have been necessary, if the person who might be taken in this case to do what everybody is supposed to do, namely, to know what is required by the Act of Parliament, instead of waiting to be asked by the collector at the receiving place: "Give me the account required by the law," says, "here is the account required by the law," and to say if he does that he cannot be held liable for the falsity of that account. That seems to my mind not a reasonable construction of the terms of the Act of Parliament. It is an account which must be exact, which he cannot be punished for not giving or for failure to give unless it is asked for, but if he, so to speak, renders the demand absurd because the man hands it to him before any demand is made, it seems to me none the less an account which, if false, as this account was, is one in respect of which a penalty might be inflicted. As to sect. 98, without going all over it or covering the ground again which my Lord has covered or which has been covered by anything that has been said, it seems to me, unless one heard the argument, it would have been difficult to see words that more aptly apply to the circumstances of this case, because not only by the interpretation clause, but, I think, by the express words of this clause, though it may be different in other sections, the clause deals with the receipt by a collector of tolls for goods at a receiving place, and secondly, describes them as goods conveyed by carriage, which would be no doubt somebody else's carriage, and "or brought for conveyance" in which these goods were brought to the receiving places, and were received and placed, and are goods which are liable to the payment of different tolls. That seems to me to apply, at any rate, quite as much to goods sent, as these were, in a different case—to goods which may be in one complete package in a carriage which the person who brings them in the carriage wishes them to be conveyed in on the line. It seems to me impossible to say that the account which is to be given was not the account that was required for the proper adjustment of tolls included here, as it clearly does so, according to the sections—the payment may be called actual rates or charges for conveyance of goods on the line. It appears to me, on that ground, the conviction was right.

Ridley, J.—I am of the same opinion. I wish to say that, upon the finding of the magistrate that a demand was necessary, I am not satisfied at all that it was necessary in the events which happened in this case, where the person in question has given the false account. I am not prepared to say I agree with that finding. I am much disposed to agree with the judgment of my Lord and my brother Kennedy, to the effect that in such a case as that it is not necessary to prove a specific demand. On the rest of the case I agree with the judgments that have been given, and I do not think I can usefully go over the ground again.

Appeal dismissed.

Solicitors: *Goldberg, Barrett,* and *Newall; C. de J. Andrews.*

(a) See *Knight* v. *Halliwell* (30 L. T. Rep. 359; L. Rep. 9 Q. B. 412).

Tuesday, April 4, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

FIRTH (app.) *v.* MCPHAIL (resp.). (*a*)

Public health—Unsound meat—Carcase deposited for purpose of sale—No exposure for sale—Offence—Person to whom article "belongs or did belong at the time of exposure for sale"—Public Health Act 1875 (38 *& 39 Vict. c.* 55), *ss.* 116, 117 *—Public Health Acts Amendment Act* 1890 (53 *& 54 Vict. c.* 59), *s.* 28.

The owner of unsound meat who has deposited the same for the purpose of sale and intended for th food of man, upon premises other than his own where it is seized before it has been exposed for sale, does not, by so depositing the meat—there being no exposure for sale—become liable to a penalty either under sect. 117 *of the Public Health Act* 1875 *taken by itself, or under that section as amended and extended by sect.* 28 *of the Public Health Acts Amendment Act* 1890.

Barlow *v.* Terrett (65 *L. T. Rep.* 148; (1891) 2 *Q. B.* 107) *followed.*

CASE stated by the stipendiary magistrate for Kingston-upon-Hull, sitting in a court of summary jurisdiction.

At a court of summary jurisdiction an information was laid before the magistrate on the 3rd Aug. 1904, in pursuance of a resolution passed by the local authority, by James McPhail (the respondent), principal meat inspector and inspector of nuisances to the Hull Corporation.

The information was as follows:

That George Firth, of Goole, in the county of York, was, on the 4th May 1904, the person to whom did belong the carcase of a cow which was on the 4th May 1904 deposited in the slaughterhouse occupied by one Charles Brader, in Sewer-lane, in the city and county of Kingston-upon-Hull, for the purpose of sale and intended for the food of man, and was lawfully seized by the said James McPhail, then appearing to him as such inspector of nuisances to be diseased, and the same carcase at the time of such seizure being in fact diseased, which carcase was afterwards, on the 6th May 1904, in due course of law adjudged by the stipendiary magistrate to be diseased and condemned by him accordingly and ordered by him to be destroyed, contrary to the form of the statute in such case made and provided.

The information was heard before the stipendiary magistrate on the 1st Sept. 1904, when the following facts were proved:—

The cow, then being the property of Mr. William Bristow, near Goole, had been killed and dressed when at the point of death from internal inflammation after calving on the night of the 1st May 1904, or the early morning of the 2nd May.

The appellant (George Firth), knowing the circumstances connected with the slaughter, purchased the diseased carcase from William Bristow on the evening of the latter day, having previously on the same day arranged with Mr. Charles Brader, a meat salesman carrying on business at No. 90, Sewer-lane, Hull, to consign it to him for sale.

On the 4th May the appellant deposited the carcase at No. 90, Sewer-lane, for the purpose of sale and intended for the food of man, and it was seized at that place by the respondent and subsequently condemned by the magistrate as diseased and unfit for human food.

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

On the part of the appellant it was contended that as there had been no exposure for sale, but only a deposit in a place for the purpose of sale upon premises other than those of the appellant, and as the carcase had not been found in the possession of the appellant he was liable to no penalty under sect. 117 of the Public Health Act 1875 (*Barlow* v. *Terrett*, 65 L. T. Rep. 148; (1891) 2 Q. B. 107, being cited), and, further, that the Public Health Acts Amendment Act 1890 did not affect the case.

On the part of the respondent it was contended that the amending section—sect. 28 of the Act of 1890—did create new offences as was apparent from the use of the word "sold," which did not occur in the original sections, and that the section not only extended the list of articles, but applied the penalties of sect. 117 to persons who had sold unsound meat, or had deposited it in any place for the purpose of sale or of preparation for sale.

The magistrate was of opinion that the contention of the respondent was right, and he convicted the appellant and committed him to prison for two months. Apart from the amending section, and but for the decision in *Barlow* v. *Terrett* (*ubi sup.*), which was decided under the Nuisances Removal Act 1863, it would seem arguable that on the reading of sect. 117 the word "belongs" is not governed by "at the time of exposure for sale," as are the words "did belong." "Belongs," being in the present tense, might be said to mean "belongs now"—that is, at the date of the order for destruction. This point did not appear to have been taken in *Barlow* v. *Terrett* (*ubi sup.*), and was not mentioned in the judgment.

The question for the opinion of the court was whether upon the above statement of facts the stipendiary police magistrate came to a correct determination and decision in point of law. If so, the conviction was to stand; but if the court should be of opinion to the contrary, then the conviction was to be reversed.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides (under the heading "Unsound Meat," sects. 116 to 119):

Sect. 116. Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal, carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, or milk, exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if any such animal, carcase, meat . . . appears to such medical officer or inspector to be diseased or unsound or unwholesome, or unfit for the food of man, he may seize and carry away the same himself or by an assistant in order to have the same dealt with by a justice.

Sect. 117. If it appears to the justice that any animal, carcase, meat . . . so seized is diseased or unsound or unwholesome or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs, or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding twenty pounds for every animal, carcase, or fish, or piece of meat . . . so condemned, or, at

the discretion of the justice, without the infliction of a fine, to imprisonment for a term of not more than three months.

Part 3 of the Public Health Acts Amendment Act 1890 (53 & 54 Vict. c. 59), relating to "Sanitary and other provisions," was adopted by the urban local authority in May 1891, and in Part 3 it is provided:

Sect. 28 (1). Sections one hundred and sixteen to one hundred and nineteen of the Public Health Act 1875 (relating to unsound meat) shall extend and apply to all articles intended for the food of man, sold or exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, within the district of any local authority. (2) A justice may condemn any such article, and order it to be destroyed or disposed of, as mentioned in section one hundred and seventeen of the Public Health Act 1875, if satisfied on complaint being made to him that such article is diseased, unsound, unwholesome, or unfit for the food of man, although the same has not been seized as mentioned in section one hundred and sixteen of the said Act.

Clarke Hall for the appellant.—The conviction of the appellant was wrong. The information was that the appellant, being the person to whom this carcase belonged, deposited the same for sale, so that the offence charged was the depositing for sale. The question turns on sects. 116 and 117 of the Public Health Act 1875, and sect. 28 of the Public Health Acts Amendment Act 1890. Dealing first with sects. 116 and 117 of the Act of 1875, it is clear that the appellant could not be convicted under those sections. The section imposing the penalty is sect. 117, and, as that is a penal section under which a person may be liable to imprisonment, it ought to be construed strictly, and a person ought not to be convicted under it unless clearly brought within its provisions. Sect. 116 provides for the examining and seizing of any carcase, &c., if "exposed for sale, or deposited in any place for the purpose of sale or of preparation for sale, and intended for the food of man." So that under that section the carcase may be seized if "deposited for sale," and under sect. 117 it may, if condemned by the magistrate, be destroyed. Then, coming to sect. 117, the persons are clearly designated upon whom the penalty is to be imposed—namely, "the person to whom the same belongs, or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found." The two latter classes do not apply in this case, as the appellant was not the person "in whose possession" or "on whose premises" the carcase was found. The only question is whether the appellant comes within the words "the person to whom the same belongs, or did belong at the time of exposure for sale." The appellant does not come within those words, as in the present case there was no exposure for sale, and exposure for sale is a necessary ingredient to constitute the offence under that section. Sect. 116 includes within its scope—that is, for purposes of seizure—a carcase "deposited for the purpose of sale," but the Legislature in dealing with the persons liable to the penalties in sect. 117, omits altogether the person who has merely "deposited for the purpose of sale," thereby clearly showing the intention that the person who merely "deposits unsound meat for sale," although he is liable to have the unsound meat seized and destroyed, is not liable to the penalties imposed by sect. 117; and it may be, as pointed out by Day, J. in *Barlow* v. *Terrett* (65 L. T. Rep. 148; (1891) 2 Q. B. 107), that the Legislature thought that the person who only deposited for sale was sufficiently punished by the loss of the meat. *Barlow* v. *Terrett* (*ubi sup.*) is precisely in point in the appellant's favour. No doubt it was decided on a different Act—namely, the Nuisances Removal Act 1863 (26 & 27 Vict. c. 117), s. 2—but the words of that section are precisely the same as the words in sects. 116 and 117 of the Act of 1875, and while under that section—sect. 2 of the Act of 1863—the inspector may examine and seize unsound meat "deposited for the purpose of sale," as in sect. 116 of the Act of 1875, when it comes to the penalty part of the section, the person who "deposits" is omitted, and the same words are used as in sect. 117. It was there held that for a conviction there must be either a sale or an exposure for sale, and that merely depositing for sale was not enough. Coming to sect. 28 of the Act of 1890, the word "sold"—"sold or exposed for sale"—is new, but that section was only intended to extend the list of articles and to include more articles of food within this legislation, but it does not create any new offences, and was not intended to increase the number of offences, and it therefore does not create the offence with which the appellant is charged.

Danckwerts, K.C. (*Sington* with him) for the respondent.—The magistrate took the right view of these sections, and the conviction was right. In sect. 117 the words "to whom the same belongs" must mean "belongs" at the time of the seizure, and that person was the appellant. If the construction put upon these sections in *Barlow* v. *Terrett* (*ubi sup.*) be adopted, then no meaning can be given to the words "to whom the same belongs," and, by the decision of Day, J. in that case, no effect is given to the word "belongs" as distinct from "did belong." The words "did belong at the time of exposure for sale" were put in to prevent some persons from escaping the penalty who otherwise would not escape. The unsound meat must be seized under one of three conditions—namely, if "exposed for sale," or "deposited for the purpose of sale," or "of preparation for sale," and then when we come to sect. 117 the penalty is imposed upon (amongst others) "the person to whom the same belongs"—that is, belongs at the time of seizure; and there is no ground for saying that "exposure for sale" is necessary, or that it is necessarily the last step before proceedings can be taken. On the true construction of the section *mens rea* is necessary, and that was present in this case; the innocent purchaser is excluded from its operation, and that solves every difficulty. The cases showing where *mens rea* is necessary are collected and considered by Wright, J. in *Sherras* v. *De Rutzen* (72 L. T. Rep. 839; (1895) 1 Q. B. 918). [*Clarke Hall* referred to *Blaker* v. *Tillstone* (70 L. T. Rep. 31; (1894) 1 Q. B. 345) as showing that it was not necessary that the defendant should have personal knowledge of the condition of the meat.] Exposure for sale is not necessary for a conviction under sect. 117. In *Mallinson* v. *Carr* (63 L. T. Rep. 459; (1891) 1 Q. B. 48) it was held that a person who had in his possession unsound meat intended for the food of man was liable to be

convicted under sect. 117, notwithstanding that he had not exposed the meat for sale; and that case was not disapproved of in *Wieland* v. *Butler-Hogan* (21 Cox Mag. Cas. 522; 90 L. T. Rep. 588), where it was distinguished. Therefore, even on the construction of sect. 117 itself, this conviction was right. Coming to sect. 28 of the Act of 1890, the word "sold" is introduced for the first time, thereby giving a new cause of seizure and creating a new offence, and the section extends and applies both sects. 116 and 117 to cases where the articles are "sold, or exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale." Under the former section—sect. 116—as it then stood the inspector could not have seized where the meat had been already sold and the exposure of it had ceased, and it was to meet that difficulty that the word "sold" was inserted, so that the person who had sold the unsound meat might be proceeded against, although the exposure had ceased. The section was intended not only to create new offences, but also to extend the provisions of sect. 117 to those new offences. Therefore the person who either sells it or deposits it for purpose of sale is liable, and sub-sect. 2 of sect. 28 shows that the responsibility of the owner was extended.

Clarke Hall in reply.—If sect. 28 of the amending Act is made to apply not only to articles, but to offences, then the appellant would come under it. Sect. 117 was applied to the new section to enable the magistrate to condemn unsound meat in cases where he could not have done so before; but it does not follow that because sect. 117 was put in to enable the magistrate to condemn in cases where the meat was sold therefore the section has created a new offence. The word "sold" was introduced in sect. 28 to meet the case of *Vinter* v. *Hind* (48 L. T. Rep. 359; 10 Q. B. Div. 63), and to prevent a person who had already exposed it for sale and had sold it from escaping punishment. Then with regard to *Barlow* v. *Terrett* (*ubi sup.*), where it was held that exposure for sale was necessary under sect. 2 of the Act of 1863, it was to meet that decision that the amendment was made in sect. 47, sub-sect. 2, of the Public Health (London) Act 1891 by introducing the words "deposit for the purpose of sale," and thereby rendering liable to the penalty the person who had "deposited for the purpose of sale," which would have applied against the appellant if this case had been in the metropolis. Outside the metropolis the decision in *Barlow* v. *Terrett* (*ubi sup.*) still applies. Sect. 28 applies to "all articles" and that only. Where a new offence is to be created it ought to be done in clear language.

Lord ALVERSTONE, C.J.—My mind has fluctuated a good deal during the course of this argument. There is so much to be said on broad principles in favour of the view of counsel for the respondent that if I could see fair reasons for construing the amending words of sect. 28 of the Act of 1890 as a general Act which read into all those previous sections words not to be found there before, I should have thought there was a great deal to be said for, and great force in, the respondent's argument that this conviction is right. It seems to me, however, that, looking at the scope of the amending Act and the previous legislation, we cannot come to that conclusion. It is perfectly true that this statute is a statute which ought to be construed liberally in the sense of making it effective in order to prevent diseased meat and diseased food of various kinds from being sold to persons who are not themselves able to detect whether the meat or the food is good or not. But it must be remembered that that particular evil is met, as far as it can be met, by the power to seize the meat, and that the additional punishment, if I may use the expression, of inflicting a fine on the persons who have done it or who are parties to the doing of it, though it may be very desirable to prevent the thing from occurring again, does not afford any direct protection to the public in the matter of the meat that is so seized. That being so, we have to remember that sect. 117 is a penal section; it is a section which in the part of it that we are now considering imposes a penalty on certain persons, and we have now to say whether that section—sect. 117—taken by itself as is contended, or amended, as it must be taken as being amended, by sect. 28 of the Act of 1890, is wide enough to include the case of a penalty and to enable a penalty to be inflicted upon a person who has deposited for sale, but whose article has not itself been exposed for sale. Now, taking sect. 117 by itself, I think that, whatever may be said as to *Barlow* v. *Terrett* (*ubi sup.*), there is nothing to enable us to answer the reasoning which Day, J. then adopted undoubtedly. He regretted that he was obliged in that case to quash the conviction and let the appellant off. That would point to his strong view that the statute could not be construed in the way which would make the person liable to the penalty under the circumstances. Therefore, if anything, it shows that Day and Lawrance, JJ. would, if they possibly could, have put upon this statute the construction which counsel for the respondent now contends for. Now, sect. 116 provides for the seizure of meat "exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man." Then sect. 117, directing that the justice might condemn the article seized, went on to order it to be destroyed so as to prevent it from being "exposed for sale, or used for the food of man"; and then it went on to say, "and the person to whom the same belongs, or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty," and so forth. Now, the last words in this sentence, "in whose possession or on whose premises the same was found," have not to be considered in this case, inasmuch as the meat in question was not in the possession of the appellant or on his premises when it was found and seized by the respondent. I desire to say that I see no reason at present to doubt the decision in *Blaker* v. *Tillstone* (*ubi sup.*), to the effect that, upon a summons under sect. 117 against a person for having in his possession and deposited upon his premises, for the purpose of preparation for sale and intended for the food of man, meat which was unsound, it is not necessary to show that the defendant had personal knowledge of the condition of the meat. It seems to me that, having regard to the particular language used in the section and the object of the Legislature, there is no reason why the person who has actually in his possession that unsound

article which is intended for the food of man should not be liable for the penalty, and that was the view we took of the matter in the case of *Wieland* v. *Butler-Hogan* (*ubi sup.*), where we were able to distinguish the case on the ground that in that case there was no evidence at all of the meat being intended for the food of man after it had gone bad. Therefore I do not think that the argument which counsel for the respondent has pressed upon us, that *mens rea*, or guilty knowledge, is necessary for the whole of the section, is one to which we can give effect. Going back to the words in sect. 117, "and the person to whom the same belongs, or did belong at the time of exposure for sale," it seems to me, as Day, J. has pointed out in *Barlow* v. *Terrett* (*ubi sup.*), it may be that in the matter of penalty the Legislature thought that the forfeiture of the meat was a sufficient punishment unless there had been an actual exposure for sale, and I confess I am unable to read the words counsel for the respondent has referred to, "and the person to whom the same belongs," as meaning "belongs at the time of seizure." Though I do not deny that counsel has put most ingenious cases to account for the following words, "or did belong at the time of exposure for sale," the more natural meaning of that section seems to me to be that exposure for sale is a condition precedent before the penalty can be inflicted upon any person under that part of the section. Passing to sect. 28 of the Act of 1890, I have already indicated that if I had been able to read subsect. 1 of sect. 28 as an enumeration of different classes of articles that might be seized, or different states of circumstances under which articles might be seized as applicable to all the sections, I think, as I have already said, it would be a difficult argument to answer. But, as has been pointed out, except the word "sold," the words "deposited in any place for the purpose of sale" occurred in sect. 116, and, inasmuch as sect. 28 of the Act of 1890 extended all the sections—that is, sects. 116 to 119 of the Act of 1875—to all articles intended for the food of man, and so forth, I think it is too strong to say that the penal section, the section imposing the penalty—namely, sect. 117—has been extended in the sense of doing away with that which was, if I am right, a specific condition precedent—namely, exposure for sale—before a penalty could be inflicted. I think the broad and the true view of sect. 28 is that which counsel for the appellant has indicated—namely, that sect. 28 merely extends those sections of the Act of 1875 to different articles not before included. It is true that the word "sold," introduced in sect. 28, does afford some ground for the contention that articles in a different category were also to be dealt with under those sections. But that does not seem to me to strengthen the argument of counsel for the respondent, because, if he is right in regard to the extension of the law in that respect, it is an extension which under ordinary circumstances is in the direction of something which has occurred after the exposure for sale has taken place. Speaking for myself, I do not think we can altogether disregard the amendment introduced upon this matter by sect. 47, sub-sect. 2, of the Public Health (London) Act 1891 (54 & 55 Vict. c. 76). In that sub-section the previous Act applicable on this subject—namely, the Nuisances Removal Act 1863 (26 & 27 Vict. c. 117), s. 2—had been amended, and the words "or deposit for the purpose of sale or of preparation for sale" were put in, which make it clear that the case now in question would be an offence within the metropolis. Counsel for the respondent has said that these words were not put in the general Act of 1890, because the Legislature thought that that provision already extended to other parts of the country, and that it was an offence previously existing in other parts of the country. I cannot take that view, having regard to what has been said as to the amending of the Act of 1890. For these reasons I am of opinion that the view taken by the learned magistrate was not the correct view. I admit the case is one of great difficulty, but, in my opinion, we cannot uphold this conviction.

KENNEDY, J.—I am entirely of the same opinion. I have nothing to add except that I should like to say that it is a very difficult point, and the statutes have left the matter in such a condition that it is not easy to form any definite opinion on anything connected with this legislation.

RIDLEY, J.—I concur. I think also that the matter is one which requires a minute examination, but on the whole I am satisfied that the opinion of the Lord Chief Justice is right.

Appeal allowed with costs. Conviction quashed.

Solicitors for the appellant, *Woodhouse* and *Davidson*, for *J. T. Woodhouse*, *Aske*, and *Ferens*, Hull.

Solicitor for the respondent, *E. Laverack*, Town Clerk, Hull.

April 4 *and* 12, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

KENSIT (app.) *v.* DEAN AND CHAPTER OF ST. PAUL'S (resps.). (*a*)

Ecclesiastical law—Brawling in church—"Disturbing" clergyman during service—Ordination by bishop to priest's orders—Reading protest against candidate—Charge of ritualistic practices—"Impediment" to ordination—"Notable crime"—Ecclesiastical Courts Jurisdiction Act 1860 (23 *&* 24 *Vict. c.* 32), *s.* 2.

The assisting at or taking part in the service in a church in which breaches of prescribed ritual have taken place does not constitute an "impediment," or "notable crime" in a candidate for priest's orders within the meaning of the exhortation in the form in the Prayer Book for the ordering of priests, wherein the bishop exhorts the people that, if any of them know any "impediment or notable crime" in any of the candidates, he is to come forth and show what the crime or impediment is.

CASE stated by the Court of Quarter Sessions of the City of London upon an appeal to them.

The appeal to the City Quarter Sessions was an appeal by John Alfred Kensit against a conviction by the Lord Mayor before the court of summary jurisdiction sitting at the Mansion House Justice Room on the 4th March 1904

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

upon an information laid for and on behalf of the Dean and Chapter of the Cathedral Church of St. Paul's charging Mr. Kensit for that he did on Sunday, the 28th Feb., at the ten o'clock service at St. Paul's Cathedral, "unlawfully disturb a clergyman in holy orders, to wit, the Right Rev. the Lord Bishop of London, then celebrating the rite of ordination in a certain cathedral church, to wit, St. Paul's Cathedral," contrary to the statute, &c., for which offence he was ordered to pay a fine of 5*l.*, and in default of distress to be imprisoned for one day.

Against this conviction Mr. Kensit appealed to the quarter sessions of the city of London held at the Guildhall on the 27th April 1904. The proceedings were taken under sect. 2 of 23 & 24 Vict. c. 32 (the Ecclesiastical Courts Jurisdiction Act 1860).

The evidence disclosed that on Sunday, the 28th Feb. 1904, the Bishop of London was conducting an ordination service, and was in front of the Communion table.

James Brown, dean's verger, deposed as follows:—

I saw Mr. Kensit walking up the choir accompanied by several others, I think six. I heard the bishop read from the service-book the words beginning, "But yet if there be any of you knowing any impediment or notable crime in any of them for which he ought not to be received into this holy ministry, let him come forth in the name of God and show what the crime or impediment is." Someone asked Mr. Kensit to come nearer the bishop—I think he was Mr. Lee, the chapter clerk. They did so. Mr. Kensit had a paper in his hand which he commenced to read. The bishop said, "Unless the impediment comes within these bounds (reading from a paper) I shall prosecute you for brawling." [The original document was produced and handed to the Bench and initialled by the chairman. In the course of the argument it was stated by counsel to be an opinion furnished to the Bishop of London by Mr. Lewis Dibdin, K.C. when at the Bar and before he became Dean of Arches, and the Rev. M. P. Gibson also deposed on oath to the same effect.] Mr. Kensit said: "You have not heard what I have to say." He then read from the printed paper now shown to me. I think the bishop said: "One person named is not here," and added, "I shall prosecute you to-morrow for brawling." Some of his party also protested, and they then all returned through the choir down the nave and out of the west door. The service then proceeded to its conclusion. The proceedings created a commotion.

In the course of his cross-examination by counsel the witness said:

He made no more noise than that necessarily caused by persons hastily coming forward. On his reaching the second name on the printed paper the bishop said: "That gentleman is not coming forward." Mr. Kensit then desisted reading about him, saying, "Thank you, my Lord."

In the course of his re-examination by counsel the witness said:

The bishop pointed out at the commencement that matters of ritual did not constitute an "impediment."

Amongst those ordained priests by the bishop was included the Rev. Basil Saunders Dyer. The protest read with regard to him was in the following terms:

I object to Basil Saunders Dyer, who has been assisting at St. Matthias', Stoke Newington, and has there been guilty of helping forward the effort to make our beautiful Communion Service resemble, as far as possible, the Roman Mass. On Sunday last, in this church, Roman vestments were worn, candles burned when not required for light, distinct acts of adoration were made to the elements, and out of a considerable congregation only four persons communicated. In this church there are separate sides assigned for men and women, but the number of men attendants is so small that half the space allotted to them is filled with ladies. Seven lamps are continually burning before the so-called altar. There is a distinct Roman request painted on the walls of the Lady Chapel, "Of your charity pray for the souls of ——." Then follow the names of four dead persons.

The rubric in the Book of Common Prayer following the exhortation in the service set out for the ordering of priests is as follows:

And if any great crime or impediment be objected, the bishop shall surcease from ordaining that person until such time as the party accused shall be found clear of that crime.

This the bishop admittedly did not do, relying on the legal opinion furnished to him that the above practices would not, even if proved against Mr. Dyer, constitute an "impediment" within the meaning of the Prayer Book.

The Court of Quarter Sessions considered themselves bound by the opinion of Sir Lewis Dibdin as to the meaning of the word "impediment," and, as Mr. Kensit did not desist when informed by his Lordship that irregularities in matters of ritual would not, even if proved, constitute an "impediment," they affirmed the conviction, as they were of opinion that his subsequent conduct did "disturb" the congregation within the meaning of 23 & 24 Vict. c. 32, s. 2.

If, however, the court should be of opinion that such practices as were alleged in the case of Mr. Dyer would, if proved, constitute an "impediment," then as the Bishop of London did not surcease until the complaint could be heard, as required by the notice, Mr. Kensit was guilty of no illegal act, but was acting strictly within his right in coming forward when called upon by the bishop to do so in the name of God.

In the event of the court holding that offences against ritual or doctrine do constitute an "impediment," the conviction was to be quashed; if otherwise, the conviction was to stand.

Attached to the case was a copy of the conviction, grounds of appeal, of the recorder's notes taken at the hearing, the printed protest of Mr. Kensit, and the opinion relied on by the Bishop of London.

The protest of Mr. Kensit was headed "Ordination Protest at St. Paul's Cathedral on Sunday morning, the 28th Feb. 1904," and began:

I, John Alfred Kensit, feel it to be incumbent upon me to make very serious objections to four out of the eight deacons who are candidates this morning for the office of presbyter or priest in our Protestant reformed Church. I call the impediments serious, as they form a complete betrayal of the distinctive principles for which our martyrs died, and for which the Church of England exists. First, I object to Basil Saunders Dyer [then followed the objections to Mr. Dyer and the three other persons named in the protest, all the objections being on the ground of alleged ritualistic practices]. In the face of these facts concerning the four candidates I have named, I call upon you, my Lord Bishop, to abstain from ordaining them to the Church's ministry, and thus prove yourself faithful to your own consecration vow that you would be faithful in ordaining, sending, or laying hands

upon others. To thus do your duty would give assurance to the laity of the diocese that you intend, by God's help, to check the advance of sacerdotalism and illegal ritual, and we might then begin afresh to trust the bishops.

Attached to the case also there was the opinion of Mr. Lewis Dibdin, K.C. (now the Dean of Arches), which was as follows:

I think it is clear that neither membership of an "*ultra* High Church society," nor the candidate's intention to be ordained on the title of an incumbent who employs extreme (and I will assume illegal) practices in public worship, constitutes a "notable crime" or an "impediment" within the Ordinal. It is obvious that neither is a "crime," and "impediment" is a technical word importing those disqualifications for orders which are either absolute, as in the case of an unbaptised person, or only to be removed by special dispensation, as bastards.

There was also, during the course of the argument, put before the court a copy of the *Record* of the 25th March 1904, containing a joint opinion of Sir John Dobson and Sir Herbert Jenner, given in 1843, upon similar matters, and the circumstances under which the opinion was given, which had been sent to that paper by a correspondent after the trial of Mr. Kensit. The circumstances were as follows:

In 1843, at the church of St. Stephen, the Bishop of New York admitted a Mr. Carey, in spite of protests then publicly made on the ground of Romish error, to the order of priesthood. This action on the part of the bishop led to the sending to England of certain questions as to the construction of the rubrics in the Ordinal, in order "to obtain the best legal advice upon them."

The case was taken to Doctors' Commons and prepared by proctors and indorsed by them thus: "For the joint opinion of Her Majesty's Advocate and Dr. Jenner."

As no copy of the American Book of Common Prayer was at hand, the opinion was based upon the rubrics and Ordinal of the English Prayer Book.

The case and the opinion in full, omitting only the quotations from the Ordinal, were as follows:

Some difference of opinion prevails as to the interpretation of the words in the above address by the bishop, beginning "Good people, these are they whom we propose," &c., "if there be any of you who knoweth any impediment or notable crime," &c.; and also as to the parties addressed under the description "people" or "congregation," whether it includes the clergy present as well as the laity. Your opinion is requested on the following points:

1st. Does that call embrace clergymen as well as laymen? Looking at the object the bishop must be supposed to have in view in making the call, we are of opinion that clergymen as well as laymen are included.

2nd. May an impediment of a purely doctrinal nature, as Romish heresy, for example, be stated? We think that such an impediment, if it exists, may and ought to be stated.

3rd. In case the impediment has been stated privately to the bishop already, and he has satisfied himself about it, and chooses to ordain, does that take away the right of a public statement? In the case here supposed we think that neither the right nor the duty of a public statement is taken away.

4th. When such an impediment is stated under such circumstances, supposing the right to make the statement, may the bishop proceed, or is he bound to suspend the ordination? We are of opinion that the bishop is bound by the rubric to "surcease from ordering" where the alleged impediment is of such a nature as to disqualify the person against whom it is objected (if the same be proved) from obtaining priest's orders, notwithstanding any previous inquiries on the subject. The bishop must, however, be allowed to exercise his discretion as to the effect of the alleged impediment, and, unless it is of a serious nature, we see nothing to prevent his proceeding with the ordination.

JOHN DOBSON, HERBERT JENNER, Doctors' Commons, Dec. 14, 1843.

Sect. 2 of the Ecclesiastical Courts Jurisdiction Act 1860 (23 & 24 Vict. c. 32) provides as follows:

Any person who shall be guilty of riotous, violent, or indecent behaviour, in England or Ireland, in any cathedral church, parish or district church or chapel of the Church of England and Ireland, or in any chapel of any religious denomination, or in England in any place of religious worship duly certified . . . whether during the celebration of Divine service or at any other time, or in any churchyard or burial ground, or who shall molest, let, disturb, vex, or trouble, or by any other unlawful means disquiet or misuse any preacher duly authorised to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament, or any Divine service, rite or office, in any cathedral, church, or chapel, or in any churchyard or burial ground, shall on conviction thereof before two justices of the peace be liable to a penalty of not more than five pounds for every such offence, or may, if the justices before whom he shall be convicted think fit, instead of being subjected to any pecuniary penalty, be committed to prison for any time not exceeding two months.

By sect. 4, persons so convicted may appeal to the next quarter sessions.

Horace Avory, K.C. (*H. C. Biron* and *Benjamin Whitehead* with him) for the appellant.—The court has power in this case to draw inferences of fact, and the first question is whether, if the appellant was wrong in his view that there was an impediment or notable crime, he nevertheless had been guilty of brawling; and, secondly, whether these allegations against a person about to be ordained would constitute an impediment or notable crime. With regard to the first point, what the appellant did in this case did not amount to the offence of brawling. Merely to make a mistake in ecclesiastical law would not amount to brawling. The kind of brawling referred to is such brawling as is intended by the Act 5 & 6 Edw. 6, c. 4, which prohibits persons from "quarrelling, chiding, or brawling" in church. The present case is not a case of brawling of that kind, but rather resembles the case of a person objecting to the banns of marriage. Originally the mode of signifying assent in answer to the bishop's exhortation was by acclamation of the people, but that was changed into the method of summoning the people to make objections, if they had any (Gibson's Codex, vol. 1, p. 149), and the summoning of the people to make objections was a substitute for the acclamation. One of the allegations against Mr. Dyer was that he had assisted at a service where there were distinct acts of adoration of the elements. That was an allegation of something which at all events might amount to a "notable crime." That this adoration of the elements is a

notable crime is proved, first, by a reference to arts. 25 and 28 of the Articles of Religion, which say that the elements ought not to be worshipped, and to 1 Eliz. c. 2, s. 4, which makes it a criminal offence in terms, and the person so offending may be convicted either by the verdict of twelve men or by the notorious evidence of the fact. That makes it a notable crime. Following upon that, the statute 13 Eliz. c. 12, s. 2, deprived of ecclesiastical promotion persons who maintained any doctrine contrary to the articles. [Lord ALVERSTONE, C.J. referred to Phillimore's Ecclesiastical Law, vol. 1, p. 94, as to "impediments."] By sect. 5 of 13 Eliz. c. 12, a candidate for ordination is required to fulfil certain conditions before he can be ordained, as, for instance, he must profess the doctrine expressed in the articles, and he cannot be ordained "unless he shall first subscribe to the said articles." The candidate must be able to subscribe—that is, honestly subscribe—the Thirty-nine Articles, and if it can be shown from his practices that he cannot honestly subscribe them, that is an impediment. By the Clerical Subscription Act 1865 (28 & 29 Vict. c. 122) he is required to make a declaration of assent to the Thirty-nine Articles. That being so, must it not be an "impediment" if it can be shown that the candidate cannot honestly make that declaration of assent? These allegations would undoubtedly afford good cause for depriving a clergyman of his benefice:

Heywood v. *Bishop of Manchester*, 50 L. T. Rep. 286, at p. 240; 12 Q. B. Div. 404, at p. 414.

That case clearly shows that the allegations alleged against Mr. Dyer in this case would, if substantiated, be good ground for a sentence of deprivation, and also good ground for a bishop in refusing to institute to a benefice, and yet it is said that they are not good ground for refusing to ordain the candidate against whom they may be proved. All the appellant did was to read once, and once only, this protest; he was entitled under the rubric to read his protest once for all, and, even assuming that he was wrong in his view, can it be said that, merely because he persisted in once reading this protest, he was guilty of an offence under the section? There was nothing in what he did to "disturb" the bishop or the congregation in any way. According to the opinion of Sir John Dobson and Sir Herbert Jenner, these allegations, if proved, were a sufficient "impediment" within the rubric.

Danckwerts, K.C. (*C. W. Mathews* and *A. B. Kempe* with him) for the respondents.—Assuming the very utmost against Mr. Dyer, it was that he was a deacon in a church in which the incumbent was guilty of ritualistic practices. That was no disqualification either as an "impediment" or as a "notable crime." Taking the form of ordering priests as given in the Prayer Book, one cannot go outside that to find impediments, and when the form uses the words "any impediment or notable crime," it is explained afterwards by the words in the rubric, "any great crime or impediment." There must be some impediments as to which there is a discretionary power. Then who is to judge? The very first thing is that the bishop has to exercise his discretion. If the objection be an absolute bar, then he ought to stop the ordering of that person; but if it is only a discretionary and not an absolute bar, then he must exercise his discretion. Suppose that the bishop decides that the objection is not *bonâ fide*, is he then to surcease from ordering that person? Clearly not, and when in this case the bishop went on with the service the appellant ought to have desisted. Instead of desisting, all these persons walk up to the bishop, and that clearly was "disturbing" the clergyman and was brawling:

Clinton v. *Hatchard*, 1 Addams, 96.

The "notable crimes" aimed at are such great crimes as homicide, sodomy, and so on, and clearly could not apply in such a case as the present; and a mere objection on the ground of ritualistic practices, even if proved, does not constitute an "impediment." Mr. Kensit in persisting in going on after his objection was overruled committed the offence charged. *Heywood* v. *Bishop of Manchester* (*ubi sup.*) is not at all in point, as the man had been ordained. He referred to

Lindwood, p. 28.

Avory, K.C. in reply. *Cur. adv. vult.*

April 12.—The judgment of the court (Lord Alverstone, C.J., Kennedy and Ridley, JJ.) was read by

Lord ALVERSTONE, C.J.—This is a special case stated by the quarter sessions of London, affirming a conviction by the court of summary jurisdiction sitting at the Mansion House, upon an information brought by the respondents, the Dean and Chapter of St. Paul's, against the appellant, John Alfred Kensit, for an offence under sect. 2 of 23 & 24 Vict. c. 32, for unlawfully disturbing the Right Rev. the Lord Bishop of London whilst celebrating the service of the rite of ordination in St. Paul's Cathedral, on the 28th Feb. 1904. In the paper which was put in evidence in the proceedings, and produced before us, the appellant stated that he felt it incumbent upon him to make very serious objections to four out of the eight deacons who were candidates on the occasion in question for the office of priest. The paper as regards Basil Saunders Dyer—the only one of the four mentioned in the paper who was in fact about to be ordained priest—was as follows: "I call the impediments serious, as they form a complete betrayal of the distinctive principles for which our martyrs died, and for which the Church of England exists. First, I object to Basil Saunders Dyer, who has been assisting at St. Matthias', Stoke Newington, and has there been guilty of helping forward the effort to make our beautiful Communion service resemble, as far as possible, the Roman mass. On Sunday last in this church Roman vestments were worn, candles burned when not required for light, distinct acts of adoration were made to the elements, and out of a considerable congregation only four persons communicated. In this church there are separate sides assigned for men and women, but the number of men attendants is so small that half the space allotted to them is filled with ladies. Seven lamps are continually burning before the so-called altar. There is a distinct Roman request painted on the walls of the Lady Chapel, 'Of your charity pray for the souls of ———,' then follow the names of four dead persons." The objections to three of the gentlemen named were read by Mr. Kensit, but as regards one, the second name on the paper,

on the name being mentioned, the lord bishop said, "That gentleman is not coming forward"; thereupon Mr. Kensit desisted from reading that part of the paper. The Court of Quarter Sessions held that the matters admitted to have been alleged by Mr. Kensit were not "impediments or notable crimes" within the meaning of the rubric. The question raised for our decision was stated in the following terms: [His Lordship read the terms.] In giving our decision upon this case we think it right to decide only the point upon which our opinion is asked by the Court of Quarter Sessions, but we desire to add that we are by no means sure that there was not sufficient evidence of an offence under the statute in that after the bishop, who was conducting the service, had clearly stated to the appellant that the matters which he, the appellant, proposed to raise were not, in the opinion of the bishop, objections which came within the rubric, the appellant persisted in continuing to interrupt the service by reading from the paper. But, inasmuch as the Court of Quarter Sessions have not decided against Mr. Kensit upon this ground, or upon anything in connection with the way in which he made his protest, as we have said, we think it right to deal only with the point raised, and make the foregoing observations in order that it may not be supposed that we have formed an opinion in favour of the appellant upon the other points which were discussed in argument, but which were not raised in the case. Dealing now with the question raised, we are clearly of opinion that the matters contained in the protest of Mr. Kensit are not impediments within the meaning of the rubric. Mr. Avory in his argument went so far as to contend that Mr. Dyer in having assisted at St. Matthias', Stoke Newington, as stated in the protest, in which church distinct acts of adoration were made to the elements, had been guilty of a "notable crime," and in support of his contention he relied upon arts. 25 and 28 of the Articles of Religion, and referred to sect. 4 of the statute 1 Eliz. c. 2, and sect. 5 of 13 Eliz. c. 12. We are, however, clearly of opinion that, even assuming that proceedings could be taken under these statutes in respect of the matters referred to in the appellant's protest, the allegations fall far short of anything which could be properly described as charging a candidate with a "notable crime," or alleging that that there was in any of them any "impediment." The history of these words "notable crime" and "impediment" can clearly be traced in the ancient constitutions of the Church, and, to quote the Constitution of Archbishop Reynolds, cited in Lindwood, p. 33 (see Phillimore's Ecclesiastical Law, 2nd edit., vol. 1, p. 94), would include such offences as are described in the words "no simoniac, homicide, person excommunicate, usurer, sacrilegious person, incendiary, or falsifier, nor any other having canonical impediment, shall be admitted into holy orders." The word "impediments" related originally to a number of matters, some of which can no longer be regarded as such, as, for instance, bastardy and certain physical defects as the loss of a limb or eye, but included impediments which would still be considered as a bar to ordination, such as the fact that the candidate was an unbaptised person, or was not of the requisite age for the orders to which he proposed to be ordained. Without attempting in this judgment to give an exhaustive enumeration of what may be regarded as "notable crimes" or "impediments," there is not a trace to be found in any authorities that a mere allegation that a candidate has been a party to, or taken part in, the service in a church in which breaches of prescribed ritual have taken place comes within those words, and, to answer the question submitted to us, we are of opinion that such practices as were alleged against Mr. Dyer would not constitute an "impediment." It is well established that the fact that a claim of right is set up is no answer to an offence under this section: (see *Asher* v. *Calcraft*, 56 L. T. Rep. 490; 18 Q. B. Div. 607). In the course of the argument our attention was called to the opinions of Sir John Dobson and Sir Herbert Jenner, given in the year 1843. Considered by itself, we must not be taken to concur in the statement in the second paragraph that an impediment of a purely doctrinal nature, as Romish heresy, may and ought to be stated, but, taken as a whole, the opinion has no bearing upon the case now before us. For the above reasons, we are of opinion that the conviction was right, and that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant, *John Othen*.

Solicitors for the respondents, *Lee, Bolton*, and *Lee*.

Friday, April 14, 1905.

Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

NOBLETT (app.) v. HOPKINSON (resp.). (a)

Licensing—Open during prohibited hours—Purchase on Saturday — Appropriation—Delivery on Sunday—Licensing Act 1874 (37 & 38 *Vict. c.* 49), *s.* 9.

Two customers went to the licensed premises of the respondent during the time they were allowed to be open, and asked if they could have beer sent to them on Sunday during the time when the premises must be closed. They paid for the beer, and directly after, before closing time, the beer was drawn and put in a bottle belonging to the respondent, corked, and put on the bar counter, and taken about closing time to the stable in the curtilage of the licensed premises. It was taken during prohibited hours on Sunday from there and given to the barman in the bar to deliver to the two men off the licensed premises, which was done.

Held, that an offence had been committed within sect. 9 *of the Licensing Act* 1874, *as there had been no appropriation at the time of sale.*

Held further (Ridley, J. dissenting), that as the agreement to deliver was an essential part of the contract, there was an offence committed within sect. 9, *even if there had been an appropriation.*

CASE stated by the justices of Bury, Lancashire, on an information preferred under sect. 9 of the Licensing Act 1874 (37 & 38 Vict. c. 49), by the appellant against the respondent, for that he, the respondent, on the 6th Nov. 1904, being a licensed person for the sale of intoxicating liquors by retail in his house and premises, did unlawfully open his premises for the sale of intoxicating liquor during

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

part of the time that they were required to be closed—to wit, at 7.55 o'clock in the morning, that day being Sunday.

The respondent is a licensed victualler and holds an alehouse licence in respect of certain premises occupied by him and known as the Hope and Anchor, Bolton-street, Bury, for the sale by retail of intoxicating liquor to be consumed either on or off the premises.

On Sunday, the 6th Nov. 1904, about 6 a.m., two constables concealed themselves in a stable within the curtilage of the licensed premises, and about 7.55 a.m. they saw a man named John Westbrook, the respondent's barman, come out of the respondent's house by the back door with a gallon bottle of beer half full, and go out of the backyard door on to Bury ground in the direction of the firehole of Spencer and Cuerdale's Works, and when close to the firehole the constables stopped him and asked him what he had in the bottle, and he replied he had half a gallon of beer for John Doherty and Walter Shedwell. Westbrook shouted for Doherty and Shedwell, and they came out from the firehole, and Doherty said the beer belonged to him and Shedwell, and they had paid for it the night before.

It was explained on behalf of the respondent, which explanation the justices accepted as the fact, that on Saturday, the 5th Nov. 1904, two men, Doherty and Shadwell, were engaged in cleaning flues at Bury ground, and went to the respondent's house during the time his licensed premises were allowed to be open, when Doherty asked respondent if he could have half a gallon of beer, and if it could be sent down to them on Sunday morning, the 6th Nov. 1904. Doherty paid for the beer, and directly afterwards, before closing time, half a gallon of beer was drawn and put into a bottle belonging to the respondent, and then corked and put on the bar counter by the respondent's son, and subsequently taken by him about closing time to the brewhouse stable within the curtilage of the licensed premises, from where it was taken by him on the Sunday morning and given to the barman behind the counter in the licensed premises to deliver to the two men.

It was admitted in evidence by the respondent that at the time of the sale of the beer on the Saturday, he agreed to deliver the beer during prohibited hours on the Sunday to the two men, Doherty and Shedwell, and that the beer was delivered during prohibited hours on the Sunday by the barman.

It was contended on behalf of the appellant that neither the beer nor the bottle was specifically appropriated to the purchaser, and that the transaction was not completed until delivery was made on the Sunday, which, it was submitted, was a material part of the transaction of sale, and that in the circumstances the respondent had opened his house for the sale of intoxicating liquor on the Sunday within the meaning of sect. 9 of the Licensing Act 1874.

The justices were of opinion that the sale of the beer was completed by payment for and appropriation of the specific goods on the Saturday, and found as a fact that the beer was paid for, drawn, put in a bottle, corked up, and set aside, and specifically appropriated on that day, and the property in the goods passed under that contract, and that in delivering the beer during prohibited hours the respondent did not open his house for the sale of intoxicating liquors within the meaning of sect. 9.

The question of law arising upon the above facts was: Were the justices right in holding that, intoxicating liquor having been ordered of the respondent, paid for, and specifically appropriated during the time his licensed premises were allowed to be open, the fact that the beer was delivered by him through his barman during the period which his premises were required to be closed constituted no offence of opening his house for the sale of intoxicating liquor during prohibited hours?

By sect. 9 of the Licensing Act 1874 (37 & 38 Vict. c. 49):

> Any person who during the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this Act, sells or exposes for sale in such premises any intoxicating liquor, or opens or keeps open such premises for the sale of intoxicating liquors, or allows any intoxicating liquors, although purchased before the hours of closing, to be consumed in such premises, shall for the first offence be liable to a penalty not exceeding 10*l*., and for any subsequent offence to a penalty not exceeding 20*l*.

Kershaw for the appellant.—There was no appropriation of the beer here, and there was an agreement to deliver during the time within which the premises were to be kept closed. Both these are essential parts of the contract of sale. *Saunders* v. *Thorney* (78 L. T. Rep. 627) is in point here, and governs this case. There a dozen bottles of beer were ordered and paid for on the Saturday, and the licensee undertook to deliver them on that day, but through an accident omitted to do so. On the following Sunday the purchaser sent for two bottles, which were delivered to him during closing hours, and it was held that that was a keeping open for the sale of intoxicating liquors on the ground that there had been no appropriation. Channell, J. says, at p. 629: "I think a person opens his licensed premises within the meaning of the section when he opens them for the carrying out of any material part of the transaction of sale." [Lord ALVERSTONE, C.J. referred to *Mackenzie* v. *Spear* (unreported).] That case was very different to this one, as the justices there found as a fact that the beer was paid for and appropriated during the time that the licensed premises were open, and it was not agreed between the parties, and it was no part of the contract of sale that the beer should be delivered during the time that the premises ought to have been kept closed. The word "sale" must be widely construed. He referred to

> The Licensing Act 1872 (35 & 36 Vict. c. 94), s. 62;
> *Pletts* v. *Beattie*, 74 L. T. Rep. 148; (1896) 1 Q. B. 519.

C. Fitch (*George Elliott* with him) for the respondent.—The justices have found here as facts that the sale of the beer and its appropriation were complete within the hours at which the premises were rightly open. That being so, their decision was right. Sect. 9 of the Licensing Act 1874 does not prohibit the delivery of intoxicating liquor during the time at which the licensed premises are directed to be closed, but merely selling or exposing for sale,

opening or keeping open for sale, or allowing the consumption on such premises. Sale and delivery are quite distinct, and that was recognised in *Pletts* v. *Beattie* (*sup.*). In *Lloyd* v. *Barnett* (82 L. T. Rep. 804), eleven being the closing hour, after that five men were in the bar of an inn with glasses, some of which were not empty. No drink had been drawn and no person had entered the house after eleven, but both doors of the inn were open, and it was held that the premises were not kept open for the sale of intoxicating liquors within sect. 9 of the Licensing Act 1874. In *Mackenzie* v. *Spear* the beer was delivered over in prohibited hours, and it was held there was no offence.

Lord ALVERSTONE, C.J.—This case is extremely near the line, and has been most ably argued by Mr. Kershaw and Mr. Fitch, and I confess that I have considerable doubt as to whether I have arrived at a right conclusion, but I must give expression to the judgment I have formed after hearing those arguments. I do not think I should gain anything by further considering the matter. Mr. Kershaw has taken two points. He says, first, the delivery of this beer on the Sunday morning was of the essence of the contract agreed between the parties. He says he is entitled to draw the conclusion that the beer would not have been purchased at all unless, as he puts it, it was Sunday beer—beer which was to be delivered on the Sunday. Secondly, he says there was no sufficient evidence of appropriation in this case. All that is said is that the licensed victualler put some beer into a bottle, half a gallon or whatever it was, and put it aside with the intention of that beer being delivered next morning, as it was in fact. There is no evidence that the purchasers assented to the appropriation of the beer by the licensed victualler as was in the case in *Pletts* v. *Beattie* (74 L. T. Rep. 148; (1896) 1 Q. B. 519) and in the subsequent cases where a great deal turns upon the authority given by the purchaser to the agent of the vendor to appropriate the goods on the licensed premises. I think, although I have felt great difficulty in this case, that what we have to consider under sect. 9 may be to a certain extent a different question to that which we have to consider under sect. 3—viz., whether the sale actually took place. It seems to me for some purposes the question may be different. Mr. Fitch relies on the statement that the property in the goods passed under the contract. I doubt whether that can be taken as a finding of fact. I think it is an inference of law drawn by the magistrates from the previous statements. I think it is really material to see what the real facts were. The statement of the contract is given in the case. Two men went to the respondent's house during lawful hours, and one of them asked if he could have half a gallon of beer, and if it could be sent to him on Sunday morning, and I think from that it might be fairly inferred and the inference to be drawn would be that he would not have bought the beer unless it could have been sent out on Sunday morning. Then he paid for it. Then the statement is made to which I have referred. "Directly afterwards, before closing time, half a gallon of beer was drawn and put into a bottle belonging to the respondent, and then corked and put on the bar counter by the respondent's son, and subsequently taken by him about closing time to the brewhouse stable within the curtilage of the licensed premises, whence it was taken by him on the Sunday morning and given to the barman." I have already said I do not think there was any evidence before the magistrates to show that what was there being done was done under the licence or authority of the purchaser. I think it was done as an act of the vendor to satisfy his contract. It was admitted in evidence that at the time of the sale of the beer on the Saturday he agreed to deliver the beer during prohibited hours on the Sunday, and the beer was delivered. I understand that to be a statement of it being admitted that it was a part of the contract that the beer should be delivered upon the Sunday. I am not going to shrink from the more difficult point; but taking the second point urged by Mr. Kershaw, I think he is right in saying there was no sufficient appropriation of the beer in the sense of the acts being done by the barman and the son of the respondent being the agents of the purchaser, and I should come to the conclusion that if the bottle had been broken on the Saturday night and Doherty had appeared on the Sunday morning, and said, "Where is my beer?" and the publican had said, "Oh, we are very sorry, but it was broken after we put it into the bottle last night," that the publican would have had no answer, and could not retain the money without delivering some more beer. That is the conclusion I should come to from that. Therefore I think upon Mr. Kershaw's second point there is not sufficient evidence on which the magistrates could find appropriation. It is true they say the beer was paid for, drawn, put in a bottle, corked up, and set aside and specifically appropriated on that day. I think by that phrase "specifically appropriated by the publican," they do not of necessity mean "put aside by him with the consent of the purchaser." I think that would be sufficient to justify me in allowing this appeal; but I do not wish to ignore the second question, because I think we ought to express our views upon it, and I think it is a matter on which we should give effect to our opinion on these particular facts. It really turns on whether we are to adopt the test which was compendiously put by my brother Channell in the case of *Saunders* v. *Thorney* (78 L. T. Rep. 627) in which he says: "I think a person opens his premises within the meaning of this section when he opens them for the carrying out of any material part of the transaction for sale." If that merely means the paying for the goods, then we ought to dismiss this appeal; but if it means the carrying out of a particular part of the transaction which led to the sale, that is the bargain made at the time of the sale, very different considerations would arise. Now, what ought it to mean in this case? I, myself, should adopt my brother Channell's view. I think that if any part of the bargain of sale involves the keeping open of the premises for the delivery of the beer, then the mischief which the section was intended to remedy takes place, and an offence has been committed. I come to the conclusion in this case that Doherty did bargain that if he bought the beer it should be delivered to him from the public-house on the Sunday morning, and I think Mr. Kershaw answered me successfully when I asked him to take the case of it being actually taken out of the bar, and put in a part

of the premises within the curtilage, so that the premises have to be got at by the man coming to fetch it or the stuff has to be taken out of it. I think that the mischief which the statute meant to aim at would take place, and therefore there would be an offence. I was very much pressed with Mr. Fitch's argument about *Pletts* v. *Beattie*, and I can forsee this decision may be used to suggest difficulties will arise when we have to deal with questions under sect. 3, as we shall have. My answer to that, as far as it is material for the purposes of to-day, is that the only question under sect. 3 was whether or not the transaction or sale took place upon licensed premises, and where a purchaser had authorised a traveller to act as his agent in the appropriation of the goods so that the goods would become at the risk of the purchaser after the appropriation, then I think, even if we were applying my brother Channell's test, no material part of the transaction of purchase takes place otherwise than on licensed premises. With regard to the case of *Mackenzie* v. *Spear*, which I now remember very well, as we have now seen the case which was stated, I have no doubt that the judgment did proceed upon the point which my brother Kennedy called attention to, that there had been an ordinary bargain for sale and delivery within licensed hours. The goods had been set aside for the purchaser and intended to be delivered upon the Saturday, so that it was no material part, or no part of the transactions at all, that they should be delivered on the Sunday. Then the purchaser came and took them away on the Sunday afterwards. I therefore do not think that the decision by this court in that case of *Mackenzie* v. *Spear* laid down any principle which prevents me from holding that this bargain to purchase on Saturday night conditionally on the beer being delivered on Sunday necessitated the premises being, within the words of sect. 9, open for the sale of intoxicating liquor, meaning thereby, open for the performance of a material part of the bargain made at the time of sale. I express my opinion on the second point with diffidence, as I am not sure that my brother Ridley agrees with me, and I admit the difficulty, but, upon the whole, I think upon both grounds the appeal must be allowed and the case must go back to the magistrates to convict.

KENNEDY, J.—I am of the same opinion. It seems to me on the facts, as stated by the magistrates, although they may show the intention—that is what it really comes to—on the part of the respondent to deliver on Sunday the beer which he put into the bottle and corked up on the Saturday night, he is not in a position to say that the contract for the purchase of the beer was complete on the facts stated in the case irrespective of the delivery of the article on the Sunday—that is, during prohibited hours. Here it is not merely an agreement to deliver during Sunday, but, on the finding in the case, an agreement to deliver the beer during the prohibited hours on Sunday. Of course, if the statute is plain, we must not be guided by what are obviously matters of maintaining the law in its integrity, but, it seems to me, nothing could be more dangerous or more likely to destroy the manifest intention of the Legislature in creating certain prohibited hours on Sunday, if the bargain is to be held to be good, and not against the 9th section, where a person comes to licensed premises and says, not "I buy this beer from you now, and leave it here," but "I will buy half a gallon of beer, if you deliver it to me during prohibited hours on Sunday." If that does not mean that it is an opening of the premises for sale of the beer the delivery of which is to complete the transaction, and the delivery of which is essential, if the publican is to keep the price paid for it the night before, it is clear the mischief will arise at once. Now, what was the real transaction according to the case which the magistrates have said to be a specific appropriation? We are not now dealing with the question of sale and delivery of goods, but with this section of an Act of Parliament relating to licensed premises, and I am not quite sure what they mean by specific appropriation. But certainly what happened was this: Doherty comes into respondent's premises and says, "Can I have half a gallon of beer to be delivered to me during prohibited hours to-morrow—not merely delivery to me, but it is to be sent down to us on the Sunday morning during prohibited hours?" The publican says, "Yes, you can." Thereupon Doherty pays the price on the counter for the beer to be delivered to him. He does nothing more. I only refer to that in passing, because *Pletts* v. *Beattie* and those cases are on a different section, and I think, speaking for myself, are open to very different considerations. In *Pletts* v. *Beattie* I pause to remark that there was an appropriation in the strongest sense, not only assented to by the buyer beforehand by a written notice, but acted upon by the seller, who took certain six bottles of ale, labelled them with the customer's name and address, and placed them in a coop or box with other bottles for the customer. What happens here is that all the publican does is to put half a gallon of beer before closing time into a bottle belonging to him (the respondent), then the son corks it and puts it on the bar counter, and takes it into the brewhouse stable, within the curtilage, whence it was taken by the son on a Sunday morning to give to the barman to take to the men. It seems to me clear beyond doubt that if at any time before the delivery of the beer paid for by Doherty on Saturday night—but paid for as beer to be delivered and sent out of the premises during prohibited hours next morning—if at any time before that beer reached the hands of Doherty at this pit the beer had been spilt, or the bottle broken or taken away, the publican would have had no right to say, "I can retain the money you paid because you accepted the appropriation of a particular bottle holding this particular half-gallon, and from the moment you assented to that it was a thing which perished for you—in legal language 'perished for you as its master.' I fulfilled my contract on Saturday." I think no property passed in that sense, because it seems to me that the bargain was plain, as found by the magistrates, that some half-gallon of beer was to be sent down to them in the prohibited hours on Sunday, and there was no sort of acceptance, such as "That is my bottle; put that aside for me." All that was said was by the publican to his son, "Put by half a gallon of beer in a bottle, and take it down to the barman for Doherty to-morrow morning during prohibited hours." Speaking for myself, I quite agree, though I have expressed it more imperfectly,

with what my Lord has said on the first point. It seems to me, whatever the magistrates chose to say in the case, that the finding that there was an appropriation of specific goods is on the facts absolutely without justification so far as its being a sale out and out in the premises of a particular quantity of beer or beer in a particular bottle—I mean a definite body of beer called half a gallon. I think, myself, if the premises are opened during prohibited hours for the purpose of fulfilling a contract to deliver goods so ordered by quantity only and to be delivered by the seller in his bottle, it is clearly keeping open within the section. Though I quite agree with what my Lord has said, I should myself with great diffidence, as my brother Ridley differs, and with a want of confidence that I am right, have gone further, and I should say that if a man said, pointing to a row of bottles of beer on a shelf, "I want to have those bottles, and I will pay for them now, and you are to deliver them to me out of your premises to-morrow during a prohibited hour," that the delivery in that case under those circumstances would be—I cannot put it better than my brother Channell's language—an essential part of their carrying out of the contract of sale, which would also be an act within the statute. It is quite true, as my brother Wills pointed out in the case of *Pletts* v. *Beattie*, that sale and delivery are two distinct elements in a contract for sale of goods. The delivery may be a thing which is assumed at the moment. He may say, "I will buy this," and nothing said about delivery at all, yet the sale is none the less a sale of a distinct article. But, on the other hand, you may surely have a contract which is like a contract for goods to arrive. It would be impossible to say that the sale was independent of that happening, which involves the delivery of goods. Here, supposing that he had bought twelve bottles which he happened to see standing on a shelf above the counter in the shop, but upon the condition that they were to be delivered to him the next day during a certain time, and they were not delivered during that time, he would have no right to say, "My contract for sale was completed." Certainly a danger would arise where there is, as there was in one of the cases which has been tried, a completed transaction. It may be that the mere fact of delivery afterwards during prohibited hours constitutes no violation of the statute, as, for example, in the case which we have been referred to—*Mackenzie* v. *Spear*—where there was no term or condition in the contract for delivery during prohibited hours, but by accident the things remained undelivered, and by accident they were delivered during prohibited hours. So, again, without any accident, I am not prepared to say that if a person simply said, "I want to purchase twelve bottles of beer," without naming any time at all, without saying, "I am going to take them during improper hours," I am not prepared to say, there being a genuine sale without reference to delivery, that because the next day the publican on the customer calling and giving an excuse good, bad, or indifferent, "I have not come before for these goods; will you let me have those twelve bottles which are ear-marked for me there?" that the mere fact of the handing them out in that way, if it were found by the magistrate to be unconnected with the contract for sale, would make the person liable as having kept open the premises. All I say is, even if the goods were specific goods, I am not myself going to say that they would be less within the section if it were part of the bargain that the goods should not only be specific and assented to as they are at the time of purchase, but are to be as part of the contract delivered out of the premises during a time when, according to the 9th section, the delivery would constitute an offence within the Act. Therefore I am of opinion that this decision of the justices is wrong.

RIDLEY, J.—I am not dissenting from the judgments that have been delivered, but the reason I assent to them is that I think, on full consideration, it is a wrong inference from the facts that there had been an appropriation of the beer. At first, indeed, I thought otherwise. I thought that the findings of the magistrates quite sufficiently established that there had been an appropriation of the beer that was bought on the Saturday evening, and therefore the matter was at an end as a transaction, and that we were to decide this case upon that view of the facts. If it had been so, I must say that I should have come to the conclusion that this decision of the magistrates was right. But, having come to the conclusion that there was, in point of fact, no appropriation, and for that purpose I adopt what has been said by my Lord and my brother Kennedy, I think that the decision of the court ought to be the other way. I think that the appropriation of the goods is all-important in a case of this kind, and that, if the sale is complete in that way when the beer is purchased on the Saturday night, I think the delivery upon the Sunday morning would not be a material part of the sale, and therefore it would not come within the argument that has been put forward in this court, and also, I think, adopted by my learned brothers. Before we go to that, I should like to look at the section, and see how it deals with the question of sale. My brother Kennedy says that if there is a sale, a term of which is that the delivery should be on the Sunday, or within prohibited hours, it must come, and ought to come within the meaning of sect. 9 of the Act of 1874. That it ought to come within it, or that the Legislature ought to deal with such offence, is not the question. The question is whether it has dealt with such an offence. I must say on reading that section it does not cover it. If you look at the clauses which it contains, particular things which are to be considered an infringement of the Act as to hours of closing, you will find that the first is, "if the publican sells or exposes for sale on such premises any intoxicating liquors" (there must be a sale—that is to say, selling or exposing for sale during the closed time), "or opens, or keeps open, such premises for the sale of intoxicating liquors"—the same again. I cannot myself understand how it can be rightly argued upon those words that this beer was sold upon the Sunday morning. He must open, or keep open, such premises, not for the purpose of delivering beer which had been sold before, but for the sale of intoxicating liquors. That means assuredly to my mind the sale of intoxicating liquors upon that day. The second branch of it is this: "Or allows any intoxicating liquors, although purchased before the hours of closing, to be consumed on such premises."

Certainly this offence, if an offence at all, is not within that clause, and the clause is of importance, because it shows how the Legislature intended to deal with the case of a man who had sold the beer the day before and allowed it to be consumed afterwards, and in the case where he allows it to be consumed on the premises that is within the Act. Otherwise it seems to me not. That is the way in which I read the section, and I think one is bound to read it according to the natural sense of the words, and not according to that which we may wish to find in it. There is one other section to which I would allude with regard to the sale. It is sect. 62 of the Licensing Act 1872, which says, in dealing with this particular branch of the subject as to what is a sale of intoxicating liquors: "In proving the sale or consumption of intoxicating liquor for the purpose of any proceeding relative to any offence under this Act, it shall not be necessary to show that any money actually passed or any intoxicating liquor was actually consumed, if the court hearing the case be satisfied that a transaction in the nature of a sale actually took place." I do not say that that phrase is necessarily to be read into the 9th section, which is the one under which the proceedings were taken in the present case, but it is on a cognate subject, and very near to the matter with which sect. 9 is dealing. Now, was there a transaction in the nature of a sale here upon the Sunday? I should say decidedly not, if there had been an appropriation of the goods upon the previous evening. That is my view upon that matter, and it is for those reasons I think that, if there had been an appropriation made out, this transaction could not have fallen within the statute. The matter has been dealt with before, I do not say in any case which is upon all fours with the present one, but I mean the question whether delivery which is to follow after the purchase and sale of goods is a part of that sale or not, and is to be regarded as necessarily a part of the bargain and sale. Among other cases, the case of *Saunders* v. *Thorney* (78 L. T. Rep. 627) has been quoted, in which there is the observation of my learned brother Channell, who says: "I think a person opens his premises within the meaning of this section," which was this particular section, "when he opens them for carrying out a material part of the transaction of sale." I agree, but in that case there had been no appropriation of the beer, and anyone, I think, would see that that was the main consideration why Lord Russell, C.J., with whom Channell, J. concurred, gave the decision which he did. There it remained that the goods should be appropriated. Then, indeed, it is still a portion of the contract of sale, but, if the appropriation is complete, it seems to me, according to the ordinary rules, we ought to say that then the sale is at an end, and that the delivery which is bargained to take place, or which is arranged to take place, is no part of the sale itself. I do not know that it is necessary to go into this subject at much length, because I am aware that, holding as I do that there was no appropriation of the goods, that is sufficient for my judgment, but I should like to refer shortly to the case of *Pletts* v. *Beattie* (74 L. T. Rep. 148; (1896) 1 Q. B. 519), in which this matter came very near to the actual decision of the court. It was a case in which the brewer was not licensed to sell at Accrington, but at Burnley. Nelson, who was the purchaser, said to the brewer: "Please supply me weekly as under until further notice. I assent to the appropriation by you to this order at your brewery"—which was at Burnley —"of goods of the above description all in a deliverable state." In other words, he said, the delivery was to be at Burnley, and the question arose upon the proceedings that took place whether there was a complete sale at Burnley and an appropriation of the goods there, or whether the real delivery of the goods was at Accrington. It is obvious that they were to be supplied as a matter of fact at Accrington, but an arrangement had been made on purpose (as we must come to the conclusion) in order to be able to say that by arrangement the goods were delivered at Burnley, and the opinion of the court was delivered upon that point. Day, J. says: "I am of opinion that this conviction should be quashed. In my judgment there was a complete sale at Burnley, and an appropriation of the goods there. Nothing was left but to deliver and pay for the goods, which was done in due course." Nothing here was left but to deliver the goods if there had been an appropriation of them. Therefore it is clear, I think, that it comes within the principle. I will not read the other judgments in the case, but that of my brother Wills is certainly strongly in point upon the same view of the case, and it seems to me that it is law, and I think it is good law, that when the bargain and sale are completed by the appropriation of the specific goods thereto, then the delivery, which may by arrangement have to take place afterwards, is no part of the sale. For the reasons that I have given, therefore, I agree with the judgment of my Lords.

Appeal allowed.

Solicitors: *Snow, Fox*, and *Higginson*, for *Harcourt E. Clare*, Preston; *R. H. Bentley*, for *Birtwistle*, Bury.

Monday, April 17, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

LIVERPOOL CORPORATION (apps.) *v.* WEST DERBY UNION (resps.). (*a*)

Rating — Free library — Managed by committee under corporation — Liability to be rated— Literary and Scientific Societies Act 1843 (6 & 7 *Vict. c.* 36).

Under statutory powers the appellants were authorised to establish and maintain a public library and to appoint a committee invested with the control and management of such library. It was to be held upon trust by the appellants for the benefit of the inhabitants of L. and the neighbourhood, and others resorting thereto. Admission was to be free, and a rate was to be levied for the purpose of defraying the expenses. Premises consisting of reading-rooms where books and newspapers could be read, and a library, were established by the appellants under these powers, and, in addition to the rate, grants were made and moneys were derived from other sources for their maintenance. They were open to the public during the appointed hours without charge.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

Held, that the premises were not exempt from liability to be rated; and

Held, further, that, even although a certificate of exemption had been obtained under the Literary and Scientific Societies Act 1843, *the premises were not exempt under that statute.*

Special case stated by the Recorder of Liverpool.

The appellants were rated as the occupiers of premises consisting of a free library.

The premises were opened as a free library on the 12th May 1903, and were placed by the appellants under the control of the library and museums committee of the appellant corporation acting under the provisions of the Liverpool Library and Museums Act 1852, the Liverpool Improvement Act 1867, the Liverpool Corporation Act 1889, s. 7, the Local Government Board Provisional Order Confirmation (No. 10) Act 1895, s. 2, and the Liverpool Corporation Act 1900, s. 30.

By the Liverpool Library and Museums Act 1852 the council was to establish and maintain a public library and museum with a gallery of arts, and power was given to sell or let land not wanted for the purposes of the Act. They might appoint a committee to be called the library and museums committee, and delegate to them such powers as they thought proper. The council was to provide all necessaries proper for the convenient use and enjoyment of the premises, and the premises and contents were to be held upon trust for the benefit of the inhabitants of the borough of Liverpool and the neighbourhood thereof and others resorting thereto. Admission was to be free of charge, and power was given to the appellants to levy a library and museum rate for the purpose of defraying the expenses.

By subsequent statutes the corporation was empowed to make by-laws for the management and regulation of the premises and for the regulation of persons resorting thereto, and penalties were provided for their infringement.

By the Liverpool Corporation Act 1889 the appellants were empowered to establish and maintain lending libraries and reading-rooms, and such establishment and maintenance were to be deemed to be within the powers conferred by the Liverpool Library and Museums Act, and all the provisions of that Act were, so far as the same were applicable, to apply accordingly.

The by-laws above referred to were to apply to the premises from time to time erected under the Act of 1852.

The premises were established by the appellants as a public library under the above powers, and used by the public under regulations made by the appellants. They were open to the public during the appointed hours without charge or hindrance except as shown in the regulations.

The appellants from time to time appointed a committee under the Liverpool Libraries and Museums Act 1852, and delegated to that committee the powers hereinafter mentioned. The committee were appointed annually, and the exercise of the powers delegated to them was subject to confirmation or rejection by the appellants.

The committee consisted in part of members of the council and in part of persons not members of the council.

The committee were invested with the control and management of all the public libraries in Liverpool, including the premises in question.

The fund available to the appellants and the committee for the maintenance of the libraries was at the time in question derived from the following sources: (1) A library and museum rate of 1½*d.* in the pound collected with the poor rate. The money raised by this rate can only be used for the purposes or some of them which the committee is appointed to manage and control. (2) A contribution of 250*l.* per annum from the Liverpool Education Committee, being part of the annual grant made by the Imperial Exchequer out of the proceeds of national taxes to that committee, and allocated by them to the libraries and museums committee for the purchase of technical books. This contribution might, if the technical instruction committee so decided, have been allocated and used for other technical instruction purposes. (3) Moneys derived from fees paid by the public for admission to lectures given on premises other than those in question arranged and controlled by the libraries and museums committee. (4) Moneys derived from fines imposed under the rules and regulations in respect of books kept beyond the allowed period.

In addition to the books, newspapers, and other publications purchased out of this fund the appellants received gifts of books and reports of societies from various sources.

All accounts and expenses incurred by the committee were examined and certified by them and paid by the city treasurer and debited to the fund.

The libraries and museums committee appointed two librarians and certain attendants to clean and keep order on the premises. The books bought for the library were purchased by the committee, who also had the custody and management of its affairs and of the premises, subject to confirmation or rejection of their proceedings by the council as required by the Act of 1852.

No person resided on the premises. Books, furniture, and effects belonging to the corporation and held for the purposes of the library were always upon the premises. The premises were in the care of the librarians and servants, and open to the public from 9 a.m. to 9.30 p.m.

Nothing was received by the appellants or by anyone in respect of the use of the premises or the contents except certain fines for detaining books contrary to the regulations.

The premises consisted of a general reading-room for men, a reading-room for boys, and a reading-room for women, and contained some 8000 volumes of books and also current magazines, newspapers, and directories. Books and papers could be read on the premises, or, subject to the regulations, books could be taken to be read outside by members of the public whose respectability was certified by two Liverpool ratepayers. In the reading-rooms books, newspapers, magazines, and directories might be read and consulted. The reading-rooms were largely used by the public for reading newspapers and periodicals of the lighter kind as well as for reading books. They were also used by ladies for reading ladies' periodicals and by children for looking at children's picture-books. A minority only of those using the reading-rooms did so for the purpose of reading books or periodicals devoted to more serious literature or science or fine arts.

The committee in 1899 applied under the Scientific and Literary Societies Act 1843 for a certificate of exemption of the lands and buildings occupied by them or under their control from payment of rates, and on the 24th Nov. 1899 a certificate of exemption was granted. That certificate was duly enrolled at the quarter sessions for the city.

It was contended for the appellants that they were not the occupiers of the premises, and that there was no rateable occupation either by the appellants or by the committee, and that, if the committee were in such occupation as would otherwise have made them rateable to the relief of the poor, they were by reason of the Scientific and Literary Societies Act 1843 exempt from being rated.

The questions for the court were: (1) Were the appellants in occupation of the premises? (2) Were the libraries and museums committee in occupation of the premises? (3) Were the premises in the rateable occupation of the appellants or the libraries and museums committee? (4) If the appellants were in rateable occupation of the premises, were they exempt fron rating by reason of the Scientific and Literary Societies Act 1843 and the certificate? (5) If the libraries and museums committee were in rateable occupation, had they become exempt from rating by reason of the last-mentioned Act and certificate?

Carver, K.C. (*F. E. Smith* with him) for the appellants.—On two grounds the appellants are not rateable in respect of this free library. They are not rateable occupiers, and they have no rateable occupation. They also have no beneficial occupation. He referred to

Lambeth Overseers v. *London County Council*, 76 L. T. Rep. 795; (1897) A. C. 625.

In that case it was sought to rate the London County Council in respect of Brockwell Park, which they had acquired under an Act of Parliament which provided that the council might purchase the park, and when they had acquired it they were to hold and maintain it as a park for the perpetual use thereof by the public for exercise and recreation. The House of Lords held that if there was occupation it was not beneficial, and therefore the London County Council were not rateable in respect thereof. In *Hare* v. *Putney Overseers* (45 L. T. Rep. 337; 7 Q.B. Div. 223) it was held that the Metropolitan Board of Works were not liable to be rated for Putney Bridge, which they had bought under statutory powers from a company, and had thrown it open to the public free of toll. It was held that there was no occupation, but even if there was occupation it was not beneficial. *London County Council* v. *Erith and West Ham* (69 L. T. Rep. 725; (1893) A. C. 562) is not in point here, for the occupation was beneficial. He also referred to

Reg. v. *St. Pancras*, 37 L. T. Rep. 126; 2 Q. B. Div. 581;

Crowther Smith v. *New Forest Union*, 61 L. T. Rep. 870.

Under the Scientific and Literary Societies Act 1843 (6 & 7 Vict. c. 36) this library is exempt. He also referred to

Manchester Corporation v. *McAdam*, 75 L. T. Rep 229; (1896) A. C. 500.

This library is instituted for the purposes of literature, and, even although the appellants may not be said to be a society within the statute of 1843, the committee is such a society. Under the Act it need not be wholly supported by annual voluntary contributions, but only in part. The grant from the education committee and the gifts of books, &c., are sufficient voluntary contributions to satisfy the Act; no benefit accrues to any member of the society, and a certificate has been granted. Therefore sect. 1 is in point, for it gives an exemption to land, houses, and buildings belonging to any society instituted for literature exclusively, either as tenant or owner, and occupied by it for such purpose, provided that the society is supported wholly or in part by annual voluntary contributions, and does not, and by its laws may not, divide any dividend, gift, or bonus between its members, and the society has obtained a certificate.

F. Marshall, K.C. (*Greer* with him) for the respondents. — *Lambeth Overseers* v. *London County Council* (*sup.*) followed *Hare* v. *Putney Overseers*, and neither of those cases are in point here, for they are essentially different. The mere fact that land or buildings are held on trust for the public does not exclude liability to be rated. Beneficial occupation does not mean an occupation that is profitable to the occupier, but an occupation that is of value to the occupier. He referred to

Jones v. *Mersey Docks and Harbour Board*, 12 L. T. Rep. 643; 11 H. L. Cas. 443;

West Bromwich School Board v. *West Bromwich Overseers*, 13 Q. B. Div. 929;

London County Council v. *Erith and West Ham*, 69 L. T. Rep. 725; (1893) A. C. 562.

These buildings are capable of beneficial occupation, and there is nothing in any of the cases to prevent their being rated. The Literary and Scientific Societies Act 1843 has no application here. These are not land, houses, and buildings belonging to a society instituted exclusively for the purposes of science, literature, and fine arts. The land, houses, and buildings do not belong to the committee, who are only appointed for the purpose of controlling and managing the buildings. It cannot be said that the corporation of Liverpool are a "society" within the Act. Further, the library is supported by the rate, and not by voluntary contributions. He referred to

Russell Institution v. *St. Giles*, 3 E. & B. 416.

Kennedy, J.—While I am only going to express my own judgment, I am sure we both feel very much indebted to learned counsel on both sides for the great assistance they have given us in this case, and the great pains they have taken to present, as they have done, in the most lucid manner, their views to the court. I have come to the conclusion myself, though I quite appreciate Mr. Carver's arguments and the force of them, that there is no exemption in this particular case from rating of this public library. I do not propose to go into the cases one by one, because they have been already so fully dealt with and commented upon by Mr. Carver in the course of his very valuable argument. But the position as it seems to me is this: Here is a building with its furniture and its fittings, with its rules and regulations, and the land on which it stands that is unquestionably controlled by the corporation of Liverpool acting through the committee which partly

consists of actual members of the corporation and partly of persons appointed by the corporation from elsewhere—not actual members of the corporate body of the town. The committee merely act, as it seems to me, taking the true interpretation of these various statutory provisions and reading them together, as persons who control and manage just practically, like any other committee appointed by the corporation, really as a sort of department for the purpose of administration in the matter of libraries. That being so, the corporation do a number of acts which would naturally be the acts of those who are for the time being occupiers. Mr. Carver says quite truly that there are two arguments in *Lambeth Overseers* v. *London County Council* (76 L. T. Rep. 795; (1897) A. C. 625), which are treated by the Lord Chancellor and Lord Herschell, both of them great authorities, as distinct. They decided there against the rateability. No doubt one of them inverted the order of the arguments, but the one argument is that there was really no occupation at all, and the other was that under the circumstances there is no beneficial occupation. In a sense it is clear that those two views are distinct views, but I do not think that, in spite of what I have heard, you can in considering either of them leave out of sight the subject-matter—if I may call it so—of the rate—namely, the use of the buildings, and the relation of the public authority to those buildings. Now, in *Lambeth Overseers* v. *London County Council* (*sup.*), as in *Hare* v. *Putney Overseers* (45 L. T. Rep. 337; 7 Q. B. Div. 223), there was under Parliamentary authority a property which was for all purposes property of the public, and though, of course, an Act of Parliament may undo what a previous Act of Parliament has done, yet until there are statutory alterations Brockwell Park on the one hand and Putney Bridge on the other belong to the public in the fullest sense. In regard to Brockwell Park, there being both duties and rights on the part of the London County Council to manage it, and see that it is properly looked after, and no doubt to provide for the maintenance of a staff there, it is, by the terms of the Act which enabled the county council to purchase it, for ever and for all time the property of the public. It seems to me, therefore, that dealing with the question of occupation apart from the question of beneficial occupation—a point so much insisted on in Mr. Carver's argument—rightly insisted on and fairly insisted on—even with regard to that it seems to me that the character of the property cannot be left out of sight, and that acts which might be in a sense treated when you have property clearly not the property of the controlling body in a sense as acts merely of custodians may none the less be when you have got property which is really the property of the administering body treated as acts both in the nature and as evidence of an actual occupation. If the property was not theirs you might treat them merely as custodians. Now, here these buildings are bought under statutory authority. They happen to be buildings bought by the corporation, but they might be buildings leased by the corporation. They have retained the power whenever this building is not required to sell it, or to lease it, or to deal with it as they please, and they retain a control over it which, seeing that the property is not public but theirs, it seems to me is fairly and properly under those circumstances referable to acts of occupation, and to the character of an occupier. It is true they are bound to use their building for the benefit of the public. The council first of all are to establish and maintain a public library which, of course, means a library to which the public will have access. Then the statute enacts that, subject to the provisions thereinafter contained, the public library, museum, and gallery of arts and premises used for the purposes thereof, and all articles and specimens therein shall be vested in and held upon trust by the mayor, aldermen, and burgesses, and shall be managed by the council, and shall at all times be kept in fit and proper order for the benefit of the inhabitants of the borough of Liverpool and the neighbourhood thereof and others resorting thereto. That seems to be a provision which as applied to property acquired whether by purchase or lease under the powers of the statute seems to be justly referable to them as occupiers in the legal sense of the word, and not merely as "custodians," to borrow the word of the House of Lords in *Lambeth Overseers* v. *London County Council*. The very fact that it is only, as far as I know and as far as has been cited to us, in those two special cases where property is the property of the public, though administered under statutory authority by some public body for some purpose and maintained, that any exemption has been made to the liability to rates of property which public bodies may hold with statutory duties for the benefit either of the public or portions of the public, it seems to me to require the central fact referred to so often by Lord Halsbury and Lord Herschell of the particular character of the property with which they were dealing—it requires something of that kind to take this case out of a class of cases which has long been well recognised. Those cases are where public bodies are administering for the purposes of the public an area more or less limited, administering for their benefit, be it schools or other institutions, or pumping stations as at Erith, under public authority for the time being using it for public purposes, and using a piece of land and buildings thereon and machinery placed in those buildings. In all those cases, although the purpose is public and although the public can require the use of those particular things which are held by the public body for those purposes, and can require them to be dealt with in accordance with statutory rules, they are none the less subject to rates. In this case it is property which unquestionably may at any time, when it is no longer required for the purposes of the Act, be sold or leased, and may be the subject of purchase, and the fact that it is not for the time being anything except a place used subject to certain regulations for the public does not appear to me in itself sufficient to take this building out of the list of rateable buildings in respect of the occupancy of the corporation. Then it is suggested, but not pressed so much, though of course fairly brought before us, that this place may be exempt under provisions of the Literary and Scientific Societies Act 1843 (6 & 7 Vict. c. 36) which was an Act to exempt from local rates land and buildings occupied by scientific or literary societies. I think there are

many difficulties, at any rate more difficulties than one, in the way of any such contention. In the first place (and that is sufficient for me) I do not see that this particular society — if you can call either the corporation or the committee in respect of this library, museum, and rooms a society, or treat it as a society—is either supporting these premises wholly or in part by annual voluntary contributions. All that is suggested here in the way of voluntary contributions are possible gifts of books from persons choosing to give books, and the 250*l.* a year which is received from the educational authority. It seems to me to call the latter a voluntary contribution is to do violence to the ordinary meaning of language which has an ordinary accepted meaning, and to treat a gift of books to an institution as a voluntary contribution would hardly seem to me to come within the fair meaning of the Act. Therefore there is the difficulty to which Mr. Carver has referred, that, assuming you can call either the municipal corporation or the committee a society instituted for the purpose of science, literature, or fine arts exclusively, the premises would not become an institution which in part, at any rate, are for any one of those three purposes, but they are for the general acquisition of that knowledge which it is so pleasant to acquire through the medium of a newspaper as to what is going on from time to time, and which is not either for literary, scientific, or artistic purposes. But, be that as it may, it is sufficient for my view to say that this clearly does not fall as an institution within the meaning of this section. I am of opinion, therefore, that the case ought to be decided in favour of the respondents.

Ridley, J.—I have come to the same conclusion, and I wish also to express my acknowledgments for the arguments which we have heard at the Bar upon a question of some intricacy. I have, however, come to the conclusion, as I have said, that this rate ought to be maintained. I think that the premises in question—the hereditaments in question — are not within the meaning of the decision in the case of *Lambeth Overseers* v. *London County Council*, nor within the decision in *Hare* v. *Overseers of Putney*. I think that, speaking generally, we may regard those two cases as standing by themselves, though there is another class of property which has been put along with them—namely, sewers—which in one of the cases which came before the court were held not to be rateable; but for the present purposes I think we must regard those two cases as constituting a class of such premises and such hereditaments as have been held not to be rateable. Upon the other side there are a long string of decisions since the case of *Jones* v. *Mersey Docks and Harbour Board* (12 L. T. Rep. 643; 11 H. L. Cas. 443), which was decided in the House of Lords, under which it has been decided from time to time that, although lands are held for public purposes, they are not on that account not rateable. It was held otherwise formerly, but since the decision in *Jones* v. *Mersey Docks and Harbour Board* that is the law that has been consistently followed. When one is asked to give reasons for this particular judgment, I think that the case of *Lambeth Overseers* v. *London County Council* is the first and the main decision to which we must turn. We must look at that and see how it was that in that case Brockwell Park was held to be incapable of being rated. It was for two reasons; first of all, that there was no occupation of it in anybody, and, secondly, that, if there were any occupation, it was not an occupation of any benefit—it was not a beneficial occupation. Brockwell Park was by statute placed under the London County Council, who were under a perpetual obligation to maintain and preserve it, when they had purchased it, as a park for the perpetual use of the public for exercise and recreation. The park itself and the land was held by them under that perpetual obligation. Thereupon it was decided upon those facts, both by Lord Halsbury and Lord Herschell, that there was not a rateable occupation by anybody, because the public was the occupier and no one else. As Lord Halsbury said: "I do not think there is here a rateable occupation by anybody." The public is not a rateable occupier, and I think that that one sentence disposes of the case. Lord Herschell, when he dealt with that point, said also: "Moreover, taking this point last, I am not satisfied that the county council are occupiers of this park for rating purposes, though the legal possession, no doubt, is vested in them. They seem to me to be merely custodians and trustees to hold it and manage it for the use of the public." That is, in other words, the same reason as was given by the Lord Chancellor. Now, the second reason that was given was this: that, if there was an occupation at all, it was not an occupation which as a matter of law could be a beneficial one. That is to say, as I understand the reasoning, it was an occupation affecting the site, affecting the premises, affecting the hereditaments in question, and it must be held for the benefit of the public. Thereupon, if it was held in that way as a matter of law and as a matter of compulsion, it was not a thing out of which the occupant, if there was an occupant, could get without some statute which is beyond the ken of the judgment releasing him from the obligation. For that reason there ceased to be a beneficial occupation. Now, those are the two reasons, and they are given at some length by both the noble Lords who gave the judgment; but Lord Herschell, in giving his judgment, distinguished and pointed out the difference between the case with which he was dealing and *London County Council* v. *Erith and West Ham*, with regard to which I must say a word or two presently. Perhaps the case of *Hare* v. *Putney Overseers* ought to be mentioned at this point. That was a case which, as it seems to me on the facts, which I consider material, cannot be distinguished from *Lambeth Overseers* v. *London County Council*. It is hardly worth while saying that, perhaps, for it is a decision of the House of Lords; but what I wish to point out is this, that the reason why they are exactly alike is that there, in the *Hare* v. *Putney Overseers*, as in *Lambeth Overseers* v. *London County Council*, there was an obligation upon the Metropolitan Board of Works to hold the bridge for ever for the benefit of the public and it was upon that ground that, in *Hare* v. *Putney Overseers*, the bridge was held not to be subject to occupation, and therefore not to be rateable. Now, those are the two cases which I mentioned before as constituting the authorities on the side upon which Mr. Carver claims that

his clients are exempt. Upon the other side there are the School Board cases and there is the pumping station case, which, perhaps, it is most convenient to discuss, although there are many others besides. The Erith case, or the pumping station case, was the case which was distinguished in *Lambeth Overseers* v. *London County Council* from the decision with which they were dealing, and Lord Herschell says in reference to that it has no application, because there the land on which the pumping stations were constructed, and the rateability of which was in question, was not by statute dedicated to that use. It was not by statute dedicated to that use, and it was not affected by any statute at all, but there was a duty on the London County Council to make outfall works which would get rid of the sewage, and one of those outfall sewers was, as long as they used that method of delivering the metropolitan sewage, of necessity a pumping station. So far the duty was one to the public. It was on behalf of the public that the thing had to be done, but there was no statute that dedicated the pumping station to that use, and there was a statute dedicating Brockwell Park to the public use. The London County Council could place their pumping stations where they pleased. They could not take away Brockwell Park and place it where they pleased. They could remove the pumping stations elsewhere at any time they thought fit, or dispose of them altogether. If they adopted some other method of dealing with the sewage they could sell it or let the land to a tenant, because the use of it would be unrestricted. There is the distinction which existed between the two cases. I do not say that the case of the pumping station is precisely similar to that with which we have now to deal, but my distinction between them is this, that there was no statute dedicating the site of the pumping stations to the public any more than there is here a statute dedicating the site of these buildings to the public. If it is true to say that the London County Council could do away with the pumping station when they pleased, it is also true to say that the corporation of Liverpool could do the same here. It is a part of the obligation upon them that they should continue this work; that there should be a library for the benefit of the public so long as it is required. It is not a case in which they can by adopting another method of benefiting the public or carrying out the duty which is intrusted to them get rid of that which they are now doing. But that does not seem to me to be a material distinction. I think the distinction between this case and the two cases relied on by the appellants is that here there is no statute dedicating this site to the use of the public just as in the pumping station case. Now, I must refer further to *London County Council* v. *Erith and West Ham* (69 L. T. Rep. 725; (1893) A. C. 562) in order to point to some observations which occur to me to carry out the distinction which I have been endeavouring to make. It is a case in which in the judgment of the House of Lords a great many authorities are cited, and one of them is *West Bromwich School Board* v. *West Bromwich Overseers* (13 Q. B. Div. 929). In giving judgment, that case is quoted by Lord Herschell, who gave judgment in that case also, and he says in referring to it that the rateability of the school depended upon very much the same considerations—not in words as the case with which he was dealing, but using the same words as he did afterwards from the case of *London County Council* v. *Erith and West Ham* when he was giving judgment in *Lambeth Overseers* v. *London County Council*—that they were liable to be rated although the premises in question were used for public purposes, and he quoted Bowen, L.J.'s judgment, who dealt with that subject in giving the judgment of the Court of Appeal, and he says this: "Lord Justice Bowen said, 'I will assume that in the hands of the school board it is not capable of being beneficially occupied, but we must consider whether it is capable of being beneficially occupied in the hands of any other person. If land is by law struck with sterility when in any and in everybody's hands, so that no profit can be derived from the occupation of it, it cannot be rated for the relief of the poor, but if the schoolhouse is not used by the school board for any profitable purpose, it by no means follows that the site of it must be sterile in every other person's hands.'" Now, according to the best consideration I can give to this matter, that reasoning applies exactly in the present case. It is adopted by Lord Herschell in the judgment which he was then giving, and it seems to me that it does supply a good distinction which we ought to follow as between the two cases which are on one side of this question and the long string of authorities which is upon the other. I certainly think it would be an extension of the principle upon which *Lambeth Overseers* v. *London County Council* and *Hare* v. *Putney Overseers* were decided if we were to hold that that extended to the present case. It certainly does not fall within the language which was used by the House of Lords in deciding the Brockwell Park case, and I should hesitate long before extending it, because I can conceive that the tendency of the decisions on the other side was to include within the area of the rating authority, or the liability to be rated, almost every property unless one can establish an exemption for it. Here it lies upon those who say that the public library is not rateable to show that it is exempt, and I think, for the reasons I have given, that, although the argument is one well worthy of consideration, according to my judgment it is not well founded, and that, as those two authorities do not apply in their facts and are not on all fours with the present case, we ought not to extend that principle. On the rest of the case and on the other points taken under the statute of 1843, I do not propose to add anything to what my brother Kennedy has said.

Judgment accordingly.

Solicitors: *F. Venn* and *Co.*, for *E. R. Pickmere*, Liverpool; *Sharpe, Parker*, and *Co.*, for *Cleaver, Holden*, and *Co.*, Liverpool.

CROWN CASES RESERVED.

Jan. 28 *and Feb.* 20, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY, RIDLEY, CHANNELL, and PHILLIMORE JJ.)

REX *v.* OSBORNE. (*a*)

Criminal law — Evidence — Admissibility — Indecent assault — Complaint or statement by girl assaulted — Statement made in prisoner's absence — When admissible — Res gestæ — *Consent not material.*

In cases of rape and indecent assault a complaint or statement by the woman alleged to have been assaulted made immediately after the event in the absence of the person accused is admissible in evidence, not merely as negativing consent, but as part of the res gestæ, *and as a collateral fact consistent with the woman's story. The admissibility of such evidence does not depend on the relevancy of evidence of consent, and a statement by a girl under the age of thirteen is therefore admissible.*

Reg. *v.* Lillyman (74 *L. T. Rep.* 730; 18 *Cox C. C.* 346; (1896) 2 *Q. B.* 167) *considered and followed.*

THIS case, stated for the opinion of the court by the chairman of the Worcestershire Court of Quarter Sessions, was, so far as is material, as follows:—

The prisoner, William Henry Osborne, was indicted for indecently assaulting Keziah Parkes.

It was proved that the prisoner kept a fried fish shop in Kidderminster at about a distance of five minutes' walk from where the prosecutrix resided; that on the day in question Kezia Parkes, a girl of the age of twelve years, with her sister, Nelly Parkes aged eight, and a girl named Mary Moule aged eleven, went to the prisoner's shop about 3.30 in the afternoon for the purpose of buying some fried potato chips.

They had been in the habit of going to the shop and of selling dripping to the prisoner.

Mary Moule asked the prisoner if he wanted any dripping, and he replied that they could fetch him some if they would come back at once Mary Moule and Nelly Parkes went to fetch the dripping. Keziah Parkes asked if she should go with them, but the prisoner said, "No, stop with me." As soon as the other girls were gone prisoner took Keziah Parkes into the back kitchen, pulled her on to his lap, put his hand up her clothes, and undid her drawers and felt her private parts. Keziah Parkes offered no resistance or objection. He then put her down on to the ground and took her up again.

A girl came into the front shop and the prisoner put Keziah Parkes down. When the girl left prisoner came into the kitchen and asked Keziah Parkes to come back on his lap, but she refused and ran off towards home. On her way home she met Mary Moule and her sister coming back to the shop. They asked her "why she was going home and why she did not wait till they came back." She had not spoken to them when this question was asked.

Mary Moule was called and asked, when she met Keziah Parkes in the street, "Did you speak to her?" Moule replied, "Yes; I asked her why she did not stop for me." The question was then asked: "What did she say?"

Counsel for the prisoner objected to this question on the grounds: First, that an answer given by a prosecutrix to a question in a charge of indecent assault could not be given in evidence, as such an answer was not a complaint within the meaning of *Reg.* v. *Lillyman* (74 L. T. Rep. 730; 18 Cox C. C. 346; (1896) 2 Q. B. 167); and, secondly, that as the girl was under the age of thirteen her consent was not material to the charge, and consequently any statement she made, whether in reply to a question or otherwise, could not be given in evidence as the rule in *Reg.* v. *Lillyman* applied only to cases where want of consent is a material element in the charge.

Counsel for the prisoner relied upon the decision of *R.* v. *Merry* (19 Cox C. C. 442), that an answer to a question was not a complaint, and also on the decision in *R.* v. *Kingham* (66 J. P. 393), that where consent is not a material element the statement of the prosecutrix is not admissible.

Counsel for the prosecution relied upon the decision in *R.* v. *Kiddle* (19 Cox C. C. 77), where it was decided that the rule in *Reg.* v. *Lillyman* applied to cases where the girl on whom the offence was alleged to have been committed is of such tender years that the court directs her evidence to be taken, but not upon oath, and where the question of her consent was immaterial.

The chairman, being of opinion that the conduct of the prosecutrix in running away home and not waiting for her companions was part of the *res gestæ*, and that her statement would be evidence of why she ran away home, was of opinion that neither the rule in *R.* v. *Merry* nor the rule in *R.* v. *Kingham* applied in this case, or, if either of them did apply, that such decisions were not in accordance with *R.* v. *Folley* (60 J. P. 569) and *R.* v. *Kiddle* (19 Cox C. C. 77), and, in accordance with those cases allowed the question to be put.

Moule replied to the question why the prosecutrix did not stop for her, "Because she did not like the prisoner, and would not go near him again, as he unbuttoned her drawers; that was all she said."

The police constable who arrested the prisoner swore that at the police-station, when prisoner was in custody, he told the prisoner that he would be charged with indecent assault upon Keziah Parkes; that he cautioned him, and then the prisoner replied, "She came and sat on my lap herself. She has done it many times, and is more to blame than me."

In summing up to the jury the chairman told them:—

(1) That the question if the girl consented or not, or whether she had allowed the prisoner to take indecent liberties with her or not on previous occasions, was no defence to the charge; that the question for them was—Did they believe that on the particular date prisoner took prosecutrix, either with or without her consent, upon his lap, put his hand up her clothes, and unbuttoned her drawers.

If so, that would be sufficient to sustain the indictment, but that they ought not to convict unless in their opinion there was corroborative evidence; that the only corroborative evidence in this case was the statement of the prisoner himself made to the police constable, that the girl came herself and sat on his lap. If they believed the police constable that the prisoner said this, there

(*a*) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

was sufficient corroboration to justify them in convicting the prisoner of an indecent assault if they thought fit to do so.

He did not refer in any way in summing up to the answer to the question which Mary Moule asked prosecutrix, as in my opinion it was not evidence of corroboration of the charge—only evidence to explain why prosecutrix did not wait for the other children.

The prisoner pleaded Not Guilty, and was found Guilty with a recommendation to mercy, and judgment was postponed, the prisoner being liberated on recognisance bail to appear and receive judgment, himself in 10*l.* and one surety in 10*l.*

The questions of law for the consideration of the court are: (1) Whether the fact that a statement made by a prosecutrix to a third person immediately after an alleged indecent assault in answer to a question from such person prevents such statement being given in evidence in accordance with the rule laid down in *Reg.* v. *Lillyman*. (2) If such a statement can be given in evidence, although it is an answer to a question, does the fact that the offence charged is one where the consent of the prosecutrix is immaterial render such statement inadmissible? (3) Can such a statement be given in evidence when the prosecutrix does not state that the act charged was done against her will?

Marchant for the prisoner.—The evidence to which objection was taken being hearsay evidence is inadmissible, unless it can be brought within the exceptional class of cases to which the principle of *Reg.* v. *Lillyman* (*sup.*) applies. That case shows a statement made in the absence of the accused to be admissible must be a complaint made immediately after the alleged assault and therefore part of the *res gestæ*; and being a complaint, it is evidence negativing consent. In this case, however, Keziah Parkes' statement was not a complaint, but merely part of a subsequent conversation. It was, therefore, not part of the *res gestæ*. It was not admissible as evidence negativing consent, for the question of consent was not relevant. If consent is immaterial, the evidence is immaterial and inadmissible. Here the prosecutrix being under the age of thirteen consent was not a question in the case, and the evidence negativing consent was inadmissible. He referred to

Reg. v. *Merry*, 19 Cox C. C. 442;
Reg. v. *Rowland*, 62 J. P. 459;
R. v. *Kiddle*, 19 Cox C. C. 77;
R. v. *Kingham*, 66 J. P. 393;
R. v. *Folley*, 60 J. P. 569.

J. B. Matthews for the Crown.—The evidence was properly admitted. The admissibility of this kind of evidence in this class of case does not depend upon the relevancy of consent, it is admissible as part of the *res gestæ*. This was decided in the case of *Rex* v. *Brasier* (1 Leach, 199; 1 East, P. C. 443), which was followed in *Reg.* v. *Lillyman* (*sup.*). *Reg.* v. *Rowland* is not an authority to the contrary.

Marchant in reply.

Cur. adv. vult.

Feb. 20.—The judgment of the court was read by

RIDLEY, J.—In this case the prisoner Osborne was tried at the Worcestershire Quarter Sessions on an indictment containing two counts; the first for indecent assault, and the second for common assault on Keziah Parkes, a girl twelve years old. It appeared that Keziah Parkes, along with a younger sister and another girl named Mary Moule, of a similar age, went to a shop kept by the prisoner for the purpose of buying chips. Two of the girls—namely, Moule and the younger sister—went out of the shop on an errand, and during their absence the alleged assault was committed by him on Keziah. She then left the shop, and on her way home met Mary Moule with her sister coming back to the shop. Mary Moule was called at the trial, and was asked when she met Keziah Parkes in the street, "Did you speak to her?" Moule replied, "Yes; I asked her why she did not stop for me." The next question put to the witness was, "What did she say?" Objection was then taken for the prisoner that the witness's answer was not admissible in evidence, but the chairman admitted the evidence. The girl's evidence was as follows: "Because she did not like the prisoner and would not go near him again, as he unbuttoned her drawers. That was all she said." The prisoner was convicted, and the point raised for our decision is whether this ruling was right. It was contended for the prisoner that the evidence was inadmissible—first, because the answer made by the girl was not a complaint, but a statement or conversation, having been made in answer to a question; and, secondly, because, as Keziah Parkes was under the age of thirteen, her consent was not material to the charge. As to the first point, the case of *R.* v. *Merry* (19 Cox C. C. 442) was quoted. In that case a question had been put to a girl of nine years old by her mother, in a case of indecent assault, and the learned judge ruled that, as the proposed evidence was a statement made in answer to a question, it was a conversation and not a complaint, and he declined to allow it to be given in evidence. It does not appear, however, from the report what the question was that was put to the girl. It appears to us that the mere fact that the statement is made in answer to a question in such cases is not of itself sufficient to make it inadmissible as a complaint. Questions of a suggestive or leading character will, indeed, have that effect, and will render it inadmissible; but a question such as this put by the mother or other person, "What is the matter?" or "Why are you crying?" will not do so. These are natural questions which a person will be likely to put. On the other hand, if she were asked, "Did So-and-so (naming the prisoner) assault you?" "Did he do this and that to you?" then the result would be different, and the statement ought to be rejected. In each case the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding judge. If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible. If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens to speak first. In this particular case we think that the chairman of quarter sessions acted rightly, and that the putting of this parcular question did not render the statement inad-

missible. Upon the second point it was contended that, although under the decision of *Reg.* v. *Lillyman* (1896) 2 Q. B. 167) the particulars of a complaint made may, in some circumstances, be given in evidence on a charge of rape, that ruling does not extend to a charge of criminal knowledge or indecent assault where, as in the present case, consent is not legally material. This contention is supported by *Rex* v. *Kingham* (66 J. P. 393), decided in 1902; but, on the other hand, in *R.* v. *Kiddle* (19 Cox C. C. 77), decided in 1898, it was ruled that the decision in question does extend to all charges of this character, whether consent is a defence or not. In *Reg.* v. *Lillyman* the prisoner was charged on an indictment containing three counts—first, attempt to have carnal knowledge of a girl above thirteen and under sixteen; second, an assault with intent to ravish her; third, an indecent assault. The prisoner was found guilty upon the first count only, and upon that count, in order to establish guilt, it was not necessary to prove want of consent. But the prosecutrix swore that what was done to her was done without her consent; and the court, in giving judgment, said that, as she had so deposed, the complaint was admissible. Two points were taken and argued—first, whether the fact that the complaint was made was evidence; second, whether particulars of it could be given; and it is to the latter of these that the greater part of the judgment relates. This point was not argued before us, as distinguished from the first point on the present occasion; and the only question, therefore, for our determination is whether, where consent is no part of the charge, the complaint is admissible. By the judgment in *Reg.* v. *Lillyman* it was decided that the complaint was admissible, not as evidence of the facts complained of, nor as being a part of the *res gestæ* (which it was not), but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains. Mr. Marchant argued upon this that the reasons so given were one only, and that the consistency of the complaint with the story given by the prosecutrix was material only so far as the latter alleged non-consent. If however, that argument were sound, the words in question might have been omitted from the sentence, and it would have been sufficient to say that the complaint was admissible only and solely because it negatived consent. We think, however, if it were a question of the meaning of words, that the better construction of the judgment is that, while the court dealt with the charge in question as involving in fact, though not in law, the question of consent on the part of the prosecutrix, yet the reasons given for admitting the complaint were two—first, that it was consistent with her story in the witness-box; and, secondly, that it was inconsistent with consent. The reasoning proceeded thus: On the second and third counts consent was material in law; on the first it was material in fact. There is for this purpose no difference between the two. It is not, therefore, because the charge itself involves proof of the absence of consent that the evidence is admissible. On the contrary, the prosecutrix herself can make it evidence by deposing that she did not consent when that is no part of the charge. In other words, whether non-consent be legally a necessary part of the issue, or whether, on the other hand, it is what may be called a collateral issue of fact, the complaint becomes admissible. But how does non-consent become a collateral issue of fact? The answer must be, in consequence of the story told by the prosecutrix in the witness-box. And the judgment treats the two cases on the same footing. If non-consent be a part of the story told by the prosecutrix, or if it be legally a part of the charge, in each case alike the complaint is admissible. But, if that is so, does not the reasoning apply equally to other parts of the story, and not merely to the part in which the prosecutrix has denied consent? If not, it seems illogical to allow, as the court did allow, that the whole of the story may be given in evidence. The true result is we think that, while the decision in *Reg.* v. *Lillyman* is not strictly on all fours with the present case, yet the reasoning which it contains answers the question now raised for decision. But, however that may be, it appears to us that, in accordance with principle, such complaints are admissible, not merely as negativing consent, but because they are consistent with the story of the prosecutrix. In all ordinary cases, indeed, the principle must be observed which rejects statements made by anyone in the prisoner's absence. Charges of this kind form an exceptional class and in them such statements ought, under proper safeguards, to be admitted. Their consistency with the story told is, from the very nature of such cases, of special importance. Did the woman make a complaint at once? If so, that is consistent with her story. Did she not do so? That is inconsistent. And in either case the matter is important for the jury. It is in accordance with this view that in early times it was incumbent on the woman who brought an appeal of rape to prove that while the offence was recent she raised "hue and cry" in the neighbouring towns, and showed her injuries and clothes to men, and that the appellee might raise as a defence the denial that she had raised the hue and cry. The passages in Bracton, De Coronâ, Lib. iii., fol. 147, and in the Pleas of the Crown, Selden Society, vol. 1, Warwickshire Eyre A.D. 1221, p. 109, as also in the Mirror of Justice, Selden Society, vol. 7, Exceptions, cap. 21, p. 103, are interesting and instructive as showing that the distinction in this special class of case has been recognised from the earliest times. The hue and cry was the phrase used generally for the pursuit of a felon; but we have not found any other case than rape in which it was for the prosecution to show that they had raised it, or in which it was a defence to show that it had not been raised. It is, however, right to refer to a passage in Bracton, De Coronâ, Lib. iii., fol. 139, in which describes the objection made by an appellee that the hue and cry had not been raised as *ista generalis exceptio et prima:* (see the passage referred to in the late Stephen, J.'s History of Criminal Law, vol. 1, p. 246). But it seems to have been specially applicable to this class of case only. A former weighty authority for the existence of this exception to an acknowledged general rule is to be found in Hale's Pleas of the Crown, vol. 1, p. 633, where it is stated that the party ravished is to give evidence on oath; and her credibility must be left to the jury: "For instance, if the witness be of good

fame, if she presently discovered the offence, made pursuit after the offender, showed circumstances and signs of the injury . . . these and the like are concurring evidence to give greater probability to her testimony when proved by others as well as herself. But, on the other side, if she concealed the injury for any considerable time after she had opportunity to complain . . . and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption that her story is false or feigned." We think that these words may be taken as stating the law accurately, and they indicate that these complaints are to be admitted, not only because they bear on the probability of her testimony in a case in which, without such or other corroboration, reliance might be placed on her testimony. Our attention has been called to the case of *The Commonwealth* v. *Cleary* (1898, 172 Mass. 175), decided by the Supreme Judicial Court of that State. In that case the indictments were for unlawfully abusing a child under the age of sixteen years. The girl had made a complaint, and the fact was given in evidence. No question arose as to the admissibility of its details; but the point reserved for the decision of the court on conviction of the prisoner, was whether the proof of the complaint could be admitted. The argument proceeded on the question whether it was too remote in point of time; but Holmes, J., in giving the judgment of the court, said: "It is not argued that the common law in cases of rape does not apply: (see *Commonwealth* v. *Roosnell*, 143 Mass. 32; *Commonwealth* v. *Hackett*, 170 Mass. 194-196). The rule that in trials for rape the Government may or must prove that the woman concerned made complaint soon after the commission of the offence is a perverted survival of the ancient requirement that she should make hue and cry as a preliminary to bringing her appeal: (Glanville XIV., c. 6; Bracton, fol. 147*a*; Fleta, c. 25, s. 14; st. 4 Edw. 1, st. 2). Appeals became obsolete, and left rape to be dealt with by indictment before the development of the modern law of evidence." He then quotes the passage from Hale's Pleas of the Crown, above set out, and says: "If it means what it has been taken to mean, that the Government can prove fresh complaint as part of its original case, it cannot be justified by the general principles of evidence which now prevail. . . . The evidence is not admitted as part of the *res gestæ*, or as evidence of the truth of the thing alleged, or solely for the purpose of disproving consent; but for the more general purpose of confirming the story of the ravished woman": (see *Reg.* v. *Lillyman*, *sup.*). And further on he says: "The test is whether, according to the principles of the exception her having made the complaint tends to corroborate testimony given by the child at the trial." For these reasons the evidence was in that case held to be admissible. With that statement of the law we concur. We are, at the same time, not insensible of the great importance of carefully observing the proper limits within which such evidence should be given. It is only to cases of this kind that the authorities on which our judgment rests apply; and our judgment also is to them restricted. It applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself. Within such bounds we think the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility, and, when consent is in issue, of the absence of consent. For these reasons we think the conviction should be affirmed.

Conviction affirmed.

Solicitor for the prosecution, *G. A. Weston*, Kidderminster.

Solicitors for the defence, *Stallard* and *Turner*, for *A. Spencer Thursfield*, Kidderminster.

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, April 7, 1905.

(Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.)

JACKSON *v.* WIMBLEDON URBAN DISTRICT COUNCIL. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Local government — Drain or sewer—"Single private drain"—Line of pipes draining several houses of same owner—Draining into "single private drain"—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *s.* 41—*Public Health Acts Amendment Act* 1890 (53 *&* 54 *Vict. c.* 59), *s.* 19.

A line of pipes conveying the drainage of several houses all belonging to the same owner into a "single private drain" to which sect. 19 *of the Public Health Acts Amendment Act* 1890 *applies, is not a "single private drain" within that section.*

APPEAL of the Wimbledon Urban District Council from the decision of the Divisional Court (Lord Alverstone, C.J., Wills and Kennedy, JJ.) upon a case stated by justices.

The Wimbledon Urban District Council commenced summary proceedings against Jackson to recover the sum of 35*l*, the amount of the expenses incurred by the district council in relaying a main drain at the rear of twelve houses in Hatfield Crescent, Wimbledon, and also the sum of 13*l*., being a proportion of the expenses incurred by the district council in relaying a single private drain connecting the said twelve houses, and other houses belonging to different owners, with a public sewer.

There were sixteen houses on the north side of Hartfield Crescent, twelve belonging to Jackson, one belonging to Holliday, and three belonging to Eysoldt.

At the rear of the twelve houses belonging to Jackson there was a main or common drain with which each of the twelve houses was connected by means of branch drains; the main or common

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

drain carried the sewage to a manhole near the back of the end house, and from there the sewage was carried through a branch drain, which ran between the end house of the plaintiff's houses and Holliday's house, to a public sewer in the street. The four houses belonging to Holliday and Eysoldt were drained by a common drain at the rear of the houses which carried the sewage to the manhole, whence it was carried through the branch drain to the public sewer.

The plan set out in the report of the case in the Divisional Court (90 L. T. Rep. 417) shows all the houses and all the drains.

All these drains were constructed wholly on private property.

It was admitted that the branch drain from the manhole to the public sewer was a "single private drain," and there was no dispute as to payment of the sum of 13*l.* by Jackson.

The Court of Appeal sent the case back to the justices to ascertain the facts as to the prior ownership of the twelve houses, but they did not state anything inconsistent with all the houses having always belonged to one owner. It was stated in court on behalf of Jackson that all the twelve houses had been built by one owner before 1890; that they had all been conveyed at the same time by the original owner to a purchaser; and that that purchaser had conveyed them all at one time to Jackson.

On the 26th Nov. 1902 a written application was made by certain persons to the district council, acting as the local authority under the Public Health Act 1875, stating that drains belonging to premises in Hartfield-crescent were a nuisance and injurious to health, and requesting the district council to take action in the matter.

The district council, acting under sect. 41 of the Public Health Act 1875, caused their inspector of nuisances to inspect the drains. Acting upon the report of their inspector, the district council then gave notice in writing to the owners of the sixteen houses to do the works necessary to alter and amend the main or common drains at the back of the sixteen houses, and also the branch drain to the public sewer.

The owners of the four houses not belonging to Jackson executed the necessary works in respect of the main drain at the back of those houses, but not in respect of the branch drain from the manhole to the public sewer.

Jackson did not comply with the notice in any respect.

The district council thereupon executed the necessary works in respect of the main drain at the back of Jackson's twelve houses, and also in respect of the branch drain from the manhole to the public sewer.

The surveyor of the district council then apportioned the expenses in respect of the branch drain amongst the three owners of the sixteen houses, and apportioned the whole cost of the works executed to the main drain at the back of Jackson's houses upon Jackson.

Jackson did not dispute the apportionment, but refused to pay after demand the sum of 35*l.* in respect of the main drain, and the sum of 13*l.* in respect of the branch drain.

The district council, having taken proceedings before justices to recover those two sums from Jackson, it was admitted at the hearing that the branch drain from the manhole to the public sewer was a "single private drain" within sect. 19 of the Public Health Acts Amendment Act 1890, and the liability to pay the sum of 13*l.* was not disputed.

The justices decided that the main drain at the back of Jackson's house was a "single private drain" within sect. 19, and that he was liable to pay the sum of 35*l.*; and they stated this case for the opinion of the court.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

Sect. 4. "Drain" means any drain of and used for the drainage of one building or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed. "Sewer" includes sewers and drains of every description except drains to which the word "drain" interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads, and not being a local authority under this Act.

Sect. 41. On the written application of any person to a local authority, stating that any drain, water-closet, earth-closet, privy, ashpit, or cesspool, on or belonging to any premises within their district is a nuisance or injurious to health (but not otherwise), the local authority may, by writing, empower their surveyor or inspector of nuisances, after twenty-four hours written notice to the occupier of such premises, or, in case of emergency, without notice, to enter such premises, with or without assistants, and cause the ground to be opened, and examine such drain, water-closet, earth-closet, privy, ashpit, or cesspool. If the drain, water-closet, earth-closet, privy, ashpit, or cesspool on examination is found to be in proper condition, he shall cause the ground to be closed, and any damage done to be made good as soon as can be, and the expenses of the works shall be defrayed by the local authority. If the drain, water-closet, earth-closet, privy, ashpit, or cesspool on examination appear to be in bad condition, or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring him forthwith or within a reasonable time therein specified to do the necessary works; and if such notice is not complied with, the person to whom it is given shall be liable to a penalty not exceeding ten shillings for every day during which he continues to make default, and the local authority may, if they think fit, execute such works, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses.

The Public Health Acts Amendment Act 1890 (53 & 54 Vict. c. 59):

Sect. 19. (1) Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section forty-one of the Public Health Act 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor, or (in case of dispute) by a court of summary jurisdiction. (2) Such expenses may be recovered summarily or may be declared by the urban authority to be private improvement expenses under the Public Health Acts, and may be recovered accordingly. (3) For the purposes of this section the expression "drain" includes a drain used for the drainage of more than one building.

The Divisional Court (Lord Alverstone, C.J., Wills and Kennedy, JJ.) allowed the appeal of Jackson (90 L. T. Rep. 417).

The district council appealed.

Macmorran, K.C. and *George Humphreys* for the appellants.—The point arising in this case has never yet arisen for decision. It is not covered by the decision in *Thompson* v. *Eccles Corporation* (21 Cox Mag. Cas. 524; 91 L. T. Rep. 750; (1905) 1 K. B. 110) in this court, in which the earlier decision in *Bradford* v. *Eastbourne Corporation* (74 L. T. Rep. 762; (1896) 2 Q. B. 205) was approved. It is here admitted that the branch drain from the manhole to the public sewer is a "single private drain" within sect. 19 of the Public Health Acts Amendment Act 1890. The drainage of Jackson's houses is carried through that "single private drain," and therefore Jackson's houses are connected with a public sewer by a single private drain within the very words of sect. 19. The whole drainage of all the sixteen houses is one system of drainage, and must be considered as a whole; the part connecting with the public sewer is a "single private drain," and therefore the whole is a "single private drain," draining two or more houses belonging to different owners, and is within sect. 19. The facts of this case are not the same as those in any of the reported cases, but it is clear that the case comes within the very words of sect. 19.

Sylvain Mayer for the respondent.—The branch drain from the manhole to the sewer is really a sewer and not a "single private drain;" and no admission that was made in respect of the claim for the expenses of relaying it can make it in law a "single private drain." Assuming, however, that the branch drain is a "single private drain," and that the main drain at the back of Jackson's houses is a part of the same line of pipes, yet there is authority which shows that one part of the same line of pipes may be a "single private drain" and the other part a "sewer":

Beckenham Urban District Council v. *Wood*, 60 J. P. 490;

Bradford v. *Eastbourne Corporation*, 74 L. T. Rep. 762; (1896) 2 Q. B. 205.

In the present case the position is even stronger, for here there are quite separate and distinct lines of pipes along the back of Jackson's houses to the manhole and from the manhole to the sewer. The case must be considered *rebus sic stantibus*, and the history of the construction and use of the line of pipes cannot be inquired into for the purpose of determining its present description:

Kershaw v. *Taylor*, 73 L. T. Rep. 274; (1895) 2 Q. B. 471.

In fact, these twelve houses have always belonged to one owner, and, therefore, sect. 19 has never at any time been applicable to this line of pipes.

Macmorran, K.C. in reply.—Sect. 19 was intended to take away, and did take away, some rights which previously existed in respect of lines of pipes used for drainage. The real question here is, What is the proper construction of sect. 19? When once there is found a single private drain, carrying the drainage of houses belonging to different owners, and connected with a public sewer, then all the houses so connected with a public sewer are liable to contribute to the expense of amending the drainage under sect. 19.

COLLINS, M.R.—This is an appeal from the decision of the Divisional Court upon a question arising upon the construction of sect. 19 of the Public Health Acts Amendment Act 1890. That section has frequently been the subject-matter of discussion in the courts, and has recently been considered in this court in *Thompson* v. *Eccles Corporation* (21 Cox Mag. Cas. 524; 91 L. T. Rep. 750; (1905) 1 K. B. 110), when we approved of and followed the decision in *Bradford* v. *Eastbourne Corporation* (74 L. T. Rep. 762; (1896) 2 Q. B. 205), which is the leading case upon that subject. In that case Lord Russell, C.J. and Wills, J. delivered elaborate and instructive judgments; and Wills, J. was a party also in the decision in the present case. I will first read the words of sect. 19. They are as follows: "(1) Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section forty-one of the Public Health Act 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any of the works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a court of summary jurisdiction. (3) For the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building." Now, in the present case there is what is admitted to be a "single private drain," running from the manhole to the public sewer between two of the houses. On the right of that single private drain there are twelve houses belonging to one owner, and on the left there are four houses, three of which belong to one person and one to another person. That "single private drain" leads, as I have said, from a manhole. Into that manhole the four houses on the left are drained by a single private drain. The drainage from the twelve houses on the right is also carried to that manhole by a line of pipes. From the manhole the drainage of all the sixteen houses is carried by one drain to the public sewer. The main argument on behalf of the appellants has been that, inasmuch as the sewage of all the sixteen houses is carried for part of the way to the public sewer through a "single private drain," therefore all the drains are brought within sect. 19 of the Act of 1890. It is contended that as all the houses both on the right and on the left are connected with a public sewer by a "single private drain," therefore all the drains which drain the houses are within sect. 19. It seems to me that the short answer to that contention is that which was given in the the court below, and in the case of *Bradford* v. *Eastbourne Corporation* (*ubi sup.*). The part of the thing to be repaired, the obligation to repair which is cast upon the owner, must be part of a "single private drain," and another part cannot be converted into a "single private drain" simply because it falls into a "single private drain" and its sewage is in part carried through a "single private drain." The part which requires to be repaired must be itself a "single private drain." If the line of pipes at the back of Jackson's houses is not itself a "single private drain," it does not become so merely because it

leads into a "single private drain." Now, the line of pipes at the back of Jackson's houses takes the drainage of houses belonging to one owner only throughout its whole length, and does not carry sewage from houses belonging to different owners. Under the definition contained in sect. 4 of the Public Health Act 1875 this line of pipes is a sewer, unless it is taken out of that category by some statutory enactment. Does sect. 19 of the Public Health Acts Amendment Act 1890 so take it out? Sect. 19 says: "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain." As I have already pointed out, that which is required to be done must be in respect of a "single private drain," and, unless that is proved, sect. 19 does not apply. In the court below it was decided that the fact that through part of its course to the public sewer the drainage of these houses was carried through a "single private drain" was not sufficient to make the other part "a single private drain." That other part remains governed by the existing law apart from the provisions of sect. 19 of the Act of 1890. Therefore, for the reasons which were given in the Divisional Court, with which I entirely agree, I think that the judgment in this case is right and is consistent with the decisions in *Bradford* v. *Eastbourne Corporation* (*ubi sup.*) and *Thompson* v. *Eccles Corporation* (*ubi sup.*). The case was sent back by us in order to clear up the question whether these houses, which now all belong to Jackson, at one time belonged to different owners. It is not necessary for us to consider now what would be the effect if the fact was ascertained that they did once belong to different owners. They now all belong to one owner, and the case was decided in the court below upon that hypothesis, and the onus is on the appellants to prove otherwise. The justices have not found anything which is inconsistent with the fact that the houses have always been in the same ownership. There is no evidence to rebut the presumption that they have always belonged to one owner. This appeal therefore fails, and must be dismissed.

STIRLING, L.J.—I am of the same opinion, and for the same reasons as were given by the Divisional Court and have now been given by the Master of the Rolls.

MATHEW, L.J.—I am of the same opinion. This is an important question. The argument for the appellants was that the nature of this line of pipes was changed because the drainage from it passed through a "single private drain" to the public sewer. It is clear from the definition in the Public Health Act 1875 that this line of pipes was a "sewer" under that Act. It was, then, a sewer before the Act of 1890. Has it ceased to be a sewer since the passing of that Act? It cannot be so said, because the same person is the owner of all the houses. Therefore, sect. 19 of the Act of 1890 does not apply, and the old law still governs the matter. This is therefore a "sewer" and not a "single private drain" within sect. 19. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: for the appellants, *Sharpe, Parker* and *Co.*, for *Butterworth*, Wimbledon; for the respondent, *W. W. Young, Son*, and *Ward*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Tuesday, April 11, 1905.

(Before SWINFEN EADY, J.)

MAYOR, &C., OF WOOLWICH *v.* GIBSON. (a)

Market—Infringement—Injunction.

By letters patent in the sixteenth year of his reign James I. granted a right to a Friday market for the town of W. By an Act of 48 *Geo.* 3, *after reciting the letters patent, it was enacted that it should be lawful for the person entitled to keep the market to take tollage of markets holden on Wednesday and Saturday.*

On the 13*th June* 1887 *the market rights were conveyed and assigned to the W. Local Board. In* 1888 *by-laws were made regulating the use of the market-place. By-law* 15 *provided that a market for the sale of goods, meat, fish, poultry, provisions, fruit, vegetables, plants, flowers, hardware, furniture, apparel, and all other goods, merchandise, and marketable commodities should be held on every day except Sunday, Christmas Day, and Good Friday.*

By a charter in the fifty-fourth year of Henry III. a Tuesday market in P. was granted, which became vested in Queen's College, Oxford, who conveyed to the plaintiff. Under sect. 19 *of the Local Government Act* 1899 *a scheme was made for W. and an Order in Council was made extending the boundaries of W. so as to include P. No provision was made for charging tolls, but power to do so was given by the Woolwich Borough Council Act* 1903, *s.* 4.

The plaintiffs asked for an injunction to restrain the defendants from hawking, selling, or offering or exposing for sale within the borough of W. (except in their own dwelling-houses or shops) any articles or commodities usually sold in public markets except in a market-place of the borough of W., and after payment of the tolls payable to the plaintiffs. Some of the defendants claimed a right to sell in the market without paying toll, and proved that they had sold without paying toll for a number of years.

Held, that as the right to take tolls was not given by the charter, but by the Act of 1903, *no right was acquired by nonpayment of tolls for a considerable period. No trace of the defendants acquiring a right adverse to the rest of the world could be discovered, and an injunction must be granted.*

ACTION.

The plaintiffs claimed to be the owners and entitled to the control of a market at Plumstead, and sought to restrain the defendants from hawking, selling, or offering or exposing for sale within the borough of Woolwich (except in their own dwelling-places or shops) any articles or commodities usually sold in public markets except in a market-place of the borough of Woolwich, and after payment of the tolls payable to the plaintiffs in Woolwich Market.

The facts were as follows:—

By letters patent dated the 1st June, in the sixteenth year of his reign, James I. granted that Sir William Barne and Hugh Lydyard and their heirs and assigns should and might for ever thereafter have, hold, and keep within the town

(a) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

of Woolwich and the liberties and precincts of the same one market day on Friday in every week yearly to be holden and kept.

By an Act of 48 Geo. 3, after reciting the letters patent, it was enacted that it should and might be lawful for the person or persons who for the time being or his or their heirs or assigns were entitled unto the said letters patent to hold and keep a market in the said town of Woolwich to demand and take for his, her, and their own use and benefit in the said market such and the like tollage as he, she, and they was and were enabled to take and receive by virtue of the said letters patent in the then present market, and that such market should be holden on Wednesday and Saturday in each and every week (Christmas Day and fast days by proclamation only excepted) during the whole of such respective days.

By a deed dated the 13th June 1887 all the market rights in the town and parish of Woolwich were conveyed by the lord of the manor to the Woolwich Local Board of Health, the plaintiffs' predecessors.

In 1888 by-laws were made to regulate the use of the market. By-law 15 provided that a market for the sale of goods, meat, fish, poultry, provisions, fruit, vegetables, plants, flowers, hardware, furniture, apparel, and all other goods, merchandise, and marketable commodities should be held in Beresford-square, Market-hill, and Albion-road on every day throughout the year, except Sundays, Good Friday, and Christmas Day.

As regards Plumstead, the title of the plaintiffs was as follows:—

By a charter dated the 1st April, in the fifty-fourth year of his reign, Henry III. granted unto the Abbot of St. Augustine's, Canterbury, for the time being and to the convent of the same place (*inter alia*) that they and their successors for ever might have one market in their manor of Plumstead, in the county of Kent, every week on Tuesday unless that market were to the injury of neighbouring markets.

In 1899 the Provost and Scholars of Queen's College, Oxford, who claimed that all interests in the charter were vested in them, granted the market rights to the plaintiffs' predecessors for a small consideration.

The London Government Act 1899, s. 19, provided that a scheme under the Act should be made for placing Woolwich under the general law applying to metropolitan boroughs and for the repeal of the application thereto of the provisions of the Public Health Acts and other enactments not applying to London, and for the application thereto of the Metropolis Management Acts 1855 to 1893, and other enactments applying to London, and, sub-sect. 2, "subject to the provisions of any such scheme, this Act shall apply to Woolwich in like manner as if the local board of health were an administrative vestry."

On the 15th May 1900 an Order in Council was made making the borough of Woolwich coterminous with the Parliamentary borough of Woolwich.

Two schemes were prepared, one for Woolwich and the other for Plumstead.

The Woolwich scheme was confirmed by Order in Council on the 7th Aug. 1900.

The Plumstead scheme was confirmed by Order in Council on the 9th March 1901. The latter scheme recited (*inter alia*) that under the charter granted by Henry III. to the abbot and convent of St. Augustine the administrative vestry had vested in them a market now held in the main High-street, Plumstead, and that by virtue of the Act the market was transferred to the council of the metropolitan borough of Woolwich, subject to the provisions of any scheme made thereunder.

Clause 3 of the scheme provided that

> The powers of carrying on the market under the said charter of Henry III. shall be exercisable by the council of the metropolitan borough of Woolwich within the parish of Plumstead only, and the profits of carrying on the market shall be applied in defraying the costs thereof, and the balance, if any, shall be credited to the parish of Plumstead. . . .

There was no provision enabling the plaintiffs to charge tolls in respect of the Plumstead market.

By the Woolwich Borough Council Act 1903, s. 4, it was enacted that the provisions of the letters patent of James I. relating to or authorising the holding of markets in the parish of Woolwich and all the powers, authorities, rights, duties, and privileges of the council in relation thereto under the letters patent and under the Public Health Act 1875 and the London Government Act 1899 and the London (Woolwich) Scheme 1900 made thereunder or otherwise, "including the power to levy tolls and demand and take charges in respect of such markets," shall extend and apply to the whole of the borough, and all such letters patent and Acts and scheme shall be read and have effect as if the whole of the borough had been referred to therein instead of the said parish.

Under the London Government Act 1899 and the Municipal Corporations Act 1882 a scheme when sanctioned has the force of law.

Eve, K.C. and *Stuart Moore* for the plaintiffs. —The defendants claim a right to sell without paying toll, but, as there was no right to take tolls before 1903, proof that they sold without paying tolls does not prove the existence of any such right. They are not *bonâ fide* inhabitants of Plumstead.

Moyses and *Cairns* for the defendants. — Sect 166 of the Public Health Act 1875 provides that "no market shall be established in pursuance of this section so as to interfere with any rights, powers, or privileges enjoyed within the district by any person without his consent." Members of the public were enjoying at Plumstead the privilege of selling without paying tolls, so their rights are saved by this proviso. The inhabitants of Plumstead had sold without paying tolls for so long that it must be presumed the grant vested in somebody in trust for the inhabitants of the vill.

Stuart Moore replied.

SWINFEN EADY, J.—The plaintiffs claim a market and the power of controlling the same, and seek to restrain the defendants from hawking, selling, or exposing for sale within the borough (except in their own dwelling-houses or shops) any articles or commodities usually sold in public markets, except in a market-place of the borough, and after payment of the tolls due to the plaintiffs. By letters patent in the sixteenth year of the reign of James I. a right to a Friday

market for the town of Woolwich was granted. By an Act (48 Geo. 3) which recites the letters patent it was enacted that it should be lawful for the person entitled to keep the market to take tollage on Wednesdays and Saturdays. On the 13th June 1887 the market rights were conveyed and assigned to the Woolwich Local Board. In 1888 by-laws were made regulating the use of the market-place, and by by-law 15 markets for the sale of fruit and vegetables (*inter alia*) are to be held at specified places every day except Sundays, Good Friday, and Christmas Day. As regards Plumstead, by a charter of 54 Hen. 3 a Tuesday market was granted. In 1899 Queen's College, Oxford, who claimed under the charter, conveyed their market rights to the plaintiffs. By sect. 19 of the Local Government Act 1899 provision is made for a scheme for Woolwich. In 1900 an Order in Council was made extending the boundaries. The scheme for Woolwich was confirmed by an Order in Council in 1900, the scheme for Plumstead by an Order in Council in 1901. No provision was made for charging tolls, but by sect. 4 of the Woolwich Borough Council Act 1903 power to levy tolls was given. Under these circumstances it would seem that the plaintiffs have the right to manage and control the market of Plumstead and take tolls. Some of the defendants claim to sell in the market without paying tolls. They say the grant was made in trust for the inhabitants, or that the court ought to presume an ancient franchise which had become vested in trustees or in somebody in trust for the inhabitants of the vill of Plumstead. There was no right to take tolls under the charter, so for a considerable period people have sold fruit and vegetables without paying tolls. Three of the defendants claim this right—two are not inhabitants, as one lives at Bexhill and another at Woolwich. The third is a market gardener who uses part of an old cottage for stores. I am satisfied that these defendants are not selling in exercise of any such right. The other defendants do not set up any right. It is clear as a matter of fact that the sales are made by the defendants as members of the public not claiming any particular right. There is no ground for the assumption the charter vested in the inhabitants. Persons selling sold free from toll because before 1903 no person was empowered to take it. Reference was made to sect. 166 of the Public Health Act 1875. But in *Fearon* v. *Mitchell* (27 L. T. Rep. 33; L. Rep. 7 Q. B. 690, at p. 696) Cockburn, C.J. says, referring to sect. 50 of 21 & 22 Vict. c. 98, which is identical: "This right which the respondent was enjoying at the time when this market-place was built was not, I think, a a right within the meaning of the section. It was a right which he enjoyed only in common with the rest of Her Majesty's subjects. He had no exclusive right to carry on this business, and he had no greater right than anybody else with suitable premises for setting up and carrying on a similar business. The word 'rights,' especially when taken in conjunction with the words 'powers or privileges,' must mean rights acquired adversely to the rest of the world and peculiar to the individual." Reading the section in that sense, there is no trace of the defendants acquiring adversely to the rest of the world any right whatever. Under these circumstances sales by the defendants in the market without paying toll are consistent with the plaintiffs' market rights. Since the Act of 1903 the plaintiffs have, what they had not before, a right to levy tolls. Generally, the defence fails. Manchester claims the right to sell, as do two others, and the defence fails with the usual consequences. Weeks sold, but he alleges the goods were not his own, but his mother's. That is no answer to the plaintiffs' action, and there must be judgment with costs against all these defendants. As to Robbins, who is a cripple and disposed of his business in Sept. 1904, I give him the benefit of the doubt as he sets up no right. Gibson consigned all his goods to Cook for sale, and Cook is not a defendant, so as to these defendants there will be no order and no costs.

Solicitors: *G. T. Courtney Lewis*; *A. Bryceson.*

KING'S BENCH DIVISION.

Thursday, Feb. 2, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.).

SANDYS (app.) *v.* JACKSON (resp.). (*a*)

Food and drugs—Milk—Demand for sample from churn—No demand for milk—Sale of Food and Drugs Act 1875 (38 *& 39 Vict. c.* 63), *s.* 6.

An inspector, having asked the respondent for a sample from certain milk churns, was supplied with such sample, but the inspector made no request in terms to be supplied with milk.

A sample having been given, it was found on analysis to be deficient in milk fat.

Held, that there was no sale to the prejudice of the purchaser within sect. 6 *of the Sale of Food and Drugs Act* 1875.

CASE stated on an information preferred by the appellant against the respondent under sect. 6 of the Sale of Food and Drugs Act 1875 for that he, the respondent, on the 11th April 1904, did unlawfully sell to one Joseph Hewitt to his prejudice one pint of milk which was not of the nature, substance, and quality demanded in that it was deficient of 12 per cent. of its natural fat.

Upon the hearing of the information the following facts were proved:—

About ten in the morning of the 11th April 1904 Joseph Hewitt, an inspector of nuisances for the county, the person named in the information, who was an assistant of the appellant, went to the respondent's yard with one William Henry Owen, an assistant to Henri Nestlé, the owner of an extensive dairy factory about four miles distant from the respondent's yard.

In the yard were standing two tin cans. The cans were of the kind locally known as "milk churns," and they are hereinafter referred to as "the churns." Milk churns are used generally for the conveyance of milk from farm to factory. The churns were so standing waiting to be taken away to the factory of Henri Nestlé before mentioned, upon a dray belonging to Henri Nestlé by a man in his employ, in consequence of an alleged contract between the respondent and Henri Nestlé.

The contract was stated to be in writing. It was not proved before the justices.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

Whilst Hewitt and Owen were standing near to the churns Henri Nestlé's dray came up for the churns. Upon the dray drawing up, W. H. Owen said to the respondent, who was standing by, "I accept this as a place of delivery of the two churns on behalf of my firm." Hewitt then said to the respondent, "I am an inspector under the Food and Drugs Acts, and require to take samples from the milk churns." The respondent made no reply. Hewitt, with a proper stirrer, thereupon stirred up the contents of one of the churns, and poured the contents into a clean empty churn, and then poured the contents back again into a churn. Into the last-mentioned churn Hewitt dipped a pint measure, drew out a pint of the contents, and handed the pint measure and contents to the respondent, who handed it to Hewitt, who then paid to the respondent 1½*d.*

In reply to a question put by the court, it was stated by the purchaser that there was no other conversation, and that no other words passed between him and the respondent.

After the 1½*d.* was paid the purchaser informed the respondent that he had made the purchase for the milk to be examined by the public analyst. He then divided the pint so taken into three parts in manner required by the Sale of Food and Drugs Act 1875, sect. 19, and delivered one of such parts to the respondent and another of such parts to the public analyst for the county of Derby, and the remaining part was produced by J. Hewitt before the justices at the hearing of the summons.

The public analyst proved that the sample of milk submitted to him was deficient 12 per cent. in natural fat.

The justices found as a fact that no request in terms to be supplied with milk was made.

It was contended for the appellant that when the purchaser said to the respondent: "I am an inspector under the Food and Drugs Act and require to take samples from the milk churns" that amounted to and was in fact a demand for milk, and that as a sample so taken proved to be deficient in natural fat the respondent ought to be convicted.

The justices were of opinion that that contention could not be supported inasmuch as the purchaser had been in fact supplied with that which he had demanded—viz., a sample from the milk churns. Accordingly they dismissed the information without calling upon the respondent to give any evidence.

The information, as before stated, alleged an offence under sect. 6 of the Sale of Food and Drugs Act 1875, and not under sect. 9 of that Act nor under sect. 3 of the Sale of Food and Drugs Amendment Act 1879.

The justices were referred, on behalf of the respondent, to the case of *Lane* v. *Collins* (52 L. T. Rep. 257; 4 Q. B. Div. 193). The appellant contended that *Lane* v. *Collins* could not now be regarded as law, and referred to *Smithies* v. *Bridge* (87 L. T. Rep. 167; (1902) 2 K. B. 13) and the Sale of Milk Regulations 1901.

The question for the opinion of the court was whether the dismissal of the information was right in law.

McCardie for the appellant.

The respondent did not appear.

Lord ALVERSTONE, C.J.—We are of opinion that we cannot in this case interfere with the decision of the justices. No doubt, if there were other evidence to show that there had been a sale of milk to the appellant by the respondent in consequence of a demand on his, the appellant's, part, we might have arrived at a different conclusion. But upon the facts found by the justices and set out in the case I think they go to show a taking of a sample under sect. 3 of the Sale of Food and Drugs Act 1879 and not a sale under sect. 6 of the Sale of Food and Drugs Act 1875. No doubt, in selling under sect. 6 of the Sale of Food and Drugs Act 1875, the vendor takes the responsibility for what he sells, and the facts set out in the case show, I think, that the purchaser obtained what he demanded—that is to say, a sample from the churn, and that his request for this sample did not amount to a request to be supplied with milk so as to support an information under sect. 6 of the Sale of Food and Drugs Act 1875. In my opinion the evidence all goes to show an act by the inspector, the present apellant, under sect 3. of the Sale of Food and Drugs Act Amendment Act of 1879. There was a demand in one sense but not a demand under sect. 6 of the Sale of Food and Drugs Act 1875. In my opinion we ought not to say that the justices have come to a wrong decision on the facts and so were wrong in dismissing this information under sect. 6 of the Act of 1875. I think this appeal fails.

KENNEDY, J.—I am of the same opinion.

RIDLEY, J.—I agree.

Appeal dismissed.

Solicitors: *Briggs, Clifford*, and *Pinder*, Derby; *T. S. Wilkins*, Uttoxeter.

Thursday, Feb. 2, 1905.

Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

WILSON (app.) *v.* FEARNLEY (resp.). (*a*)

Tramway—By-law—Ticket — Failure to produce —Refusal to deliver up—Offence.

By a tramway by law made by the corporation of S. "Each passenger when tickets are issued shall as and when requested to do so show his ticket to the conductor or other servant of the corporation acting in performance of his duty, and shall also when requested to do so by the conductor or other servant of the corporation acting in the performance of his duty deliver up his ticket or, in case of failure to produce such ticket, pay the fare legally demandable for the distance travelled over by such passenger."

The appellant, a passenger on one of the tramcars of the corporation of S., paid his fare, but refused to accept the ticket tendered by the conductor, on account of a condition printed on the back of it. The ticket fell on the floor of the top of the tramcar. Later an inspector asked the appellant for his ticket, who pointed it out to him lying on the floor, but refused to take it up or to pay another penny for his fare.

Held, that the appellant had not committed any offence under the by-law.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

CASE stated by the stipendiary magistrate for the city of Sheffield.

The respondent is the tramways manager of the City of Sheffield Corporation Tramways. The appellant is a member of the corporation's council.

Four complaints were laid by the respondent against the appellant for breaches of the corporation's tramways by-law No. 9, and were brought before the magistrate on the 14th July 1904, to be heard, and a letter dated the 11th June 1904 was put in evidence against the appellant. Two of the complaints related to showing the passenger's tramcar tickets under by-law No. 9, and were dismissed, and their dismissal has not been disputed. One of the other two complaints was as follows:

The information of Arthur Robinson Fearnley, of the said city, tramways manager, who states that Arnold Muir Wilson, of Bank-street, in the said city, solicitor, on the 11th June 1904, at the city aforesaid, being a passenger upon a car of the Lord Mayor, aldermen, and citizens of the said city, run by the said lord mayor, aldermen, and citizens on the Nether Green route of the tramway system, on which said route tickets are issued, unlawfully did not as and when requested so to do deliver up his ticket to Walter Maltby, a servant of the said Lord Mayor, aldermen, and citizens acting in the performance of his duty, contrary to the by-laws duly made in that behalf in pursuance of the statute in such case made and provided.

The other alleged that the appellant did not as and when requested so to do deliver up his ticket to Walter Maltby, a servant of the Lord Mayor, aldermen, and citizens, acting in the performance of his duty, but failed to produce the same, and refused to pay the fare, to wit, one penny, legally demandable for the distance travelled over by him, contrary to the by-laws duly made.

With one exception the facts that occurred were practically undisputed at the hearing.

It appeared that the appellant was a passenger on the top of a tramcar, and paid to the tramcar conductor the proper amount of one penny for his fare. The conductor thereupon proceeded to give him a tramcar ticket of the usual and only kind given to the tramcar passengers, which was similar to the specimen ticket accompanying the case.

There was some dispute as to what precisely happened as to the ticket. The conductor appeared to believe that he put the ticket into the appellant's hand, and that the appellant took it and then threw it on the floor. The appellant felt certain that he had not taken it, and the ticket was thrown on to the floor by the conductor. The ticket undoubtedly got on to the floor.

The magistrate thought the conductor had tried to push it into the appellant's hand and let go his hold of it, and that the appellant had closed his hand and not taken hold of it, though it may have touched his hand, and so between them it dropped. There was no doubt the appellant openly objected to taking the ticket, because it had on it the condition which is printed on the back of the specimen ticket.

The condition is:

Important Notice to Passengers. — Passengers are being carried at less than the maximum authorised charges, and every passenger is notified that in consideration thereof a passenger is only carried on the terms that the maximum amount recoverable from the corporation on account of any injury or damages suffered by a passenger, and for which the corporation is legally liable, is 25*l*. Except as above, every passenger travels at his own risk. Passengers can only travel subject to being bound to observe the by-laws for the time being.

It seemed to the magistrate that, even if the conductor put the ticket more into the appellant's hand than the appellant thought he had, there was plainly expressed refusal by the appellant to accept a ticket with the condition on it, and that he had not accepted the ticket, and that it had passed from the conductor on to the floor without any acceptance.

After the ticket was on the floor of the top of the tramcar it appears to have lain there, and then a tramcar tickets inspector, one Walter Maltby, came and asked the appellant for his ticket, and thereupon the appellant pointed to the ticket lying on the floor, but refused to take it up or touch it, because of the condition on it, and he refused to pay another penny for his fare, though asked by the inspector to do so.

After the corporation had issued tickets to passengers upon their tramway system with the limitation of liability mentioned on the 12th May 1904, the appellant gave notice to the town clerk as follows:

I desire to notify the tramways committee, through you, that I decline to receive any more tickets from any conductor on the cars so long as they have printed on the back the condition seeking to limit the corporation's liability to 25*l*. I hope that other ratepayers will similarly decline. Please bring this letter before the committee at their next meeting, and acknowledge its receipt.

Such notice was duly received and acknowledged.

After that, on the 11th June 1904, the appellant had become a passenger on a corporation car on a route on which tickets were issued, paid his fare, had tendered to him a ticket under the circumstances herein stated, and, subsequently, when requested so to do, did not deliver any ticket up, and refused to repay the fare.

The appellant on the 11th June 1904 wrote the following letter:

You will be saved considerable trouble in this matter with reference to evidence. Please take this letter as an unqualified admission by me of the following facts: This morning I rode outside a Nether Green car, arriving at High-street at 9.30. The conductor was No. 126. I paid my fare to him, and he tendered me a ticket, F.d. 3255, which I refused to accept on the ground of there being printed on the back the condition limiting the corporation's liability. He dropped the same on the roof of the car, where it remained until inspector No. 13 boarded the car on Sheffield Moor. He asked me for my ticket, and I told him I had not got one. He then called the conductor, and requested him to demand a second fare from me, which I declined to pay. I told both the inspector and conductor that I was prepared to accept a perfectly clean ticket without this indorsement. If you require me to make any further admissions I shall be glad to do so. I subsequently took the ticket from the roof of the car, and have it in my possession for production. I should like to state that both the conductor and inspector were very courteous. Please consult me as to the date of the hearing of the summons.

It was contended on behalf of the respondent that the validity of the condition limiting liability

was immaterial so far as the by-law was concerned, and that under the circumstances hereinbefore stated the appellant was liable to a penalty for not delivering up or producing his ticket, if he had one, or, alternatively, if he had not one, for refusing to pay the fare legally demandable as above; and, further, that the condition was a valid one.

The appellant contended that the ticket, by reason of its indorsement, was a conditional ticket, and not a ticket in the ordinary and legal sense of the term, and that as the handling or acceptance of the same might be construed against him as an acceptance of or acquiescence in the condition appearing on the back thereof, he was justified in law in refusing to accept the same from the conductor, and also justified in law in refusing to handle or produce such alleged ticket on such demand as aforesaid, or to pay a further penny for such refusal.

The magistrate overruled, as regards the complaints, this contention, and held that as to the by-law the appellant was bound in law to accept this alleged ticket, and to produce the same on such demand as aforesaid, or in default to pay a further penny for such refusal.

The defendant further contended that no ticket had been issued or tendered to him which he was bound by law to deliver up on such demand as aforesaid, but that a conditional ticket had been issued or tendered to him.

The magistrate similarly overruled this contention also.

The appellant further contended that he had not in law refused or failed to deliver up a ticket, as no such ticket had been issued or tendered to him.

The magistrate similarly overruled this contention also.

After the hearing the magistrate dismissed a complaint that the defendant did not show his ticket, and also a complaint founded on an allegation that he did not show it, and no question has been raised as to those complaints.

The magistrate considered that the complaint of the offence that he did not, when requested to do so, deliver up his ticket, and the complaint of the offence that he, having failed to produce his ticket, did not pay the fare, were proved within the intention of the provisions of the 9th by-law, and on each complaint he convicted the appellant of the offence complained of in it, and inflicted a nominal penalty of 1*s*. It seemed to him that the defendant had acted in all honesty of purpose and desire to call attention to and dispute the legal power to impose on passengers the condition which is printed on the back of each ticket, and that the power to impose it is well open to doubt and dispute; but it seemed to him that, though a fit and proper occasion for a settlement of doubt and dispute about it would arise if a claim for compensation had to be made, and more than 25*l*. honestly asked for, and more than 25*l*. or less than a proper amount was refused, yet the purposes for which powers to make by-laws are given by Act of Parliament, and for which the by-laws have been made, and the inferior nature of the courts in which complaints of breaches of them are heard, make it unlikely that such a doubt and dispute should be intended to be determinable as a side issue arising out of a question of compliance with one of them. It was urged, amongst other arguments, that by taking a ticket with the condition printed on it a person injures his position for objecting to the condition, because it can then be said that a ticket has been accepted on which the condition is printed, and so the condition has been accepted; and there seemed to him force in the argument, but it seemed to him questionable how far printing the condition on the tickets adds anything to anything caused by the conspicuous notices of the condition that are placed inside the cars and on the seats used on the tops of the cars; and it also seemed to him that a passenger is indirectly compelled to take the ticket as it is, for no other ticket is issued, and by-law No. 9 under a penalty indirectly compels acceptance of a ticket, so that an argument of acceptance of the condition by acceptance of a ticket is overriden by the acceptance being not voluntary, but under compulsion of the by-law. It seemed to him that the by-law 9, disregarding all else, is intended to enforce due payment of fares by passengers and due collection and handing over of fares by conductors, and that for that purpose it obliges a passenger to take a ticket and to produce it and to deliver it up when duly required, and that if a passenger is unable to produce it and unable to deliver it up by his own action he fails to comply with the by-law, and offends against it. It seemed to him that, though the defendant had shown the ticket, he, under the circumstances, had not delivered it up to and failed to produce it to the ticket inspector, and had not paid the fare, and had broken by-law No. 9, although his breach as an offence was of a trifling character.

The following is a copy of the appellant's notice of application to state a case, and it gives grounds on which the convictions were questioned:

I, Arnold Muir Wilson, of Bank-street, in the city of Sheffield, solicitor, being dissatisfied with your determination, as being erroneous in point of law, of a certain information heard and determined by you on the 14th July 1904, wherein I was charged that I, on the 11th June 1904, being a passenger upon a car of the Lord Mayor, aldermen, and citizens on the Nether Green route of their tramway system, on which said route tickets are issued, unlawfully did not, as and when requested to do so, deliver up my ticket to Walter Maltby, a servant of the said Lord Mayor, aldermen, and citizens, acting in the performance of his duty, contrary to the by-laws ordained and declared by the council of the said city on the 9th Dec. 1903, and in respect of which you fined me the penalty of 1*s*., hereby apply to you to state and sign a case setting forth the facts and grounds of your said determination for the opinion thereon of the High Court of Justice. The grounds of this application are: That you were wrong in holding that a ticket had been issued or tendered to me which I was bound by law to deliver up. That I did not in law refuse or fail to deliver up a ticket. There was no evidence in law to support such conviction. That there was no evidence in law showing tickets were issued on the said Nether Green route. That such conviction was bad on the face of it.

The question upon each of the two complaints that have been set out in this case is, Whether upon the grounds objected, or any of them, it was wrong to convict the appellant?

By-law No. 9 is as follows:

TICKETS.—9. Each passenger when tickets are issued shall as and when requested to do so show his ticket to

the conductor or other servant of the corporation acting in the performance of his duty, and shall also when requested so to do by the conductor or other servant of the corporation acting in the performance of his duty deliver up his ticket, or in case of failure to produce such ticket pay the fare legally demandable for the distance travelled over by such passenger.

The appellant in person.

Macmorran, K.C. (*Bairstow* with him), for the respondent.

Lord Alverstone, C.J.—The informations here allege that the appellant when requested unlawfully refused to deliver up his ticket; and, further, that, having failed to produce the same, he refused to pay the fare legally demandable for the distance travelled over by him. But in this case all the appellant did was to refuse to accept or touch the ticket. The conductor purported to give it him, and when the inspector came the appellant pointed to the ticket on the floor, and said, "There's my ticket," but refused to take it up or touch it. That is no refusal to deliver up the ticket, and I cannot say that the appellant has been guilty of any unlawful breach of by-law No. 9, and the appeal must be allowed.

Kennedy, J. and Ridley, J. concurred.

Appeal allowed.

Solicitors: *Halse, Trustram,* and *Co.* for *A. Muir Wilson*, Sheffield; *Richard F.* and *C. L. Smith* for *H. Sayer*, Sheffield.

Thursday, March 2, 1905.

(Before Darling, J.).

Cox *v.* Truscott. (*a*)

Local government—Borough councillor—Disqualification—Municipal Corporations Act 1882 (45 & 46 *Vict. c.* 50), *ss.* 12, 41.

By sect. 12 (1) *of the Municipal Corporations Act* 1882 "*A person shall be disqualified for being elected and for being a councillor, if and while he . . . (c) has directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council*"; *and by sect.* 41 (1) "*If any person acts in a corporate office . . . after becoming disqualified, he shall for each offence be liable to a fine not exceeding fifty pounds, recoverable by action.*"

The defendant was a town councillor and trustee of a Wesleyan chapel, to which was attached a non-provided school. Fuel for warming was supplied by the defendant to the trustees, and by arrangement the town council paid the trustees for such of the fuel as was used for the purpose of warming the school building during the time when it was used as a non-provided school. Orders were given by the trustees to the defendant on the 4*th and* 23*rd Jan. and the* 2*nd Feb., and were fulfilled on the* 11*th and* 25*th Jan. and the* 3*rd Feb. respectively. The defendant voted as councillor on the* 1*st and* 5*th Feb., and on these dates the fuel ordered had not been paid for.*

Held, that he was not disqualified from voting on these dates.

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

Action to recover penalties under sect. 41 of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50) from the defendant for having voted at meetings while interested in contracts with the council.

The plaintiff and defendant were both members of the town council of Maidenhead, which was, by virtue of the Education Act 1902 (2 Edw. 7, c. 42), the education authority for the borough of Maidenhead. Among the non-provided schools which the town council was bound to maintain in a state of efficiency was a school attached to a Wesleyan chapel. The school building, besides being used for purposes of secular instruction, was also used for the purposes of religious instruction, and for other purposes connected with the chapel. The defendant was one of the trustees of the chapel, and had supplied coal and coke for the use of the chapel and of the school, upon orders given by the trustees. After the Education Act 1902 came into force, an arrangement was made by which, instead of buying fuel for the school themselves, the town council allowed the trustees to buy the coal and coke and afterwards paid the trustees for such portion of the fuel as was used for the purposes of warming the school building when secular instruction was carried on there. Under this arrangement the trustees continued to procure coal and coke from the defendant. Orders to supply coal and coke had been given by the trustees to the defendant on the 4th and 23rd Jan. and on the 2nd Feb. 1904, and the fuel so ordered was supplied by the defendant on the 11th and 25th Jan. and 3rd Feb. respectively. The defendant voted, as a member of the town council, at meetings held on the 1st and 5th Feb. 1904, on which dates the coal and coke had not been paid for.

J. Eldon Bankes, K.C. (*Spokes* with him) for the defendant.—The plaintiff here has made out no case for the defendant to answer. The contract to be within sect. 12 of the Municipal Corporations Act 1882 must be "with, by, or on behalf of, the council." That is not the case here. He referred to

Le Feuvre v. *Lankester*, 3 El. & Bl. 530;
Nutton v. *Wilson*, 22 Q. B. Div. 744;
Barnacle v. *Clark*, 81 L. T. Rep. 484; (1900) 1 Q. B. 279.

At the time the votes were given the defendant had no interest in the contract. The mere fact that the money had not been paid made no difference. He also referred to

Royse v. *Birley*, 20 L. T. Rep. 786; L. Rep. 4 C. P. 296;
Lewis v. *Carr*, 36 L. T. Rep. 44; 1 Ex. Div. 484.

Dickens, K.C. and *Hohler* for the plaintiff.

Darling, J.—This case is a peculiar one—an action for penalties, and it raises questions, to my mind, of very considerable difficulty—questions as to which I do not profess that my opinion is absolutely clear. But still I think my opinion does upon these points incline in certain directions, and I will give learned counsel the benefit of them for the purposes of to-day, at all events. Now, the plaintiff is an alderman of the town council of Maidenhead, and the town council of Maidenhead have become the educational authority by reason of the recent educational Act of 1902. The defendant is also a member of the town council of Maidenhead, and therefore a member of the

educational authority, and among the non-provided schools which the educational authority has to maintain in efficiency is a certain Wesleyan school. There are other schools. There are Church of England schools, Roman Catholic school, and a Wesleyan school, and all these schools the educational authority has to maintain in a state of efficiency. The defendant is one of the trustees of the Wesleyan chapel, and the Wesleyan chapel has attached to it this school, which is one of the non-provided schools, and that school was always used for giving of instruction, ordinary secular instruction, during part of the time, and it was used for the purposes of a chapel and a Sunday-school giving religious instruction, and it was used for other purposes connected with the chapel. It had to be, and has to be, warmed and lighted, and for that purpose it is necessary to have fuel. What is complained of here is not a new proceeding at all. It has been the habit for a long time for the trustees of the Wesleyan chapel to buy their coal and coke of the defendant, and the way in which it was done is this: They send to defendant an order in these terms: "Wesleyan Methodist Chapel, Maidenhead. Please supply two chaldron coal for schools, one chaldron coal for schools, one chaldron coke for church." Then the defendant would send a delivery note addressed to the Wesleyan chapel or to Wesleyan schools for the coal which was to be delivered at the chapel or at the schools, and the bill would be sent in to the trustees of the chapel, acting by their stewards, and they would pay it. That had long, as I have said, been the course of dealing between these people. Then came the Education Act 1902, which says: "The local education authority shall maintain all public elementary schools within their area which are necessary, and have control over the expenditure for that purpose," and on that it was the duty of the educational authority, who was the town council of Maidenhead, to provide, coal for the necessary warming of this school, the Wesleyan school, in so far as the Wesleyan school was used for the purposes of the educational authority under the Education Acts. But they would not be bound to provide more coal than that. They would not be bound to provide, and they ought not to provide, coal for use on the Sunday, when the place was used as a Sunday school; nor coal for warming the hall or the building when it was used for some other purposes than the purposes of the educational authority. These coals which were ordered were ordered for other things than the absolutely necessary purposes of the education authorities. They were ordered not by the education authority; they were ordered by the trustees of the chapel, and when they were ordered by the trustees of the chapel some went to the chapel and some to the schools. As to those that went to the chapel no question arises. As to those that went to the schools some portion was used for educational authority purposes and some portion for the religious purposes of the trustees of the chapel. Now, it is said that the defendant is liable to a penalty because he had become disqualified by reason of supplying those coals. He had become disqualified to be a member of the town council of Maidenhead, of the educational authority of Maidenhead, and when he voted he became liable to a penalty. That is because the 41st section of the Municipal Corporation Act 1882 provides "if any person acts in a corporate office after becoming disqualified he shall be liable to a fine not exceeding 50*l.* recoverable by action." Now, what has he done which it is said results in his becoming disqualified? To find that out you have to look at sect. 12 of the same Act of Parliament, in which it enacts: "A person shall be disqualified for being elected" (that is not the case here) "and for being a councillor" (that is the case here) "if and while he has directly or indirectly by himself or his partner any share or interest in any contract or employment with, by, or on behalf of the council." First of all there must be a contract—whether the defendant is to have an interest in it or not, it must be established that there is a contract by or on behalf of the council. What contract is suggested? The only contract that to my mind could be made out between the council and anybody would be a contract between the council and the trustees of the chapel; and I think it has been made out from the resolution that has been put and from the schemes that have been spoken of, that there was such a contract. Now, the contract being between the trustees and the council, if the trustees order goods—coal—and that coal was handed over to the managers of the of the school and used for warming the school in the day time, when it was used as an ordinary secular school, then I have no doubt that if the town council (the education authority) had refused to pay for it, the trustees could have sued the town council on the contract, and could have recovered the money against them. Let us see if it can be made out that there is a contract "by or on behalf of" the council. Now, the question is whether the defendant here can be said to have any interest directly or indirectly in that contract. The words of the statute are not that the contract shall be between the defendant and the council. Of course, if the words were so, there is no contract between him and the council; but the question is, is he directly or indirectly interested in a contract made with, by, or on behalf of the council? I think he is; I think he has an interest in that contract. The contract is made between the council and the trustees of the chapel; the trustees—in order to carry out that contract—must get the coal from somewhere; they contract that the defendant shall supply it; and that is not a contract made each separate time, but the evidence is perfectly plain as to this, that it was well understood that, whenever coal was wanted for these purposes (which included the education authority's purposes), the defendant was to supply it. And he would know when he got the order that some of this coal was for the educational authority of which he was a member. Therefore he certainly, to my mind, has, if not a direct interest, at least an indirect interest in that contract between the trustees of the chapel and the education authority of which he is a member. Now, if that is made out, he would be disqualified in some sense. Let us see in what sense. Sect. 12 does not say that he shall be disqualified altogether. It provides: "A person shall be disqualified for being elected and for being a councillor if and while he has interest direct or indirect in any contract by or on behalf of the council." He is only disqualified, if he has an interest in the contract, while he has such an interest. He gets rid of his disqualification

when he gets rid of the contract; and the contract is got rid of if the contract is performed—that is, if there is no more to be done at the time of the acts. How did he act? It is said here that he acted by vote. There was an order for fuel on the 4th Jan., and there was delivery of that on the 11th Jan. Well, that contract was carried out as far as the defendant was concerned; and he had no more interest in it except this, that the trustees of the chapel owed him the price. There was another order on the 23rd Jan. and delivery on the 25th, and he voted on the 1st Feb. There was another order on the 2nd Feb. and delivery on the 3rd, and he voted on the 5th Feb. Therefore his votes were given, not while any order remained unfulfilled—they were given when there had been an order, when the coal had been delivered, when everything had been done under the contract but to pay for the coal which the defendant had delivered. His only interest then was that the trustees should pay. I think that the cases cited by Mr. Bankes show that, the contract having been fulfilled by the contractor who was to sell the goods, nothing is left of that contract but to pay the price, and that the relation of debtor and creditor is not such a relation as is contemplated by this statute. It seems to have been held that the contract incriminated, if I may so describe it, no longer exists. If, then, the defendant had voted when there was a contract by him that he would deliver coal, and when he had not performed his part of it, he would have voted while he was disqualified, but here I come to the conclusion that he did not vote on either of the occasions in question while he was disqualified. Under these circumstances, I think the action fails. There is another point. It is said in the pleadings that the defendant had an interest directly or indirectly in a contract made with, by, or on behalf of the council, in that he sold and delivered two chaldrons of coke to the managers of the school. That, I find, he did not do; he did not sell to the managers of the school; he delivered at the school, perhaps to the managers of the school, but the orders show that he sold to the trustees of the chapel under a contract between himself and the trustees; he had no contract with the managers nor with the education authority. I think there is a contract between the trustees and the education authority, and that the defendant had an interest in it; but he did no act giving a right to any person to sue him for a penalty while he was disqualified. Therefore my judgment will be for the defendant.

Judgment accordingly.

Solicitors: *J. M. Haslip*, for *Martin* and *Martin*, Reading; *Alfred Cox* and *Son*, for *Clarke* and *Son*, High Wycombe.

Tuesday, April 11, 1905.

Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

REX *v.* JOHNSON; *Ex parte* THORNELY. (*a*)

Licensing — Populous place — Exemption from closing—Jurisdiction — Certiorari — *Licensing Act* 1872 (35 *&* 36 *Vict. c.* 94), *s.* 26—*Licensing Act* 1874 (37 *&* 38 *Vict. c.* 49), *s.* 32.

If there is an erroneous decision of justices on a matter within their jurisdiction either in fact or in law, certiorari *will not lie, but if there is an erroneous assumption of jurisdiction in point of law based upon evidence which is not evidence of any legal matter that may be considered by them, then* certiorari *will lie.*

An order made under sect. 26 *of the Licensing Act* 1872 *by justices, exempting a licensed victualler from the provisions of the Act with respect to closing his premises on certain days and during certain times, is a judicial order, and if made without proper evidence and so without jurisdiction, can be brought up on* certiorari.

CAUSE shown against rules *nisi* for writs of *certiorari* to bring up and quash certain orders made by licensing justices in respect of certain licensed premises.

On the 10th Sept. 1874 the county licensing committee made an order under sect. 32 of the Licensing Act 1874, declaring Upton-on-Severn, to be a populous place.

The population of Upton-on-Severn was then and is now between 2000 and 3000.

The orders permitting the houses to remain open as stated were continuously renewed after each census until 1902.

In Dec. 1902 the committee of the licensing justices, without hearing evidence, and the population being still between 2000 and 3000, revoked these orders.

In April 1903, an application to the licensing sessions for an order declaring Upton to be a populous place was refused by the county licensing committee.

On the 22nd Oct. 1903 an application was made to the justices for the Upton-on-Severn Division on behalf of the licensee of the Lion Hotel and the licensees of other licensed premises for an order under sect. 26 of the Licensing Act 1872.

The justices granted the application, but they subsequently, in Feb. 1904, revoked that order because they had been advised that the order was bad on technical grounds.

On the 16th June 1904 applications were again made for orders under sect. 26, and such orders were granted in respect of the Lion Hotel and eleven other houses.

Those orders had expired on the 30th Sept. 1904 and had not since been renewed.

The justices in their affidavit stated that on the application for the order in question they had heard evidence that it was desirable to make the order for the accommodation of a considerable number of persons following lawful trade and callings in the immediate neighbourhood of the licensed premises in question, and that they had granted the application on the evidence called before them, and had not been influenced by other considerations.

The order which purported to be granted under sect. 26 of the Licensing Act 1872 was as follows:

We, the undersigned justices of the peace, usually acting at the Petty Sessions for the Petty Sessional Division of Upton-on-Severn, within which the premises the Lion Hotel, hereinafter mentioned, are situate, and having heard evidence to show that it is necessary and desirable so to do for the accommodation of a considerable number of persons following the lawful trade or calling of farmers, tradesmen, fruit and pea dealers,

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

market gardeners in the immediate neighbourhood of such lawful trade and calling aforesaid, do hereby consent to the grant and do grant an order exempting Isaac Rendell Budden, of the Lion Hotel, Upton-on-Severn, being a person duly licensed to sell intoxicating liquor at the Lion Hotel, from the provisions of the Licensing Acts 1872-1902, with respect to the closing of the said premises between the hours of 10 and 11 o'clock at night from the date hereof until the 30th Sept. 1904. Given under our hand this 16th day of June 1903.—CHAS. C. JOHNSON, R. S. BAGNALL.

By sect. 26 of the Licensing Act 1872 (35 & 36 Vict. c. 94):

The local authority of any licensing district, upon the production of such evidence as such authority may deem sufficient to show that it is necessary or desirable so to do for the accommodation of any considerable number of persons attending any public market or following any lawful trade or calling, or attending any theatre, may grant, if such authority think fit to any licensed victualler or licensed keeper of a refreshment house [or any person licensed to sell beer or cider by retail to be consumed upon the premises], in respect of premises in the immediate neighbourhood of such market or of the place where the persons follow such lawful trade or calling or of any such theatre an order exempting such person from the provisions of this Act with respect to the closing of his premises on such days and during such time except between the hours of one and two of the clock in the morning as may be specified in such order. The holder of an order under this section shall not be liable to any penalty for not closing his premises on such days and during such time as may be specified in such order; but he shall not be exempt from any other penalty under this or any other Act or otherwise. A notice is such form as may be prescribed by the local authority stating the days and hours during which the premises are permitted to be open under such order of exemption shall be affixed, and kept affixed in a conspicuous position outside the premises, and if the holder of the order of exemption make default in affixing or in keeping affixed such notice in manner aforesaid, during any part of the time for which his exemption is granted, he shall be liable to pay a penalty not exceeding 5l. Every person who keeps affixed to his premises any such notice when he does not hold an order under this section shall be liable to a penalty not exceeding 10l. Any such local authority as aforesaid may at any time if it seem fit to them withdraw an order under this section, or alter the same by way of extension or restriction as such authority may deem necessary or expedient, so however as not to render any person liable to any penalty for anything done under such order before the holder was informed of such withdrawal or alteration. The following person and bodies of persons shall be deemed to be local authorities of licensing districts for the purpose of this Act, that is to say: (1) In the metropolitan police district the Commissioner of Police for the Metropolis, subject to the approbation of one of Her Majesty's principal Secretaries of State; (2) in the city of London and the liberties thereof, so far as they are not included in the metropolitan police district the Commissioner of City Police, subject to the approbation of the Lord Mayor of the said city; (3) in any other place, two justices of the peace in petty sessions assembled.

By sect. 32 of the Licensing Act 1874 (37 & 38 Vict. c. 49)

"Populous place" means any area with a population of not less than 1000, which by reason of the density of such population the county licensing committee may by order determine to be a populous place. At a meeting specially convened for that purpose in manner provided by any regulations in that behalf or in default of such regulations by the clerk of the peace as soon as may be after the passing of this Act and not later than the 1st Sept. 1874, the county licensing committee shall consider all the cases within their jurisdiction with respect to which it is incumbent upon them to make orders in pursuance of this section, and they shall make orders accordingly and shall specify therein the boundaries of such towns or populous places. The county licensing committee may adjourn any meeting held in pursuance of this section, and may also at any subsequent meeting especially convened for that purpose make with respect to any town or populous place within their jurisdiction any like order not restrictive of any order previously made. Provided that as soon as may be after the publication of each census the county licensing committee shall at a meeting to be specially convened for the purpose revise the orders then in force within their jurisdiction constituting areas either parts of towns or populous places, and may alter or cancel any of the said orders or may make such further orders, if any, as they shall deem necessary to give effect to the provisions of this Act.

Amphlett, K.C. and *R. Coventry* showed cause against the rule.—The justices here had power to make this order under sect. 26 of the Licensing Act 1872, and the facts which they have stated show that they had that jurisdiction. Even if that is not so, this is an administrative function and not a judicial one, and *certiorari* is not applicable. No notice is given of such an application as this, and the justices only hear one party. *Boulter* v. *Kent Justices* (77 L. T. Rep. 288; (1897) A. C. 556) shows that the justices are a licensing meeting, are not a court of summary jurisdiction, and a grant or refusal by them of a licence is not an order. There is no method of questioning the discretion of justices. The present case cannot be distinguished in principle from *Reg.* v. *Sharman* (78 L. T. Rep. 320; (1898) 1 Q. B. 578). They also referred to

Reg. v. *Bowman*, 78 L. T. Rep. 230; (1898) 1 Q. B. 663;
Reg. v. *Cotham*, 78 L. T. Rep. 468; (1898) 1 Q. B. 802.

It was held in *Reg.* v. *Manchester Justices* (80 L. T. Rep. 531; (1899) 1 Q. B. 571) that *certiorari* would lie to bring up an order of a confirming authority, but the ground of that decision was that the confirming authority was different from the licensing committee, as it could award costs against an unsuccessful objector, though before the licensing committee there was no litigation or *lis inter partes*. That case was followed in *Rex* v. *Sunderland Justices* (85 L. T. Rep. 183; (1901) 2 K. B. 357). They also referred to

Laceby v. *Lacon*, 80 L. T. Rep. 473; (1899) A. C. 222;
Reg. v. *Nicholson*, 81 L. T. Rep. 257; (1899) 2 Q. B. 455;
Reg. v. *Bolton*, 4 P. & D. 679; 1 Q. B. 66;
Reg. v. *Cheshire Justices*, 8 A. & E. 398.

Under sect. 26 of the Licensing Act 1872 these orders are to be made by the local authority of any licensing district, and under the definition clause those local authorities for the purposes of the Act are to be in the metropolitan police district the Commissioner of Police for the Metropolis, in the city of London the Commissioner of City Police, and in any other place two justices of the peace in petty sessions assembled. It cannot be said that the commissioners of police for this purpose are a court of summary jurisdiction, and, if that is so, the two justices of

the peace sitting for this purpose cannot be such a court. The orders are merely administrative orders, and made by an administrative and not a judicial authority. They referred to

Hagmaier v. *Willesden Overseers*, 21 Cox Mag. Cas. 551; 90 L. T. Rep 683; (1904) 2 K. B. 316.

Where the mischief is over, as it is in this case, even although it may be a judicial order, the court will not grant *certiorari* unless the applicant can show peculiar reasons. They referred to

Reg. v. *Surrey Justices*, L. Rep. 5 Q. B. 466;
Reg. v. *Taunton St. Mary's*, 3 Maule & Sel. 465;
Reg. v. *Lord Newborough*, 20 L. T. Rep. 818; L. Rep. 4 Q. B. 585.

J. B. Matthews, in support of the rule.—On the point whether *certiorari* lies, justices are in a different position to other bodies. Even where justices were acting in administrative business, their order has been brought upon *certiorari*. He referred to

Case of Cardiff Bridge, 1 Salk. 146;
Reg. v. *Glamorganshire*, 1 Ray. 580;
Rex v. *Uttoxeter*, 1 Bott. P. L. 292;
Reg. v. *Arkwright*, 12 Q. B. 960.

The case of *Reg.* v. *Sharman* (*sup.*) is distinguishable, and its principle ought not to be extended. Under sect. 26 the order is to be made by justices of the peace in petty sessions assembled. That is a judicial order, and the justices must act on evidence. *Certiorari* therefore lies. In the present case there was no evidence to show that it was necessary or desirable for the accommodation of the persons mentioned in the section to make an order exempting the premises from closing.

Lord ALVERSTONE, C.J.—The question which is raised in this case, upon one part of it, undoubtedly presents considerable difficulty—viz., whether or not what the justices have done here could be questioned upon *certiorari* at the time that this rule was moved. Perhaps to clear matters away with reference to the points which have been put by Mr. Amphlett and supplemented by Mr. Coventry in his very short but able argument upon the point, if this had been a case of the whole thing having come to an end before the rule was moved, I do not think that we should interfere—certainly not by *mandamus*. We cannot interfere by *mandamus* in this case, only by *certiorari*. The only authority that I know of is the one to which Mr. Coventry referred (*Reg.* v. *Lord Newborough* (*sup.*), and there, as I thought, by the report, and now find, the rule was moved after the whole effect of the order had been carried out. Therefore no proceedings were taken when the order was still a living, existing, and effective one. Strictly speaking, this rule might have been argued in the month of July or August last when there were still two months to run of the period over which the order was to operate. Before I deal with the question of the *certiorari*, I had better state at once what I understand the facts to have been. I pass by with one sentence all that Mr. Amphlett has told us about the previous history with regard to the populous place. It certainly was rather an extraordinary thing that a place such as this should ever have been termed a "populous place," but most certainly if in any way it was thought by someone that the effect of the recission or revision of the order as to its being a populous place could have been got over by some operation of this statute, I cannot help thinking that whoever for the time being formed that opinion formed it without duly considering what the purview of the two statutes is. Sect. 26 of the Licensing Act 1872 says: "The local authority of any licensing district"—and in this case it was two justices of the peace in petty sessions assembled—"upon the production of such evidence as such authority may deem sufficient to show that it is necessary or desirable so to do for the accommodation of any considerable number of persons attending any public market or following any lawful trade or calling or attending any theatre, may grant, if such authority think fit, to any licensed victualler, or licensed keeper, or a refreshment-house in respect of premises in the immediate neighbourhood of such market or of the place where the persons follow such lawful trade or calling or of any such theatre, an order exempting such persons from the provisions of this Act with respect to the closing of his premises on such days and during such time, except between the hours of one and two of the clock in the morning, as may be specified in such order." Under that there is no question that in this case the justices have purported to exempt twelve out of fourteen of the public-houses that applied in this comparatively small township of Upton-on-Severn for a period of six months from keeping their premises closed between ten and eleven o'clock. They have purported to repeal the provisions of the Licensing Act without, as it seems to me, any evidence whatever of the facts or of the matters which they were allowed to take into consideration under the section. Now, I think it would be well that I should state, although it is not the first time I have stated it, what I understand the law to be with regard to *certiorari* generally in these cases. If there is an erroneous decision of justices on a matter within their jurisdiction, either in fact or in law no *certiorari* lies. If there is an erroneous assumption of jurisdiction in point of law based upon evidence which is not evidence of any legal matter that may be considered by them *certiorari* will lie, and the existence of the want of jurisdiction may be established by affidavit. I believe that follows from *Reg.* v. *Bolton*, and a number of other cases subsequent to it, where we had to consider this matter, and I assume that those propositions are those that we have to consider for the purpose of to-day. Now, as a sort of subordinate class as Mr. Amphlett and Mr. Coventry have contended, there certainly do exist, and have grown up several classes of cases where *certiorari* has been held not to lie, as, for instance, the notable one in *Boulter* v. *Kent Justices*, where the justices were acting as a licensing committee, and the case (I only give it as an example) where the justices were approving the names for a jury list (*Hagmaier* v. *Willesden Overseers*), and I have no doubt there are others. Mr. Amphlett mentioned some, and I think Mr. Mathews referred to the poor rate cases. There are some others which can be traced through the books which have been held not to be matter for *certiorari*, but I must say that, apart from authority, where the justices are sitting in petty sessions, and are to act upon evidence which is

to be brought before them in petty sessions, if they go beyond their jurisdiction I should have thought it would require very strong grounds to come to the conclusion that *certiorari* would not lie where an order has been made which they have only been able to make by exceeding their jurisdiction. In this case the facts bring it within one of those two propositions which I have stated, and the question is within which one. The first is one which is in favour of Mr. Amphlett—error of law and fact on a matter within their jurisdiction. Mr. Amphlett says, with perfect force and I think soundly, you cannot question the weight of the evidence, you cannot question whether they ought to have drawn a different conclusion of fact. If there had been any evidence at all before these justices of the matters which might fairly be considered within this section then I think that this appeal ought to be dismissed. Now the first point is "any considerable number of persons attending any public market." I do not think it wants much experience—it certainly does not want much Worcestershire experience—for one to say what those words relate to. It is perfectly well known that markets begin some of them very early in the morning, and others are carried on at late hours at night, either for the reception or the delivery of articles of food in the metropolis and other places. The business in fact is done in the late hours of night and the early hours of morning. It is not suggested that there was in this case any suggestion of evidence of anything beyond the use of the words "market gardeners," which is nothing to do with "market" in that sense. Then, "or following any lawful trade or calling." What does that mean? Applying what I hope is common sense to the matter, it seems to one pretty plain that there are trades and businesses which require to begin very early in the morning and to be carried on until late at night. Take, for instance, railway porters at some great station, or the arrival of goods at some great depot, where it is necessary that refreshment should be forthcoming, and if this had been a case in which the magistrates had had any evidence before them of it being necessary for a particular public-house to be open to accommodate a class of people carrying on a lawful trade, again we should not have interfered. Then, finally, "or attending any theatre," because there is another most laudable class of people who attend theatres, that has been repealed, but for the purpose I am dealing with it does not matter whether it has been repealed or not There is a laudable class of people who go to plays whom it was thought might have refreshment after the performance at the theatre. Under these circumstances, it seems to me, with great deference to the very fair and able way in which Mr. Amphlett has put it, it would be an abuse of language to suggest that when the magistrates said that there were a number of farmers, tradesmen, fruit and pea dealers and market gardeners—putting them in as a class—they meant a market or any particular trade. What they did mean was that they hoped by means of this section to allow the inhabitants of this small district to get drink between ten and eleven o'clock; and, further than that, it really is frankly stated that any other publican who applied would have the same privilege given to him. It may have been very just, as Mr. Amphlett has said, but it shows perfectly plainly that they were not acting upon a consideration of this particular section. Therefore unless the authorities prevent us from dealing with the matter, I come clearly to the conclusion that the magistrates assumed to themselves a jurisdiction which they have not got—namely, a jurisdiction to extend the hours because the general number of inhabitants of the place desire to take drink, and not because of the necessities of the market or trade or calling or theatre required it. I think that observation is clearly strengthened when you notice that it is to be particular premises, particular hours, and particular days, showing that it is not meant to be a general order for every day of the week, but it is to be an order made in reference to what I may call the local circumstances of the particular house and the local requirements of the persons entitled to come and make the claim, and the adjudication further is to be made by two justices of the peace in petty sessions assembled. I should have thought that, apart from authority, there was no doubt that the *certiorari* would lie under those circumstances. Now, is the state of the authorities such that we ought not to act? A great many cases have been cited to us, and, no doubt, will be cited if any further discussion takes place in this case, but I am bound to say I think there are certain expressions of opinion which accord with my own judgment, which, without being binding upon us, are so near to what I may call directions on this point that we are not entitled to lay down a rule differing from them. I think, without saying there is a judgment upon the matter, there is so much opinion upon the matter which accords with my own judgment that I think we ought not to act contrary to that opinion unless a court of superior authority to our own says we are wrong. *Reg.* v. *Sharman* was in one sense an authority in support of Mr. Amphlett; but, on the other hand, if the judgment is looked at it obviously is a case which does not lead me to think that if Wright, J. had decided this case he would have said that no *certiorari* lay in this case, because he expressly excepts the case of justices who are sitting and making a judicial order and who are sitting as a court. It has been so regarded in all cases where that has been discussed. But I think, for the purposes of to-day, I need only refer to three judgments which seem to me to lay down the proper principle. I call attention to the judgment of Smith, L.J. in *Rex* v. *Sunderland Justices* (at p. 368 of (1901) 2 K. B.). It will be remembered that in that case they were overruling the decision of this court, we being bound by the case of *Reg.* v. *Stockport Justices* (60 J. P. 552), that a question of bias could be entertained, and that the particular facts showed bias. Smith, L.J., referring to *Boulter* v. *Kent Justices*, which has been relied upon in this case, said: "I see no ground for extending the effect of that decision to the present case. The decision in *Boulter* v. *Kent Justices* related only to proceedings before the licensing meeting. The House of Lords held that the licensing meeting was not a court of summary jurisdiction, and possibly it may follow, therefore, that a *certiorari* would not lie to bring up proceedings before the licensing meeting. In the case of *Reg.* v. *Manchester Justices*, Channell, J. held that a *certiorari* would lie to bring up

an order made by justices as the confirming authority under the Licensing Acts. I agree with him in the conclusion at which he there arrived, and in the grounds which he gave for it. Apart from *Boulter* v. *Kent Justices* I think it would be clear that a *certiorari* would lie in this case; and Vaughan Williams, L.J. in the passage on p. 370 says: "Speaking for myself, I wish to go further and to say that I do not think that it necessarily follows from the decision in *Boulter* v. *Kent Justices*, that a writ of *certiorari* will not lie in respect of proceedings before the licensing meetings, on the ground that a *certiorari* will only lie to bring up the order of a court properly so called. It is not necessary to decide this point, but I can only say, speaking for myself, that, having regard to the general principles of the common law, I should have been disposed to think that, wherever a body such as justices have, under the provisions of a statute, to grant or withhold a certificate, such as a certificate for a licence, and it appears from the statute that they have to exercise a judicial discretion in so doing, a *certiorari* would lie to bring up the proceedings before them in the case of erroneous exercise or excess of jurisdiction, whether they could or could not be said to have acted as a court in the strict sense of the term." I think that means erroneous exercise of jurisdiction; it is not erroneous exercise or excess of jurisdiction; or probably it is an exhaustive way of stating the way in which the question of want of jurisdiction may be raised. Then (I will not read it) I myself wish to found my judgment also upon the reasons of my brother Channell's judgment in *Rex* v. *Manchester Justices*. It seems to me we have there three very learned judges, by the opinion of two of whom we are in one sense bound, coming to the conclusion that if it be in the nature of a judicial proceeding *certiorari* would lie. That Mr. Amphlett does not seriously disagree with. I think the fact that the evidence is taken before them as a court, and taken before them I presume upon oath, at any rate taken before them as sitting justices in petty sessions, is another argument in support of the view that I am taking, and the provisions that they shall have only such evidence as they shall deem sufficient does not justify them in treating as evidence of one set of facts that evidence which has no bearing whatever upon the matters which may be submitted to their jurisdiction. In the case in the House of Lords of *Laceby* v. *Lacon* the only thing that was said by the Lord Chancellor was that it would be sufficient to decide the question when it arose. He did not express any opinion. I do not remember whether that case was after *Rex* v. *Sunderland*—I think it was—but if it was, certainly he did not express any opinion contrary to the view I have stated. I therefore come to the conclusion that the magistrates in this case did in fact exceed the jurisdiction that was conferred upon them by the section, acting on evidence which was no evidence in relation to the only issues which could be raised before them under the section. They were making an order in the nature of a judicial order, and that order being made without jurisdiction, the rule for *certiorari* should be made absolute. The rule for a *mandamus* will of course be discharged.

Kennedy, J.—The Lord Chief Justice has so entirely expressed my view that I do not think it necessary to add anything.

Ridley, J.—I agree for the same reasons.

Rules for certiorari absolute.

Solicitors: *F. Brooke*, for *George Coventry*, Upton-on-Severn; *Blundell, Gordon*, and *Co.*, for *S. Thornely*, Worcester.

Wednesday, May 10, 1905.

(Before Channell, J.)

Durham County Council v. Mayor, &c, of West Hartlepool. (*a*)

Local government — Adjustment — Formation of county borough—Loss of profitable area—Local Government Act 1888 (51 *&* 52 *Vict. c.* 41), *s.* 32.

The county council of D. and the council of the county borough of W. H. had respectively claimed certain payments in addition to those allowed on an award made with regard to the financial adjustment to be made on the creation of the county borough of W. H.

The county council claimed in respect of repair, maintenance, and improvement of (1) *county bridges, and* (2) *main roads, and* (3) *in respect of discontinued contributions and miscellaneous expenses, being the expenditure of the county council on salaries, registration of voters other than Parliamentary ownership voters, law charges, printing and stationery, weights and measures and health departments, election and county rate basis expenses, petty sessional courts in the county and office expenses, on the ground that owing to and since the constitution of the county borough they had been deprived of, and would in future be deprived of, all contributions from the area of the county borough towards these expenses.*

The council of the county borough claimed that they should be paid by the county council, in addition to the sums they were to be paid under the award, sums (4) *in respect of children in industrial schools and reformatories,* (5) *in respect of subsidised roads, and* (6) *in respect of fines, on the grounds as to* (4) *of the increased burden thrown on the area within the county borough, and as to* (5) *by reason of the loss which that area had sustained by reason of the discontinuance of contributions by the county council, and as to* (6) *by reason of the loss of the allocation of an excess of fines levied in the area.*

Held, that under sect. 32 *of the Local Government Act* 1888 *items* 1, 2 *and* 3, *as well as items* 4, 5, *and* 6, *were the subjects of valid claims.*

Award by an arbitrator stated in the form of a special case.

The borough of West Hartlepool Order 1902, which was confirmed by the Local Government Board's Provisional Orders Confirmation (No. 12) Act 1902, contains the following provisions:

Art. 2. The borough (of West Hartlepool in that order referred to as the borough) shall be constituted a county borough and all the provisions of the (Local Government Act 1888, in that order referred to as the Act) respecting county boroughs shall apply to the

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

borough as if the borough had been named in the 3rd schedule to the Act and as if Durham had been specified in that schedule as the county in which the borough should be deemed for the purposes of the Act to be situate. . . .

Art. 3 (1). An equitable adjustment shall be made respecting the distribution of the proceeds of the local taxation licences, of the estate duty, and of the local taxation (customs and excise) duties and respecting all other financial relations or questions between the administrative county (of Durham, in that order referred to as the administrative county) and the borough. . . .

(2) Any such adjustment between the administrative county and the borough shall be made by agreement between the council of the administrative county and the (mayor, aldermen, and burgesses of the county borough of West Hartlepool, acting by the council, in that order referred to as the) council of the borough within six months from the commencement of this order. . . . In default of agreement between the parties concerned in the case of any such adjustment as aforesaid the adjustment may be made by the Local Government Board or if that board think fit by an arbitrator appointed by them.

(3) For the purpose of any such adjustment as aforesaid the provisions of the Act relating to adjustments between administrative counties and county boroughs shall apply with the necessary modifications and the Local Government Board or an arbitrator appointed by them as the case may be shall be substituted in such provisions for the commissioners appointed under the Act, and notwithstanding anything in the provisions of this order or of the Act any such adjustment and the determination of any matter incidental or in relation thereto or consequent thereon shall when made by the Local Government Board be deemed to be made by them otherwise than as arbitrators, and any arbitrator appointed by them shall be deemed to be an arbitrator within the meaning of section 62 of the Act, and the provisions of the Act shall apply accordingly; Provided —(*a*) that in lieu of sub-section (6) of section 61 of the Act sub-sections (1) and (5) of section 87 of the Act shall apply to any inquiries which may be directed by the Local Government Board under this article and to the costs of such inquiries; and (*b*) that sub-section (6) of section 32 of the Act shall apply to any agreement or any award made under this article.

The Local Government Act 1888 contains the following "provisions relating to adjustments between administrative counties and county boroughs":

32 (1). An equitable adjustment respecting the distribution of the proceeds of the local taxation licences and probate duty grant, and respecting all other financial relations, if any, between each county, and each county borough specified in the said schedule as being deemed for the purposes of this Act to be situate in that county, shall be made by agreement, within twelve months after the appointed day, between the councils of each county and each borough, and in default of any such agreement, by the commissioners appointed under this Act; and such adjustment shall provide, in the case of any expenses which may in future be incurred by the county wholly or partly on behalf of the borough for the liability of such borough to contribute, and save as provided by this Act, any existing liability to contribute or to incur expense shall, after the appointed day, cease, and an equitable provision for such cessation shall be made in the adjustment. . . .

(3) In such adjustment regard shall be had to the existing property, debts, and liabilities (if any) connected with the financial relations of the county and borough, and to the consideration that the county is not to be placed in any worse financial position by reason of the boroughs therein being constituted county boroughs, and that a county borough is not to be placed in a worse financial position than it would have been in if it had remained part of the county and had shared in the division of the sums received by a county in respect of the licence duties and the probate duty grant as provided by this Act, and to the amount of benefit and value of the services which the borough receives in return for existing contributions (if any), and to all the circumstances of each case which it appears equitable to consider, subject nevertheless to the following provisions: . . .

(*b*) If the borough is not at the passing of this Act a quarter sessions borough, the borough council shall contribute a proper share of the costs of and incidental to the quarter sessions and petty sessions of the county, and of and incidental to the coroners of the county or any franchise therein, and if a grant of a court of quarter sessions is hereafter made to the borough, the borough shall redeem the liability to such contribution, on such terms as may be agreed upon, or, in default of agreement, may be determined by arbitration under this Act: . . .

(4) In the adjustment of any financial relations other than the distribution of the proceeds of the licences and probate duty grant, no borough wholly or partially exempt from contributing to any object shall be rendered liable so to contribute or to contribute in greater proportion than at present.

(5) The provisions of Part 3 of this Act with respect to the adjustment of property, income, debts, liabilities, and expenses, and to borrowing for the purpose shall apply as if the commissioners under this Act were the arbitrator in that part mentioned.

(6) Provided that at any time after the end of five years from the date of an agreement or award adjusting the financial relations of any county and borough, if the council of either the county or borough satisfy the Local Government Board that the adjustment has become inequitable, and that the councils are unable to agree on a new adjustment, the board shall appoint an arbitrator; and such arbitrator shall proceed to make a new equitable adjustment, as if he were the commissioners under this Act, and the provisions of this Act shall apply accordingly. Any new adjustment made by agreement, or by the award of an arbitrator under this section, may, after the expiration of five years from the date of such agreement or award, be altered either by agreement or by arbitration as above mentioned.

(7) Until any adjustment in pursuance of this section has come into operation, the county or borough council shall pay out of the county or borough fund to the borough or county council, as the case may be, the average annual amount which during the three years next before the appointed day has been expended by the county for the benefit of the borough, or contributed by the borough to the county, as the case may be, but any sum so paid shall be taken into account in the making of the adjustment, and the adjustment shall be made so as to take effect as from the appointed day.

(8) Any contribution by a county borough to the county in pursuance of this section shall be required and made in accordance with sect. 153 of the Municipal Corporations Act 1882, and that section, except so far as relates to the appointment of an arbitrator, shall apply in like manner as if every such borough were a quarter sessions borough situate in the county.

(9) Expressions in this section relating to contributions by a borough to a county shall be construed to include any sum raised by the assessment of the parishes or hereditaments in the borough to the county rate.

By sect. 61 of the Local Government Act 1888 certain persons were appointed as commissioners for the purposes of the Act, and their powers have now ceased.

Part 3 of the Local Government Act 1888 contains the following provisions "with respect to the adjustment of property, income, debts, liabilities, and expenses":

61 (7). The authority of the commissioners shall extend to the settlement and the determination by them, on such terms and in such manner as they, in their absolute discretion, think most just and fit, of the matters referred to them, and also of all such matters and questions as are, in their judgment, incident thereto or consequent thereon, to the end that their award or awards may effect a final settlement, and until a final settlement is made the authority of the commissioners shall extend to determine the proportions in which payments are to be made to the councils of counties and county boroughs out of the local taxation account, and all payments so made shall be taken into account in the making of the adjustment.

(8) Every award, order, and other instrument made by or proceeding from the commissioners, shall be binding and conclusive to and for all intents and purposes, and shall have the like effect as if it had been made by a judge of the High Court of Justice in England, and shall be acted on, obeyed, executed, and enforced by all sheriffs and other officers and persons accordingly. No such award, order, or other instrument shall be removable by any writ or process into any of Her Majesty's courts, and the commissioners' proceedings or acts shall not be liable to be interfered with or questioned by or in any court, or elsewhere, by way of *mandamus*, prohibition, injunction, or otherwise.

62 (1). Any councils and other authorities affected by this Act or by any scheme, order, or other thing made or done in pursuance of this Act, may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses, so far as affected by this Act or such scheme, order, or thing, of the parties to the agreement, and the agreement and any other agreement authorised by this Act to be made for the purpose of the adjustment of any property, debts, liabilities, or financial relations, may provide for the transfer or retention of any property, debts, and liabilities, with or without any conditions, and for the joint use of any property, and for the transfer of any duties, and for payment by either party to the agreement in respect of property, debts, duties, and liabilities so transferred or retained, or of such joint user, and in respect of the salary, remuneration, or compensation payable to any officer or person, and that either by way of a capital sum, or of a terminable annuity for a period not exceeding that allowed by the commissioners under this Act or the Local Government Board.

(2) In default of an agreement as to any matter requiring adjustment for the purpose of this Act, or any matter which, in case of difference, is to be referred to arbitration, then, if no other mode of making such adjustment or determining such difference is provided by this Act, such adjustment or difference may be made or determined by an arbitrator appointed by the parties, or in case of difference as to the appointment, appointed by the Local Government Board.

(3) An arbitrator appointed under this Act shall be deemed to be an arbitrator within the meaning of the Lands Clauses Consolidation Act 1845, and the Acts amending the same, and the provisions of those Acts with respect to an arbitration shall apply accordingly; and, further, the arbitrator may state a special case, and notwithstanding anything in the said Acts, shall determine the amount of the costs, and shall have power to disallow as costs in the arbitration the costs of any witness whom he considers to have been called unnecessarily, and any other costs which he considers to have been incurred unnecessarily.

(4) Any award or order made by the commissioners or any arbitrator under this Act may provide for any matter for which an agreement might have provided.

An equitable adjustment was not made by agreement between the council of the administrative county of Durham (hereinafter referred to as the county council) and the mayor, aldermen, and burgesses of the county borough of West Hartlepool, acting by the council (hereinafter referred to as the council of the county borough) within the period of six months from the commencement of the Borough of West Hartlepool Order 1902—that is to say, from the 1st Oct. 1902.

The Local Government Board, in pursuance of their powers in that behalf, under their seal of office, on the 21st Dec. 1904, appointed an arbitrator to make such equitable adjustment as is authorised by art. 3 of the order between the county and county borough aforesaid.

The arbitrator awarded, in accordance with an agreement between the county council and the council of the county borough, certain adjustments and payments which were set out in the award.

The county council and the council of the county borough, respectively, claimed certain payments in addition to those referred to above.

The particulars of the claims in question and the facts found with regard to them were as follows:

The county council claimed that they should be paid by the council of the county borough, in addition to the above-mentioned sums, which under the award are to be paid by that council, the following sums, that is to say—(1) 5928*l.* in respect of the repair, maintenance, and improvement of county bridges; (2) 32,610*l.* in respect of the repair, maintenance, and improvement of main roads; and (3) 8174*l.* in respect of discontinuing contributions to miscellaneous expenses, such expenses (which are hereinafter referred to as "miscellaneous expenses") being the expenditure of the county council on salaries, registration of voters other than Parliamentary ownership voters, law charges, printing and stationery, weights and measures department, health department, election expenses, county rate basis expenses, petty sessional courts in the county and office expenses.

The county council claimed the sums specified above and numbered 1, 2, and 3, on the ground that, owing to and since the constitution of the county borough they have been deprived of, and will for the future be deprived of, all contributions from the area within the county borough towards the expenses incurred by them in respect of the several purposes to which the claim relates, and the liability for such expenses is now and will continue to be imposed solely on the area of the county as diminished by the area which has been formed into the county borough.

It was admitted by the council of the county borough that there are no county bridges or main roads within the area of the county borough, and that the contributions from the area within the county borough towards miscellaneous expenses have in past years prior to the constitution of the county borough exceeded the amount of such expenses incurred by the county council for that area.

The council of the county borough claimed that that they should be paid by the county council, in addition to the above-mentioned sums, which under the award are to be paid by that council,

the following sums, that is to say—(4) 3225*l.* in respect of children in industrial schools and in reformatories; (5) 3214*l.* in respect of subsidised roads; and (6) 305*l.* in respect of fines.

With regard to the item numbered 4, the council of the county borough claimed the sum of 3225*l.* on the ground that, owing to and since the constitution of the county borough, an increased burden has been thrown on the area within the county borough in respect of the expenses of the maintenance of children in industrial schools and reformatories, and that the burden on the area now comprised in the county has been thereby diminished.

It was admitted by the county council that the contributions from the area within the county borough towards such expenses have in past years prior to the constitution of the county borough been much less than the actual expenditure of the county council in respect of the maintenance of the children sent to industrial schools and reformatories from that area.

With regard to the item numbered 5, the council of the county borough claimed the said sum of 3214*l.* on the ground of the loss which the area within the county borough has sustained by reason of the discontinuance of the contributions which, prior to the constitution of the county borough, were made by the county council under sect. 11, sub-sect. (10), of the Local Government Act 1888 towards the cost of the maintenance, repair, enlargement, and improvement of highways (not being main roads) in the area within the borough.

It was admitted by the county council that, during the three completed years next before the 1st Oct. 1902, they made under the powers conferred on them by the said Act voluntary contributions towards the cost of highways (not being main roads) in the area within the county borough, and that since the constitution of the county borough such contributions by the county council have necessarily ceased.

With regard to the item numbered 6, the council of the county borough claimed the said sum of 305*l.*, on the ground that, prior to the constitution of the county borough, the share of the area within that borough in the proceeds of the fines levied at petty sessions throughout the county was on the basis of its rateable value in excess of the fines so levied in that area; that since the county borough was constituted the area within that borough had lost the allocation of that excess, and that in consequence an additional sum is available for allocation to the county.

It was admitted by the county council that prior to the constitution of the county borough the share in the proceeds of the said fines which, on the basis of its rateable value, was allocated to the area within the county borough, was in excess of the fines actually levied in that area.

It was agreed by the county council and the council of the county borough that if under an adjustment under the Borough of West Hartlepool Order 1902, and the provisions of the Local Government Act 1888, therein referred to, either of those councils had a valid claim against the other in respect of any of the items of claim above-mentioned, in consequence of the loss sustained by reason of the constitution of the county borough, the sum stated above in connection with each such item was to be deemed to be the sum which represented the amount of the loss.

The questions for the opinion of the court were: (1) Whether the loss sustained by the county council is, under art. 3 of the said borough of West Hartlepool Order 1902, and the provisions of the Local Government Act 1888 therein referred to, the subject of a valid claim against the council of the county borough in the case of any of the items of claim numbered 1, 2, and 3, and, if so, which; (2) whether the loss sustained by the council of the county borough is, under the said Order and provisions, the subject of a valid claim against the county council in the case of any of the items of claim numbered 4, 5, and 6, and, if so, which?

Montague Shearman, K.C. and *R. Simey* for the county council.—Under sect. 32, provision should be made in the award for the loss sustained, and in particular for these items. The case of *Caterham Urban District Council* v. *Godstone Rural District Council* (21 Cox Mag. Cas. 568; 90 L. T. Rep. 653; (1904) A. C. 171) was decided upon sect. 62 of the Act of 1888. That case overruled two earlier decisions, one in the Court of Appeal and another in the Divisional Court. Both the decisions which it overruled were decisions on either sect. 62 of the Act of 1888, or on a section which is practically the same words. Sect. 68 was the section which was being construed by the House of Lords in the *Caterham* case, and that section and the section in similar words in the Local Government 1894, s. 68, were the sections being construed in the two earlier cases which the House of Lords' decision overrules—namely, *Buckinghamshire County Council* v. *Hertfordshire County Council* (80 L. T. Rep. 85; (1899) 1 Q. B. 515) and *Rochdale Union* v. *Haslingden Union* (80 L. T. Rep. 146; (1899) 1 Q. B. 540). So far there has been no decision upon the effect of sect. 32 of the Act of 1888, and it is that section which is the governing section in this case. The really important words of distinction are that by sect. 32 "regard shall be had to the existing property, debts, and liabilities (if any) connected with the financial relations of the county and borough, and to the consideration that the county is not to be placed in any worse financial position by reason of the boroughs therein being constituted county boroughs, and that a county borough is not to be placed in a worse financial position than it would have been if it had remained part of the county." In *Caterham Urban District Council* v. *Godstone Rural District Council* (*sup.*) the Surrey County Council had made an order taking Caterham out of the area of the rural district council of Godstone, and made Caterham an Urban district. Then the rural district council of Godstone claimed in respect of the loss of the contribution which Caterham up to that time had been in the habit of making to the highways in the rural district council within the rural district, on the ground that the rates received from Caterham in the past had exceeded the amounts which the rural district council had spent in Caterham. It was entirely a question turning on sect. 68 of 1894, which is the same as sect. 62 of the Act of 1888. The words of the section in the Act of 1894 are: "(1) Where any adjustment is required for the purpose of this

Act, or of any order, or thing made or done under this Act, then, if the adjustment is not otherwise made, the authorities interested may make agreements for the purpose, and may thereby adjust"—these are the important words—"any property, income, debts, liabilities, and expenses, so far as affected by this Act, or such scheme, order, or thing, of the parties to the agreement." Sect. 62 of the Act of 1888 provides: "(1) Any councils and other authorities affected by this Act or by any scheme, order, or other thing made or done in pursuance of this Act, may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses, so far as affected by this Act, or such scheme, order, or thing, of the parties to the agreement, and the agreement and any other agreement authorised by this Act to be made for the purpose of the adjustment of any property, debts, liabilities, or financial relations may provide," so and so. So that in neither of those two sections is there anything in any way corresponding to the very wide provision contained in sect. 32, providing that regard has to be had to the consideration that the county is not to be placed in any worse position by reason of the boroughs therein being constituted county boroughs. Clearly it was intended by the Act of Parliament which made West Hartlepool a county borough, that the liability of West Hartlepool constituted by the special Act should be the same as if the borough had been created a county borough by the operation of the Act of 1888, s. 32. To decide that sect. 32 of the Act of 1888 has not the construction which the Durham County Council are contending for would really mean to relieve West Hartlepool from a very large liability in respect of these contributions which every borough, either within or outside the county, constituted by the Act has to pay.

Cripps, K.C., *Macmorran*, K.C. and *Pritchard* for West Hartlepool.—We have to consider here what is the true construction of sect. 32, having regard to the decision of the House of Lords in *Caterham Urban District Council* v. *Godstone Rural District Council* (*sup.*). The subject-matter of sect. 32 and sect. 62 is really the same in this respect: that you have to consider what is to be done when you are splitting up into two parts a local authority which up to that point had been only one. According to the contention of the other side, if the county borough appears to be exceptionally badly treated—that is to say, if the expenditure had been very slight in relation to its rateable value, the measure of compensation would be correspondingly large. If you take that test—namely, that the worse the county borough has been treated, the larger the amount it will have to pay—according to my learned friend's contention that is at any rate a very strong reason for scrutinising the language to see if that result is to be brought about. What the House of Lords have decided on sect. 62, with regard to the words "adjustment," and so on, "for the purpose of adjustment any property, income, or debts," and later on for the purpose of any property, liabilities, or financial relations is that you have to deal with existing conditions as regards debts, liabilities, or financial relations, and you cannot look to the future and estimate that by what the conditions will be when the two bodies separate. They have also pointed out that if you did look behind that and see what the effect of separation would be then you get into the areas of compensation as distinct from adjustment. They referred to

Re Rochdale Union and Haslingden Union, 78 L. T. Rep. 583; (1898) 2 Q. B. 206.

[Channell, J.—The things which you have to adjust are these subject-matters that are here, income, debts, liabilities, and expenses, but in the mode in which you will adjust them you may take into consideration what the future state of things will be.] Yes, but that does not enlarge the area of the subject-matter of adjustment. Reading sect. 32 there is no difference in this respect between sect. 32 and sect. 62. It is "equitable adjustment," the same words. By sub-sect. 3 of sect. 32 "in such adjustment"—which we say is an adjustment of existing conditions—"regard shall be had to the existing property, debts, and liabilities (if any) connected with the financial relations of the county and borough, and to the consideration that the county is not to be placed in any worse financial condition by reason of the boroughs therein being constituted county boroughs and that a county borough is not to be placed in a worse financial position than it would have been if it had remained part of the county and had shared in the division of the sums received by a county in respect of the licence duties and the probate duty grant as provided by this Act." That is to say, that in making the adjustment as regards the existing conditions you are to see that the financial position on either side was not affected for the worse either as regards the county borough interest, or as regards the county council. It excludes exactly what the House of Lords says was excluded under sect. 62; any idea of compensation as regards any advantage which one side or the other might get from the mere rating question, because that is a matter which arises in the future. That is not a matter with which you are dealing as at the date of the adjustment. There is no difference upon that point—which we submit is the real *ratio decidendi* of the House of Lords—between sect. 32 and sect. 62. Whether you adjust, having regard to the conditions, or whether you give compensation because after the separation of the two parts this portion *inter se* may have been altered as regards the rating capacity, or the other may keep constant on the separation—of course those two things are quite distinct—there is no difference between sect. 32 and sect. 62 on that point. It is an adjustment of what—of the existing property, debts, and liabilities connected with the financial relations, and an adjustment also of these licences. The first point is what have you to adjust? [Channell, J.—The difference, and the substantial difference, it seems to me, is that in sect. 62 you have got a distinct subject-matter of things to be adjusted—in other words, divided; whereas in this sect. 32 you have the much more general words, "respecting all other financial relations."] One point is that the conditions which arise consequent upon the separation, and subsequent to the separation, are not in themselves proper subject-matters of the adjustment at all. Now, what is the subject-matter of adjustment? It is respecting the distribution,

first of all, of the local taxes, licences, and probate duty grant, "respecting all other financial relations." Those are all existing financial relations. They say that the operation of the separation, or the fact of the separation, will throw a larger burden upon them as regards the maintenance of the highways than they are bearing now because of the distribution. That is what we say according to the House of Lords decision, and, according to the true construction of sect. 32, they are not entitled to say. That is brought about by the act of separation; it is not an existing financial relation at the time at all, and it is impossible to call it so. They referred to

Caterham Urban District Council v. *Godstone Rural District Council* (*sup.*).

There is no word from the beginning to end of sect. 32 which, according to what the House of Lords has said, implies, either in word or in spirit, the principle of compensation. We submit there is nothing to show there is any distinction between the substantial *ratio decidendi* of the two cases, and, both on principle and on the House of Lords decision, we say these are not proper subject-matters for valid claims.

Montague Shearman, K.C. in reply.—I desire to explain the appearance of the words "financial relations" in sect. 62. It is quite clear where they come from. Will your Lordship look at sect. 32, sub-sect. 5? Sect. 32 is what is called part 2 of the Act, and part 2 deals with boroughs and part 3 with boundaries. Part 2, sects. 31 to 49, deals with boroughs, and from 50 onwards its subject relates to boundaries. Sub-sect. 5 of sect. 32 is this: "The provisions of part 3 of this Act with respect to the adjustment of property, income, debts, liabilities, and expenses, and to borrowing for the purpose shall apply as if the commissioners under this Act were the arbitrator in that part mentioned." Your Lordship notices there they refer to the provisions in part 3—that is in sect. 62—for the words "property, income, debts, liabilities, and expenses," and not "financial relations." "Property, debts, and liabilities" are referred to in 62. I think it is quite clear why the words "financial relations" come in at the middle of the section and not at the beginning. Then in part 3, by sect. 62 (1): "Any councils and other authorities affected by this Act or by any scheme, order, or other thing made or done in pursuance of this Act, may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses, so far as affected by this Act, or such scheme, order, or thing, of the parties to the agreement"—what I am saying is, as Lord Davey said, that sect. 62 is wholly procedure—"and the agreement and any other agreement authorised by this Act to be made for the purpose of the adjustment of any property, debts, liabilities, or financial relations, may provide for the transfer or retention of any property, debts, liabilities, or financial relations may provide." Sect. 32 relates to sect. 62, and, when sect. 62 is made, it is procedure giving powers. It says powers not only as to agreements for debts, liabilities, and income under part 3, but also financial relations under part 3. My argument is that sect. 62 is merely procedure, that the operative part of part 3 is sect. 59. The operative part is not sect. 62, but it is sub-sect. 4 (E) of sect. 59.

CHANNELL, J.—In my view there is sufficient difference between sect. 32 and the section that was before the House of Lords, and in particular it is in the words of the last part of sub-sect. 1 of sect. 32. Now, here it first of all says this is an adjustment respecting all other financial relations. Those words are so vague and so unsatisfactory in every way; it is not adjusting all other financial relations, but an adjustment respecting all other financial relations, and I myself should be wholly unable to put any definite meaning on them if they stood alone, but I do think that this is intended to be an adjustment of financial relations generally, and that Mr. Shearman has correctly explained the reason why those words "financial relations" come into sect. 62 as referring to any other agreement under this Act relating to financial relations. I think that has a reference back to sect. 32. That explains the peculiar way in which those words come in. But those words are, as I say, extremely vague and extremely difficult to construe, but the words that I do not think are difficult to construe are the words of the latter part of the sub-section: "And such adjustment shall provide, in the case of any expenses which may in future be incurred by the county wholly or partly on behalf of the borough for the liability of such borough to contribute." So far as certain things before this are concerned, a very large number of things, almost everything had been done for the borough by the county, and, as I pointed out, if it was a quarter sessions borough those were done not by way of direct rating, I mean they were paid for not by way of direct rating, but by way of a money contribution. This is expressly relating to that. It says, notwithstanding this Act, some things will still continue to be done by the county for the borough, and as to those the adjustment is to provide. "And save as provided by this Act, any existing liability to contribute or to incur expense shall, after the appointed day, cease, and an equitable provision for such cessation shall be made in the adjustment." That seems to say that you must provide that certain things are to cease; for instance, the liability to maintain the roads. I think there can be no doubt that the Act provides that in the future the liability to maintain the roads within the borough is to be borne within the borough, and the liability of the county to incur expense in reference to the rates with the borough is to cease, and equally the liability of the borough to contribute to the expenses of the county in respect of the rates inside the county, or the rates generally, is to cease. They may not alter that, but what they are to do is to make an equitable provision for such cessation. That must mean that they are to take it into consideration somehow or other from a money point of view. Personally I very much doubt it being right to capitalise the existing difference between the expenditure in the recent years and the contributions of the recent years, but it is a matter for the arbitrator to consider what is equitable. That is a matter perhaps of personal opinion, but he has to make some provision upon the subject, and that that is to be an equitable one seems to me to be provided by the Act. Then I think that the other words are important. "In such adjustment regard shall be had to the existing property, debts, and liabilities (if any) connected with the financial relations of the

county and borough, and to the consideration that the county is not to be placed in any worse financial position by reason of the boroughs therein being constituted county boroughs, and that a county borough is not to be placed in a worse financial position than it would have been if it had remained part of the county and had shared in the division of the sums received by a county in respect of the licence duties and the probate duty grant as provided by this Act, and to the amount of benefit and value of the services which the borough receives in return for existing contributions (if any) and to all the circumstances of the case which it appears equitable to consider." There are words preceding which I think pehaps ought not to have been left out—about remaining in the same financial condition. I cannot think that that can be meant to be limited with regard to the same financial condition and in respect of the debts, licences, and probate duty. That is put in inartistically as one of the things contemplated, but it is not confined only to that. I think that shows that the scheme was the alteration of local government for the future, and as regards the late boroughs and the counties not to alter their financial position further than could possibly be helped. It was intended, as it seems to me, to start the boroughs and the counties, so that the ratepayers would be practically as nearly as could be at starting in the same position as they had been in before, but it was not intended that they should be for all time. It was not intended that account should be taken of the fact that in all probability West Hartlepool would be a very growing place, and that some of the smaller villages in Durham might not be, and things of that sort, but it was intended to alter the machinery, and as between large boroughs and the counties to which this section relates, to start them as far as possible in the same position as they were in before. I say as between the large boroughs and the counties, because my distinct recollection is, and I think after a decision to the contrary by Wills, J., affirmed afterwards by the Court of Appeal, it was held that the state of things was very different with regard to small boroughs. As regards the large county boroughs having their own county rate in place of their own machinery it was intended to start them as far as possible with new machinery, but in the same financial position so far as you could as they were in practically at the time. I think, therefore, there was power to make an equitable provision of some kind for the cessation of the liability to repair and maintain county bridges and main roads. I have not gone through the miscellaneous expenses. I hope it is not necessary to do so. They are grouped together, and I should suppose with such an arbitrator as this they are grouped correctly. I have not gone through them in detail, and I have not had any argument in detail about them. I think, therefore, it was within the power of the arbitrator to make some equitable provision in reference to these matters. That being so, I do not think I can say that those sums which in point of fact by agreement between the parties have been taken can be set aside or varied, or anything else by me, although if they had been arrived at by capitalising the existing difference between the expenses and the amount produced by rates I do not think that is a principle that I should have adopted as being the equitable one under the circumstances, but I do not think I have power to review it. I think that disposes of the points in the case. I should desire to answer question 1: That the loss sustained by the county in reference to the matters therein referred to is a subject on which the arbitrator has power to make an equitable provision. That is how I desire to answer it. I do not suppose that that makes any real difference. It is only to show the ground on which I put it.

Both questions answered in the affirmative.

Solicitors: *Maude* and *Tunnicliffe*, for *Ralph Simey*, Clerk of the County Council of Durham; *Baker* and *Co.*, for *Higson Simpson*, Town Clerk of West Hartlepool.

April 14 *and May* 15, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

REX *v.* HENDERSON; *Ex parte* JAMES. (*a*)

Rating—Warehouse—Occupation.

J. B. M. and Co. were the owners of a warehouse at L. During a certain period the warehouse was closed and had no goods in it whatever, and all the working appliances such as scales, weights, and trucks were removed and the water supply and hydraulic power was cut off. A notice was exhibited saying the warehouse was to let, but the owners did not intend to allow any part to be used unless they could obtain sufficient goods which would take up at least one-half of the available space of the warehouse and so make it commercially worth their while to open the warehouse.

On an application for a distress warrant for the rates for such period during which the warehouse was closed, the justices found as a fact that there had been no occupation of the warehouse during that period, and they refused the application.

Held, that the justices were justified in so finding.

Bootle Overseers *v.* Liverpool Warehousing Company (85 *L. T. Rep.* 45) *followed.*

CAUSE shown against a rule *nisi* for a *mandamus* to the Liverpool justices to state a case.

On the hearing, at the suggestion of the court, the rule was made absolute, and the affidavits filed in support and opposition to the rule were taken as the case, and the matter was argued accordingly.

The affidavit in support was as follows:—

I, William James, of 62, Sea View-road, Liscard, in the county of Chester, one of the collectors appointed by the council of the city of Liverpool to collect general rates, water rates, and rents, make oath and say as follows:

1. At a petty sessions held in and for the city of Liverpool on the 10th Nov. 1904 John Henderson, Esq., Thomas Edward Sampson, Esq, and Charles Frederick Finney, Esq., three of His Majesty's justices of the peace for the said city sitting as a court of summary jurisdiction, heard and determined a complaint preferred by me on behalf of the said council against J. D. Melladew and Son, the occupiers of certain warehouse premises, known as 3, Neptune-street, situate within the city of Liverpool.

2. My said complaint was preferred under the Liverpool Corporation Act 1893, the Liverpool Corporation Act 1862, the Liverpool Improvement and Waterworks Acts

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

1871, and the Local Government Board's Provisional Order Confirmation (No. 10) Act 1895, s. 2, for that the said J. B. Melladew and Son were persons duly rated and assessed and liable to pay in respect of the said premises certain rates called the general rate and water rate and also a certain water rent all duly made or fixed in and for the said city on the 3rd Feb. 1904 and also duly rated and assessed and liable to pay in respect of the said premises the general rate, water rate, and water rent all duly made and fixed in and for the said city on the 7th Feb. 1900, and that they had not for the space of fourteen days after demand in writing by me paid the amounts due from them in respect of the said rates and water rent made on the dates aforesaid—that is to say, the sums of 22*l.* 9*s.* 11*d.* and 1*l.* 4*s.* 5*d.* respectively, and that the said sums still remained wholly due and unpaid.

3. Upon the hearing of the said complaint the said J. B. Melladew and Son (hereinafter called the defendants) having appeared pursuant to a summons in that behalf, to show cause against the issue of a distress warrant to levy the amount of the said rates and water rent, it was admitted by counsel on their behalf: (1) That the said rates and water rent had been duly made for each of the said years; (2) That demands had been duly made for payments of the said rates and water rents in each of the said years; (3) That for the purpose of the case the defendants were to be treated as the owners of the warehouse; (4) That with the exception of the period of time from the 1st Oct. to the 12th Dec. in the year 1900, and from the 25th Feb. to the 13th July in year 1904, the defendants were in occupation of the said warehouse during the years for which the said rates and rents were made; (5) That if the defendants were in occupation of the said warehouse during the whole of the said years, including the said two periods, there was due and owing from them the sum of 7*l.* 4*s.* 5*d.* in respect of the year 1900, and the sum of 14*l.* 4*s.* 3*d.* in respect of the year 1904. Counsel on my behalf agreed to accept these figures as accurately representing the amounts due in respect of the said two periods.

4. It was contended on behalf of the defendants that on the 1st Oct. 1900 and the 25th Feb. 1904 respectively the defendants ceased to occupy the said warehouse and did not again occupy it until the 11th Dec. 1900 and the 12th July 1904 respectively, and that therefore the defendants were not liable for the said rates and water rents during the said periods.

5. In addition to those mentioned in par. 3 hereof following facts were proved or admitted: (1) That the said warehouse consisted of several floors, and that the defendants carried on the business of warehouse keepers there and at adjoining and neighbouring warehouses by letting either the whole warehouse or separate floors or receiving goods at a certain rent per package per week; (2) That on or about the 1st. Oct. 1900 and the 25th Feb. 1904, a letter was written by the defendants to the superintendent-collector of rates for City of Liverpool, as follows: "No. 3, Neptune-street and Dundee-street, City.—(Warehouse) District No. 8.—Please note that we have this day gone out of occupation of above warehouse. We invite inspection.—Yours faithfully, J. B. MELLADEW"; and on or about the 12th Dec. 1900 and the 13th July 1904 a letter was written:—"Warehouse, No. 3, Neptune-street.—Will you please note that we have reopened the above warehouse this day.—Yours faithfully, JOHN B. MELLADEW AND SON"; (3) That a bill was affixed to the premises during each of the said periods in the words following—that is to say: "To let, apply to J. B. Melladew and Son"; (4) That during the said periods the warehouse was not nor any rooms in it let and no goods were on the premises, but that if rooms had been wanted they would have been let, and that if at any time during the said period the defendants had been offered goods for storage in sufficient quantity to make it commercially worth their while—*i.e.*, about half the capacity of the warehouse—they would have opened the warehouse; (5) That during the said periods the supply of water at higher pressure for working hydraulic lift in the warehouse was pursuant to a notice in that behalf given by the defendants to the Hydraulic Power Company cut off, the defendants thereby saving the minimum charge payable to the said company for supply of water pressure during such period as the said lift was not being used and the defendants being able to get the supply put on at any moment when goods were received upon notice being given to the company; (6) That during the said period the weights, scales, and trucks, three or four in number used for trucking and weighing goods, were removed to an adjoining warehouse, but that the latter warehouse was next door, and that they were there very handy and could be got whenever wanted; (7) That with the exception of the weights, scales, and tracks, which had been moved to an adjoining warehouse and the water supply being cut off, the warehouse was ready for the receipt of goods at any minute, provided the defendants were offered enough; (8) That warehouses are a class of property of which intermittent user is characteristic as illustrated by the two years in question; and (9) That the said warehouse and premises were assessed at 180*l.*, and that the assessment committee for the parish of Liverpool, by whom the assessment was made, had in making such assessment taken into account the intermittent user characteristic of such warehouses, and assessed the said warehouse at a rent from year to year of 1*s.* 3½*d.* per square yard of floor space in expectation of the warehouse being from time to time empty, instead of at 1*s.* 6*d.* per square yard, at which it would have been assessed, had the assessment been made on the basis of the warehouse not being so from time to time empty.

6. It is contended on my behalf that: (*a*) There was no evidence that the defendants had ceased to occupy the said warehouse at any time during the said periods; (*b*) That the defendants had, in fact, intended to reopen the said warehouse whenever they were offered sufficient goods to make it commercially remunerative so to do, and that there was therefore no evidence of an intention on their part to cease to occupy the said warehouse; (*c*) The case presented by the defendants related only to the question whether the defendants' occupation was beneficial or not; (*d*) The court had no jurisdiction to inquire into the question whether the defendants' occupation was beneficial or not; (*e*) The intermittent user of the warehouse was properly taken into account in making the assessment, and that if sufficient allowance had not been made in respect thereof the defendants' proper remedy was to have appealed against the assessment, and that it was not a matter which the said justices could entertain on my said complaint; (*f*) The defendants had showed no sufficient cause against the issue of distress warrant.

7. The justices aforesaid dismissed the said complaint rejecting my said conditions, and holding that during the said periods the said warehouse was not occupied by the defendants.

8. Being dissatisfied with such determination as being erroneous in point of law I applied to the said justices to state a case setting forth the facts and grounds of such determination for the opinion of this honourable court pursuant to the statutes in that behalf, but the said justices refused my application, and granted a certificate that my application was frivolous.

The affidavit in opposition was as follows:—

We, the said John Henderson, Thomas Edward Sampson, and Charles Frederick Finney, justices of the peace for the city of Liverpool, make oath and say as follows:

1. We formed the court at which, on the 10th Nov. 1904, an information was laid by William James, a

collector of rates for the mayor, aldermen, and citizens of city of Liverpool (hereinafter called the informant) applying for a distress warrant against Messrs. J. B. Melladew and Son (called the defendants) in respect of certain unpaid portions of general rate and water rate for years 1900 and 1904 for premises No. 3, Neptune-street, in the said city, being a self-contained warehouse.

2. On the 10th Nov. we heard all the evidence offered, and were addressed by counsel for the informant and defendants respectively.

3. At the hearing it was admitted that the allowance and due publication of the rate had been made, and that there had been a demand and nonpayment of a portion of the rates. It was further admitted that the unpaid balance for 1900 was 7*l.* 4*s.* 5*d.*, and for 1905 was 14*l.* 4*s.* 3*d.*, and that if these sums were found to be due the defendants were the persons liable to pay the same.

4. The facts which were proved were as follows: (*a*) That between the 1st Oct. 1900 and the 11th Dec. 1900 (which is the period in respect of which the 7*l.* 4*s.* 5*d.* is claimed) the warehouse was closed and had no goods in it whatever; (*b*) That between the 25th Feb. 1904 and 13th July 1904 (which is the period in respect of which the 14*l.* 4*s.* 3*d.* is claimed, the warehouse was closed, and had no goods in it whatever; (*c*) That on or about the first date in each of the said periods a letter was sent by defendants to the informant stating that the defendants had gone out of occupation of warehouse, and that the inspection of the informant was invited; (*d*) That at the end of the said periods the defendants gave notice to the informant that they had reopened the premises for business; (*e*) that during the said periods all the working appliances (such as weights, scales, and trucks) necessary to carry on the business of a warehouse keeper, were removed from the premises, except a hoist which was worked by hydraulic power. The power necessary to work the said hoist was, at the request of the defendants, cut off during the periods by the company supplying such power; (*f*) That by putting back the necessary working appliances and by making an application for the turning on or off the water for the hoist the warehouse could at any time be used for storing goods in whole or in part, but that the defendants did not intend to allow any part of the same to be used unless they could obtain sufficient goods which would take up at least half of the available space of the warehouse; (*g*) That during the latter period the defendants offered to allow the informant to keep the keys of the premises; (*h*) That during the periods in question a notice was displayed on the premises as follows: "To be let, inquire John B. Melladew and Sons;" and if any person desired to do so, they could look round the warehouse by obtaining an order; and (*i*) That the premises consisted of a self-contained warehouse of several floors, and that the defendants were the managers of this and other warehouses on behalf of the same owners; the understanding as to management being that if the premises were let the defendants should receive 10 per cent. of the takings.

5. At the close of the hearing we adjourned the application in order that we might have the shorthand notes of the evidence and the arguments transcribed before giving our decision.

6. On the 17th Nov. 1904, having considered such evidence and arguments, we gave our decision that we found as a fact that there had been no occupation of the warehouse during the said periods, and we therefore dismissed the said information. The following transcript of shorthand notes taken on that occasion correctly sets forth what was said on that occasion: "The Chairman: We have arrived at a unanimous conclusion, upon the evidence given, that Messrs. Melladew were not in occupation of the warehouse No. 3, Neptune-street, during the periods for which the rates are claimed, and we therefore cannot issue a distress warrant asked for. We consider the law is settled, so far as this court is concerned, by the *Bootle* case, and the matter resolves itself as far as we are concerned into the question of fact—Was there any occupation or not? and we find there was not. We were asked to take into consideration the fact that the assessment was based upon the intermittent user of the warehouse, but there is a decision of the High Court which states that assessment, when an application is made for a distress warrant, and we have therefore not taken that matter into our consideration. Mr. Maxwell, on behalf of defendants, asked for costs, but the application was not pressed in view of the opinion expressed by Mr. Sanders, the magistrates' clerk. Mr. Scott, on behalf of informant, said that the bench had of course appreciated that this was a case of great importance, one of the objects of which was to test the accuracy of the decision in the *Bootle* case, to which the bench had referred, and the corporation as plaintiffs therefore ask the bench to state a case in the usual way. The Chairman: Are you quite satisfied that this is the right procedure for you to take in regard to the matter? Mr. Scott: I have carefully considered it, and I have come to the conclusion that that is the best procedure, but I should be very glad to hear any suggestion from the bench on the point. Chairman: We considered this point before coming into court, because of what Mr. Scott said during the hearing of the case. We are of opinion that, as the question of occupation is one of fact and as there is the *Bootle* decision to guide us on the law applicable to such a finding of fact, the law is not in doubt so far as this court is concerned. As to whether the law as it stands should be altered ought not to be considered by us, and it has been held in the Court of Appeal that when justices follow a previous decision of the High Court on a case which they consider is similar they ought not to state a case for the purpose of enabling the decision of High Court to be reconsidered as there is another way in which they can make an application to High Court. Mr. Scott: I understand that the magistrates formally, for the reasons stated, refuse to state a case, and leave the corporation to apply for a *mandamus* in the usual way. The Chairman: Quite so."

Balfour Browne, K.C. (*Leslie Scott* with him) for the corporation of Liverpool.—This case is different from *Bootle Overseers* v. *Liverpool Warehousing Company* (85 L. T. Rep. 45). It was an entirely different notice that the tenant in that case gave before the rate was made. He stated there distinctly that he did not intend to occupy the premises during the period of the currency of the rate. In that case from a date prior to the making of certain rates the respondents gave notice to the appellants that they intended to keep certain warehouses unoccupied during the current overseers' year and to claim exemption from the rates in respect thereof. All goods had been removed before the making of the rate and the warehouses had not been used since that date, though they were advertised in the list of warehouses to let belong to the respondents. Each warehouse was one of a block through which considerable shafting passed, and at the end of block was a notice: "For storage apply to the Liverpool Warehousing Company." A warehouse, in respect of which notice had been given to the appellants, was still advertised on the cards issued by the respondents, and they had tried to let it by notice affixed on the warehouse, and it was held that the justices were justified in coming to to the conclusion that there was no occupation of these warehouses so as to render the respondents liable to be rated in respect thereof. The whole distinction between that case and this is that there it was found distinctly by the court that

the tenant intended not to use the warehouse during the rateable period, and therefore it was assumed that he was out of occupation. Here the very reverse was found, and the tenants have expressed their intention to come in whenever they have goods enough. The whole point depends upon *bonâ fide* intention. That is shown by the case of *Mayor of Southend* v. *White* (83 L. T. Rep. 408). In that case the respondent held certain premises for a term of years, and had entered into possession, and had used the premises as a shop. As the business was only remunerative in the summer, the respondent at the end of the summer locked up and left the shop with the intention of not reopening the same for business until the beginning of the following summer, and during this interval he had not in fact returned to the shop, and no one lived therein. Before he left he removed all his stock, but left in the premises certain fixtures and other articles. He was entitled under his lease to occupy the premises and carry on his business continuously throughout the year except for certain hours during the night. A general district rate was made for the half year, during the whole of which the shop was so closed in the winter, and it was held that the respondent was in occupation of the premises during the time they were so closed, and was liable to pay the half year's rate accordingly. There the occupier of that shop never intended not to occupy, and in this case also the owner of the warehouse never intended not to occupy. He was only waiting until he got goods enough to fill half the warehouse. In *Gage* v. *Wren* (87 L. T. Rep. 271) the respondent took a lease of a house and furnished it for the purpose of receiving boarders. She did not reside in the house, and in Dec. 1900 removed from the house all her furniture and effects except certain fittings, fixtures, and things which she had hired from the previous tenant. She intended to return to the house in the following summer, and in May she returned and refurnished the house, but, with the exception of the fittings and things left therein the house was empty from Dec. 1900 to May 1901. She contended that she was not liable for the general district rate for the period from Dec. 1900 to May 1901 on the ground that during that period the house was unoccupied within the meaning of sect. 221 (2) of the Public Health Act 1875, but it was held that the proper inference of law was that the respondent had the beneficial occupation of the house during the whole period, and was therefore not entitled to the exemption in that section in favour of unoccupied premises, but was liable to the rate for the whole period. [Lord ALVERSTONE, C.J.—But there, chattels were left in the place.] In *Bootle Overseers* v. *Liverpool Warehousing Company* (*sup.*) there was found a *bonâ fide* intention not to occupy, and therefore it does not govern this case. Here there was occupation during practically the whole year because the tenants intended to fill the warehouse whenever they could, and the mere giving notice for particular days that it is empty does not take it out of occupation although it takes it out of user.

Macmorran, K.C. (*Maxwell* with him) for J. B. Melladew and Co.—The other side has confounded two things, one is possession which amounts to the right to occupy, and the other is occupation. In law rateability depends upon occupation and not upon possession. In *Crowther Smith* v. *New Forest Union* (61 L. T. Rep. 870) the owner was endeavouring to let his land and had put up a notice to that effect, but he had not actually let it, and the Court of Appeal held that he was not rateable though he had the legal possession because he was not in actual possession, and Lord Esher said that legal possession was not enough to make the owner the occupier. Occupation is a question of fact and of degree in every case. Intention has nothing to do with it, it is the fact of the occupation of the premises which is the test of rateability. Occupation involves and implies something in the nature of use, and unless there is such use there is not such occupation as makes a person rateable. This case is covered by the decision in *Bootle Overseers* v. *Liverpool Warehousing Company* (*sup.*).

Leslie Scott, in reply, referred to

Rochdale Canal Company v. *Brewster*, 71 L. T. Rep. 243; (1894) 2 Q. B. 852.

Lord ALVERSTONE, C.J.—I think that it is very important in this case that we should adhere to the rule that where a case has been decided in this court and there is really no substantial distinction between it and the case which is being considered we ought to follow it. I therefore do not propose to discuss the merits of the case of *Bootle Overseers* v. *Liverpool Warehousing Company* (*sup.*), and, unless it is distinguished really on fair grounds, I think we ought to follow it. I think Mr. Macmorran has satisfied me, and Mr. Leslie Scott does not at all dispute that the question is, Has there been occupation during part of the year? If there is occupation during part of the year the person is entitled to relief for the part of the year during which he does not occupy, and I think the distinction must be drawn between the intention to occupy and the intention to use. If there is no occupation the intention to use is not enough. Applying the case of *Bootle Overseers* v. *Liverpool Warehousing Company*, and accepting it for the purpose of to-day as a correct enunciation of the law, what have the magistrates found in the case? They say: "We found as a fact that there had been no occupation of the warehouse during the said periods, and we therefore dismissed the said information. The following transcript of the shorthand note taken on that occasion correctly sets forth what was said on that occasion. (The Chairman) We have given this case our very special careful consideration, and have arrived at a unanimous conclusion upon the evidence given that Messrs. Melladew were not in occupation of the warehouse No. 3, Neptune-street during the period for which the rates are claimed, and we cannot therefore issue the distress warrant asked for. We consider the law is settled so far as this court is concerned by the *Bootle* case, and the matter resolves itself so far as we are concerned into the question of fact. Was there any occupation or not? We find there was not." It seems to me, therefore, that unless Mr. Leslie Scott can go the length of saying there was no evidence of an absence of occupation we ought to follow the *Bootle* case. I express no opinion on the matter—feeling myself bound by the authority—but here you have got the fact of use so put an end to, that, whatever appliances are required are taken out of the place and the water is cut off.

I think it is going too far to say that there was no evidence upon that question of fact, it being found in the same way as it was in the *Bootle* case. The court has thought it conclusive in the matter, and I think therefore that the appeal must be dismissed.

Kennedy, J.—I do not discuss the matter. It appears to me impossible to distinguish this, however ably Mr. Scott has endeavoured to persuade me otherwise, from the *Bootle* case. I say nothing further as to the *Bootle* case, except that it binds us.

Ridley, J.—I also think we are bound by the former decision. It is true that the facts in this case are somewhat different, but the principle of the *Bootle* case, it appears to me, applies to this. I think the two cases stand or fall together, and that therefore the appeal must be dismissed.

Appeal dismissed.

Solicitors: *F. Venn* and *Co.*, for *E. R. Pickmere*, Liverpool; *Whitley* and *Co.*, Liverpool.

Feb. 13 *and* 18, 1905.

(Before Warrington, J.)

T. Tilling Limited *v.* Dick Kerr and Co. Limited. (*a*)

Highway — Local authority — Electrification of tramways—Temporary rails—Damage done by contractors—Liability—Limitation of action—Public Authorities Protection Act 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1—*London County Tramways (Electrical Power) Act* 1900 (63 *&* 64 *Vict. c. ccxxxviii.*), *s.* 6.

The L. C. C. entered into a contract with D. K. and Co. Limited, the defendants, for the purpose of adapting certain tram lines belonging to the L. C. C. to be worked by electricity. The defendants, in the course of their work, for the purpose of maintaining the tramcar service uninterrupted, constructed certain temporary lines of rail, which were in fact an obstruction to the roadway, and caused damage to the omnibuses of T. T. Limited, the plaintiffs, using those roads.

The plaintiffs sued the defendants for the damage.

The defendants pleaded (1) *that the obstructions were placed in the road under statutory authority*; (2) *that they were protected by sect.* 1 *of the Public Authorities Protection Act* 1893 (56 *&* 57 *Vict. c.* 61), *the action having been brought more than six months after the cause of action accrued.*

Held, (1) *that the construction of these temporary lines by the defendants was not authorised by sect.* 6 *of the London County Tramways (Electrical Power) Act* 1900 (63 *&* 64 *Vict. c. ccxxxviii.*), *not being works necessary for adapting the tramways to be worked by electricity, and the defendants were accordingly not protected by it*; *and* (2) *that the Public Authorities Protection Act* 1893 *did not extend to independent contractors doing under contract and for their own profit the works which a public body was authorised to do, and that the plaintiffs were entitled to the relief asked for*; *the amount to be ascertained by the official referee.*

(*a*) Reported by H. M. Charters Macpherson, Esq., Barrister-at-Law.

Action.

The defendants, a large firm of contractors, were employed by the London County Council early in the year 1903 to reconstruct and electrify for them certain existing tramways in South London in accordance with the powers and provisions of the London County Tramways (Electrical Power) Act 1900, the London County Council (Tramways and Improvements) Act 1901, and the Tramways Act 1870.

By a contract dated the 31st Dec. 1902, the defendants undertook the work described therein, and in a specification annexed, at a certain price.

The specification provided, amongst other things, that the contract should include the provision and maintenance of all temporary lines, turnouts, and crossover roads to be used during reconstruction, so as to interfere as little as possible with the tramway traffic. The contract and specification also contained provisions casting upon the defendants the duty of observing the provisions of the statutes and the responsibility for all damage caused by interference with traffic or otherwise; and by clause 13, which particularly dealt with the continuance of the tramway traffic during the reconstruction, it was provided:

> The reconstruction, unless specially otherwise ordered by the engineer, is to be carried out upon one track only for each section opened at one time. The contractors shall provide all flush or raised temporary junctions and turnouts for diverting the horse-car traffic so that it can be carried on for both the up and down services on the track not in process of reconstruction, and they are to lay flush or raised temporary lines as required between the turnouts, if so ordered by the engineer, to ensure that the process of excavation, removal of pipes and sewers, or the general process of reconstruction shall interfere as little as possible with the regular tramway services along or crossing the route. Before any breaking up of the street is commenced the tramway traffic is to be established to the satisfaction of the engineer and the tramway manager over the substituted lines, and, should any operation require any further provision of temporary lines to carry on the traffic, such provision is to be made by the contractors and the traffic satisfactorily established without extra charge before the work is proceeded with.

Clause 14 provided that the traffic was in no case to be suspended on more than one line.

The plaintiffs were omnibus and carriage proprietors owning a large number of public omnibuses, which plied for hire in the principal thoroughfares of South London, and they alleged that the defendants in course of their operations had unlawfully obstructed certain thoroughfares by laying and maintaining upon the surface of that part of the road which was open for vehicular traffic raised tram rails in such a manner that the uppermost surface of such rails was not on a level with the surface of the road, as required by the Tramway Acts, but projected above it to the extent of the full depth of the rail, thereby committing a public nuisance; that in consequence of these obstructions the plaintiffs' omnibuses had been frequently injured. In addition to some sixty-nine specific instances of accident or injury given in their particulars, the plaintiffs also complained of damage caused by the undue and extra strain put upon their omnibuses when using these thoroughfares through being obliged to con-

tinually cross and recross these raised rails; and they further alleged that the upkeep of their omnibuses had been thereby increased, and the depreciation of their frames, axles, and wheels had been accelerated.

The court was not asked at the trial to assess the amount of damage sustained by the plaintiffs, but only to decide the question of the liability of the defendants, as it had been arranged that in the event of the defendants being held to be liable the actual amount of damage suffered should be the subject of a further reference.

The plaintiffs also alleged that the defendants had been guilty of negligence in carrying out their work, mainly on the ground that they had provided a set of temporary raised rails for carrying on a double line of tramway traffic while one side of the roadway was up for electrification, instead of being satisfied to use only "crossovers" to turn the tram traffic on to the existing single tram line.

The defendants pleaded that what they had done was only done in pursuance or in execution of statutory powers, and as to sixty-seven of the sixty-nine specific instances of injury, which happened six months before the issue of the writ, they pleaded the benefit of sect. 1 of the Public Authorities Protection Act 1893, which enacts as follows:

> Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect: (a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of.

Sect. 6 of the London County Tramways (Electrical Power) Act 1900 provides that the London County Council, for the purpose of working the tramways by electrical power, may (*inter alia*) "reconstruct or make such alterations of the tramways and may execute all such works on or in connection therewith in, over, or under the streets or roads in which the same are laid as may be necessary for adapting the same to be so worked."

The plaintiffs' contention on this was that the laying of temporary raised rails for the convenience of the tramway traffic was not authorised by this section as work necessary for adapting the line to be worked by electricity.

The action was tried with witnesses before Warrington, J., sitting as an additional judge of the King's Bench Division. The result of the evidence is stated in the judgment.

Avory, K.C. and *A. J. Simon* for the plaintiffs.—The defendants were negligent in the exercise of their powers (if any), and are liable for the damage they have done to our omnibuses. They have no statutory powers to justify their operations, as they were not, within the language of sect. 6 of the London County Tramways (Electrical Power) Act 1900, works "necessary for adapting" the tramways to be worked by electricity, but really works to enable the London County Council to carry on the existing traffic by means of horse power during the reconstruction. Nor are the defendants, who were independent contractors and working for their own profit under their contract, protected by the provisions of the Public Authorities Protection Act 1893:

Parker v. *London County Council*, 90 L. T. Rep. 415; (1904) 2 K. B. 531;
The Ydun, 81 L. T. Rep. 10; (1899) P. 236;
Greenwell and another v. *Howell and another*, 82 L. T. Rep. 183; (1900) 1 Q. B. 535;
Kent County Council v. *Folkestone Corporation*, 92 L. T. Rep. 309; (1905) 1 K. B. 620.

Ruegg, K.C. and *J. Pike Glasgow* for the defendants.—The defendants were clearly acting within their statutory powers, and these were only "works necessary for adapting the line to be worked" by electricity within the meaning of sect. 6 of the Act of 1900. Even if this were not so, they are within the protection given by the Act of 1893. The London County Council would not have escaped liability, if sued, by throwing the blame on the contractors:

Penny v. *Wimbledon Urban Council*, 80 L. T. Rep. 615; (1899) 2 Q. B. 72.

The contractors here were the agents of the council.

Avory, K.C. replied.

Feb. 18.—Warrington, J.—The plaintiffs in this case sue the defendants for damage caused to their omnibuses by certain obstructions placed in the highways over which they travel by the defendants. The defence is twofold. The defendants say: (1) That the obstructions were placed in the road under statutory authority; and (2) that they are protected by the Public Authorities Protection Act 1893, the action having been brought more than six months after the cause of action accrued. The plaintiffs say that even if the acts complained of were done under the statutory authority, the defendants were negligent in the exercise of their powers, and are therefore liable. I find that negligence is not proved, and, therefore, I need not deal further with this part of the case. The London County Council, prior to the year 1900, purchased, under statutory powers, the South London Tramways of the London Tramways Company, and by the London County Tramways (Electrical Power) Act 1900 provision was made for the substitution of electrical for horse traction on their tramways. The material section of this Act is the 6th. [Having read the section, his Lordship continued:] The special Acts of the London Tramways Company and the General Tramways Act provide that the uppermost surface of the rail shall be on a level with the surface of the street, and that the rights of the public to pass over or along the streets shall not be abridged save as in the Acts provided. For the purpose of effecting the conversion of the South London system of tramways, the London County Council made a contract with the defendants, dated the 31st Dec. 1902, by which the latter undertook the work described therein, and in a specification annexed, at a certain price. The specification provided, amongst other things, that the contract should include the provision and maintenance of all temporary lines, turnouts, and crossover roads to be used during reconstruction, so as to interfere as little as possible with the tramway traffic. The contract and specification also contained provisions casting upon the defendants the duty of observing the

provisions of the statutes, and the responsibility for all damage caused by interference with traffic or otherwise. Clause 13 of the specification particularly provided for the continuance of the tramway traffic. [His Lordship read the clause, and continued:] At the trial a portion of the Romney-road, opposite the Royal Naval College at Greenwich, was taken as an example of what had been done by the defendants. For the purpose of maintaining the traffic on a double line of rails, and with a desire, at the same time, to interfere as little as might be with the ordinary traffic, the defendants laid between the kerb on one side of the road and the permanent tramway a temporary line of rails, at the same time closing altogether the other half of the road. The one half which was open for traffic was thus occupied by one of the two permanent lines and by the temporary line. The temporary line was constructed of rails with a bevel on either side from the ground to the height of 2in. or thereabouts, and with a groove in the top to take the flange of the wheel; the uppermost surface of the rails was, therefore, not on a level with, but was above the surface of the street. At intervals there were clamps and nuts projecting above the surface of the raised rails. At the two ends of each section so dealt with, called a "turnout," a junction was made between the temporary line and the permanent tramway. The plaintiffs are omnibus proprietors using the roads on which the work was done. I find as a fact that the raised rails were an obstruction to the highway, and caused damage to the plaintiffs' omnibuses. There is evidence, which I accept, that it would have caused great public inconvenience to interrupt the service of cars, and that less real interference to ordinary traffic is caused by the construction of a "turnout," such as I have described, than by carrying on the tram service on a single line with "crossovers" at intervals. The first question is, Were the acts of the defendants authorised by the statutes? It is, I think, clear that the acts of the defendants would be a cause of action to the plaintiffs, unless they were so authorised; and, further, that if the acts in question are authorised expressly or by necessary implication, the defendants would be excused, although the doing of them may occasion a nuisance, public or private. It is contended that the works constructed by the defendants are works necessary for adapting the tramways to be worked by electricity, and are, therefore, authorised by sect. 6. [His Lordship read this section again, observing that the words in question appeared to point to permanent alterations, and not to temporary expedients for carrying on the tramway traffic, and continued:] I cannot adopt the defendants' construction; in my opinion the works they have constructed are not necessary for adapting the tramways to be worked by electricity, but were necessary (if at all) for maintaining the tramcar service uninterrupted. Works for this purpose are, in my judgment, not covered by the Act, and the defendants are accordingly not protected by it. Then arises the question whether, as to causes of action arising more than six months before the date of the writ, the action is barred by 56 & 57 Vict. c. 61, the Public Authorities Protection Act 1893. The full title is as follows: "An Act to generalise and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties"; and the first section runs thus. [His Lordship read the section, and continued:] It has been held that the protection of the Act extends to the officers of a public body and to persons acting under their direct mandate (*Greenwell and another* v. *Howell and another*, *ubi sup.*); but there is no case deciding that it extends to independent contractors doing under contract and for their own profit the works which the public body is authorised to do. In the absence of authority I should have been prepared to hold that contractors undertaking work for their own profit are not within the protection of an Act passed as this is "for the protection of persons acting in the execution of statutory and other public duties." (As to reading the title as part of the Act, see *Fielding* v. *Morley Corporation*, (1899) 1 Ch. 1). I am glad to find that this view is supported by the decision of the Court of Appeal in *Kent County Council* v. *Mayor, &c., of Folkestone* (*ubi sup.*). Without going through the facts there in detail, I may say that the question distinctly arose whether the statute applied to the case of contractors. Vaughan Williams, L.J. said this: "But with reference to this particular point, upon which Darling, J. really disposed of the action, I cannot agree with him, because, in my judgment, the Public Authorities Protection Act 1893 has no application to this act at all, and my reason for saying that is this, that the contractor who acted in this case was in no sense the servant of the local authority, the defendants, the Folkestone Corporation." Romer, L.J. dealt with the point as follows: "In the first place it is clear to me that the Public Authorities Protection Act 1893 has no application to this case. It was admitted, and rightly admitted, on behalf of the respondents, that they could not say that this was an action, prosecution, or proceeding in respect of any alleged neglect or default in the execution of an Act of Parliament or of a public duty or authority. But they contended that it was an action, prosecution, or proceeding against a person, which includes a corporation, for an act done in pursuance or execution, or intended execution, of the defendants' public duty or authority. When the facts of the case are considered it is clear that this action does not fall at all within those words which I have just read. The damage done to the road in question was done by certain contractors, and those contractors were not the servants or agents of the defendants in doing that damage. The contractors were simply persons who contracted to deliver certain stone and material within the limits of the defendants' borough; and the way they should do that was for them, and not for the defendants, to consider. Therefore it certainly could not be said that these acts were anything done by the defendant corporation in pursuance or execution, or intended execution, of any Act of Parliament or any public duty and authority. And I need scarcely point out that it certainly cannot be said that the contractors, when they did the damage, were acting in pursuance or execution, or intended execution, of any Act of Parliament, or in consequence of any public duty and authority, for they had none. That shows, to my mind, that this Act has no application to the present case." Stirling, L.J. puts the case even more plainly.

He says: "It is said that the Act of 1893 applies and it is contended that this is an action brought for an act done in pursuance or execution, or intended execution, of an Act of Parliament or a public duty or authority; an act done, it is said, by the corporation of Folkestone. Inasmuch as the contractors were not the servants of the corporation, it certainly was not done by the corporation, and in my judgment it was done by the act of the contractors, and they were not acting in the execution of any public duty or authority, but, as I have already said, simply in performance of the private obligations which arose from the contract they entered into with the Folkestone Corporation. Therefore, in my judgment, the Act of 1893 does not apply at all." In my opinion, therefore, the plaintiffs are entitled to the relief they ask. It is agreed that the damages are to be ascertained by some form of reference. The defendants must pay the costs up to and including judgment. I propose, therefore, to make declaration that the plaintiffs are entitled to recover damages in respect of the matters complained of in this action, and to refer it to the official referee in rotation to ascertain the amount of such damages. The plaintiffs are also entitled to costs up to judgment; the subsequent costs must be dealt with by the referee.

Solicitors: *Hicklin, Washington,* and *Pasmore; William Hurd* and *Son.*

Wednesday, April 5, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

WEDDERBURN (app.) *v.* SMITH (resp.). (*a*)

Weights and measures — Weight found to be unjust—Official stamp defaced by inspector—Seizure of unjust machine — Prior test with local standards—Misconduct.

The respondent, an inspector of weights and measures, having found that certain weights carried by a coal carman were unjust, defaced the official stamps thereon, but did not seize or detain them. He also ascertained that the weighing machine carried by the carman was unjust by testing it with some 56lb. weights on the van, and nine small local standard weights.

Two informations having been preferred by the appellant against the respondent under sect. 49 of the Weights and Measures Act 1878, *alleging misconduct on the part of the respondent,*

Held, that the justices rightly dismissed both informations.

WEDDERBURN *v.* SMITH, No. 1.

CASE stated on an information preferred by the appellant against the respondent, under sect. 49 of the Weights and Measures Act 1878, for that the respondent, being the inspector of weights and measures for the borough of Croydon, unlawfully and in breach of his duty tampered with and defaced the official stamps on two 56lb. weights, and thereby misconducted himself contrary to the statute.

James Hunt, a coal carman, was on the 26th March 1903 sent with a van load of coal, and was on his journey stopped by the respondent, acting under the Weights and Measures Acts 1878 and 1889, who, having ascertained the destination of the load of coal, proceeded to the house where delivery was to be made in the borough of Croydon. On arrival there James Hunt produced, at the request of the respondent, the weighing machine and weights from the coal van, and the load—namely, five sacks of coal—was then duly weighed. During the weighing of the coal the respondent noticed that the scales gave variations, and the respondent then fixed up his official scale beam (which beam was duly certified by the Board of Trade), and with a 56lb. local standard weight tested the four 56lb. weights of the company, and found that two of the 56lb. weights were correct and the other two incorrect, one to the extent of ½oz. and the other to the extent of ¾oz. as compared with the local standard weight.

The respondent said to James Hunt that the two weights were incorrect, and he rejected them as unjust, and he caused the official stamps thereon to be crossed with a chisel, and so did deface them, and then handed the said weights so rejected and defaced to the carman, telling him they were incorrect, and wanted adjusting.

The respondent, in order to identify the two weights so found to be unjust and so rejected, and to prevent their being used so as to facilitate the commission of fraud, defaced them with the chisel.

The office of the respondent as inspector of weights and measures is at the town hall, and he attends at such office for the purpose of stamping and verifying weights.

The regulations with respect to inspectors and the inspection of weights and measures and weighing and measuring instruments made by the council of the borough of Croydon on the 3rd Feb. 1890, and approved by the Board of Trade on the 18th Feb. 1890, contain the following clauses:

7. Any stamps on rejected weights, measures, and weighing instruments should be defaced by the inspector. No fee is to be charged on rejected weights, &c.

17. Where any doubt may arise as to the practical meaning or construction of these regulations or as to the accuracy of a weight, &c., the decision of the Board of Trade should be accepted by the inspector as final.

The appellant contended that the power, if any, of the respondent to deface the weights was only exercisable upon their being brought or submitted to him for the purpose of verification; that the power, if any, was only exercisable by the respondent at his office as such inspector upon the weights and measures being brought or submitted to him thither for the purpose of verification; that upon the respondent finding the weights to be unjust he ought to have seized and detained the same, and he ought to have laid an information or complaint against the vendors of the coal for having in their possession for use for trade false weights, but that with the exception of such seizure and detention the manner of dealing with the weights should have been left to a court of summary jurisdiction to decide upon the hearing of the information or complaint as prescribed by sect. 57 of the Weights and Measures Act 1878; and that the respondent in failing so to seize and detain the weights and in failing to lay such information or complaint and in so

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

defacing the weights was guilty of a breach of duty or misconduct within sect. 49 of the Weights and Measures Act of 1878.

The respondent contended: (*a*) That the weights were lawfully defaced in pursuance of regulation No. 7 set out above; (*b*) that if the regulation No. 7 did not authorise the rejection and defacing of such weights the question was one as to the practical meaning or construction of the regulations, and should be referred to the decision of the Board of Trade in pursuance of regulation No. 17 set out above; (*c*) that to constitute misconducts so as to be an offence under sect. 49 of the Weights and Measures Act 1878 there must be a wilful intent to do wrong: (*Moore* v. *Brompton County Court Bailiff*, 69 L. T. Rep. 140; *Rayson* v. *South London Tramways Company*, 69 L. T. Rep. 491; 17 Cox C. C. 691; (1893) 2 Q. B. 204; *Roberts* v. *Woodward*, 63 L. T. Rep. 200; 17 Cox C. C. 139; 25 Q. B. Div. 412; *Dickinson* v. *Fletcher*, 29 L. T. Rep. 540; L. Rep. 9 C. P. 1).

The justices found as facts that the rejected weights were unjust; that the respondent used some local standard weights in testing the rejected weights; that the respondent in rejecting and defacing the weights acted in good faith and in the belief that he was empowered so to do by the regulations set forth above; and that the evidence did not support the information.

They therefore dismissed the information.

WEDDERBURN v. SMITH, No. 2.

CASE stated on an information preferred by the appellant against the respondent, under sects. 48 and 49 of the Weights and Measures Act 1878, for that the respondent, being the inspector of weights and measures in the borough of Croydon, unlawfully seized a weighing machine without first having tested the same with local standards, and thereby misconducted himself contrary to the statute.

In addition to the facts set out in the second paragraph of *Wedderburn* v. *Smith, No.* 1 (*sup.*), the justices found the following facts.

The respondent then tested the weighing machine with the fair 56lb. weights of the company, and used nine small local standard weights in testing such weighing machine to ascertain the extent to which such weighing machine was unjust. The respondent found the weighing machine to be unjust and called the attention of the carman to the unsatisfactory condition of the weighing machine and seized the same.

The respondent then preferred an information against the sellers of the coal under sect. 25 of the Weights and Measures Act 1878, for that they had in their possession for use for trade within the borough a weighing machine which was false and unjust, which information was heard and determined at the petty sessions, when the justices found as a fact that the weighing machine was unjust, and they convicted the sellers and imposed a fine.

The appellant on the hearing of the information against the sellers was called as a witness on behalf of the sellers, and after the conviction of the sellers for the offence laid against the respondent the information referred to in the first paragraph of this case as a common informer. The appellant carries on business as a scalemaker on his own account and has a number of contracts with traders within the County of London, whereby he undertakes to keep such traders' weights and measures in order.

The weighing machine referred to in the information in this case was the same weighing machine which was found to be unjust, and for which the sellers were convicted.

There is no local standard weighing machine or scales.

The course adopted by the respondent in connection with the seizure of the weighing machine was in accordance with the general practice of inspectors of weights and measures in the City of London and County of Surrey.

The appellant contended (*a*) that by sect. 48 of the Weights and Measures Act 1878 and sect. 7 of the Weights and Measures Act of 1889, and the Regulations of the Borough of Croydon made in virtue of the powers conferred by sect. 9 of the last-named Act, and approved by the Board of Trade, an obligation was imposed on the respondent to compare the weighing machine by means of some local standard as a condition precedent to seizing the same; and (*b*) that the failure on the part of the respondent so to compare the machine before seizing it constituted a breach of duty or misconduct in the execution of his office as such inspector on the part of the respondent under sect. 49 of the Weights and Measures Act 1878.

The respondent contended (*a*) that sect. 48 of the Weights and Measures Act conferred a power to compare weights and measures with some local standard, but did not impose a duty to compare; (*b*) that the words in that section "may compare every such weight and measure with some local standard" did not apply to weighing machines, and that the word "measure" meant measures of length or capacity as set forth in the 3rd schedule, part 1, of the Weights and Measures Act 1878; (*c*) that the justices' conviction of the vendors on the 7th May 1904 estopped the appellant from contending either that the weighing machine was not unjust or that the same was not lawfully seized; (*d*) that the weighing machine was tested with some local standard; and (*e*) that to constitute misconduct so as to be an offence under sect. 49 of the Weights and Measures Act 1878 there must be wilful intent to do wrong.

The justices found as facts that there was no local standard weighing machine or scales; that the weighing machine was unjust; that the respondent used some local standard weights in testing the weighing machine; that the respondent acted in good faith in seizing the weighing machine; and that the evidence did not support the information, and they dismissed it accordingly.

By sect. 48 of the Weights and Measures Act 1878 (41 & 42 Vict. c. 49):

> Every inspector under this Act authorised in writing under the hand of a justice of the peace, also every justice of the peace, may at all reasonable times inspect all weights, measures, scales, balances, steelyards, and weighing machines within his jurisdiction which are used or in the possession of any person or on any premises for use for trade, and may compare every such weight and measure with some local standard, and may seize and detain any weight, measure, scale, balance, or steelyard which is liable to be forfeited in pursuance of

this Act, and may for the purpose of such inspection enter any place, whether a building or in the open air, whether open or enclosed, where he has reasonable cause to believe that there is any weight, measure, scale, balance, steelyard, or weighing machine which he is authorised by this Act to inspect . . .

And by sect. 49:

If an inspector under this Act stamps a weight or measure in contravention of any provision of this Act, or without duly verifying the same by comparison with a local standard, or is guilty of a breach of any duty imposed on him by this Act, or otherwise misconducts himself in the execution of his office, he shall be liable to a fine not exceeding five pounds for each offence.

By sect. 7 of the Weights and Measures Act 1889 (52 & 53 Vict. c. 21):

Any local authority may provide for the use of their officers working standards of measure and weight, and scale beams of such material and in such form as the Board of Trade may approve, and those standards may, if verified in such manner as the Board of Trade from time to time direct, be used for the inspection and verification of weights and measures as if they were local standards.

And by sect. 29 (1):

Any inspector of weights and measures or officer appointed for the purpose by the local authority may, at all reasonable times, enter any building or part of a building or other place in which coal is sold or kept or exposed for sale, and may stop any vehicle carrying coal for sale, or for delivery to a purchaser, and may test any weights or weighing instruments found in any such place or vehicle, and may weigh any load, sack, or other less quantity of coal, found in any such place or vehicle, or which is in course of delivery to any purchaser . . .

Lush, K.C. and *Tindal Davis*.—On the first information the respondent ought to have been convicted for it was a breach of his duty, and therefore misconduct on his part, to deface the weights. He can only deface when the weights are brought in for verification, but when he inspects he can only seize or detain and summon the user. As to the second information, there was clear breach of duty and misconduct, for the weights used were those rejected, and there was no testing with any local standard.

Danckwerts, K.C. and *Colam*, for the respondent, were not called upon to argue.

Lord ALVERSTONE, C.J.—The contentions put forward on behalf of the appellant in this case are really not arguable when the facts are properly appreciated. I am not expressing any opinion as to whether any other proceedings would lie against the respondent, for that is not the point here, and of course there may be very good answers to any other proceedings. The question here is whether the justices upon the facts set out in the case must convict the respondent of misconduct under sect. 49 of the Weights and Measures Act 1878. The only allegation of misconduct in the first case is that the respondent left the weights in the possession of the man and did not retain them, having previously defaced stamps upon them. The duty of the inspector depends upon sect. 48 of the Act of 1878, which authorises every inspector under the Act at all reasonable times to inspect all weights, measures, scales, balances, steelyards, and weighing machines within his jurisdiction which are used or in the possession of any person, or on the premises for use for trade, and to compare every such weight and measure with some local standard, and to seize and detain any weight, measure, balance, or steelyard, or weighing machine, which is liable to be forfeited in pursuance of this Act. Under this section the inspector has power to seize and detain; but to say that he must seize and detain a weight when he has found it unjust, and has in consequence defaced the stamps upon it, is going too far, for the section does not impose any such duty upon him, though it permits him to do so. Regulation 7 of the borough of Croydon's regulations, approved by the Board of Trade, contemplates the defacement of an unjust weight by an inspector without either obliging him to seize or detain it. It seems to me it is impossible to hold that the justices have arrived at a wrong conclusion upon the facts found by them. I should have come to the same conclusion as they did, and found that there was no misconduct within the contemplation of sect. 49 on the part of the respondent. With regard to the second case, I think the same reasons apply—namely, that on the facts the justices were justified in finding that there was no misconduct.

KENNEDY, J.—I agree that under the circumstances set out in these cases there has been no misconduct on the part of the respondent. As weights and measures may be seized and detained under sect. 48 it may be a question whether it is altogether wise to leave an unjust weight in the possession of the person using it. But I am very far from saying that the respondent here has been guilty of misconduct or of a breach of duty imposed on him by sect. 49 of the Act.

RIDLEY, J.—I agree. *Appeals dismissed.*

Solicitors: *Frederick T. Mawby; F. C. Lloyd*, Croydon.

April 5 *and* 6, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

TROUGHTON (app.) *v.* MANNING (resp.) (*a*)

Motor-car—Driving recklessly—Danger to person on car—Motor Car Act 1903 (3 *Edw.* 7, *c.* 36), *s.* 1.

The appellant having refused to pay a toll for a motor-car, the respondent, the toll collector, placed himself in front of the car to prevent it proceeding. Having been warned to stand clear, the respondent, after the car was in motion, hung on to the side of the car, was carried along, and after having asked the appellant to stop fell off and was injured. The speed of the car was reasonable, and no danger was caused to anyone but the respondent.

The justices convicted the appellant of reckless driving under sect. 1 (1) *of the Motor Car Act* 1903.

Held, that the conviction was wrong.

CASE stated on an information preferred against the appellant by the respondent, a collector of bridge tolls at Sandwich, for that the appellant on the 23rd July 1904, then being the driver of a motor-car, drove such motor-car recklessly, contrary to the Motor Car Act 1903, s. 1 (1).

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

The following facts were proved before the justices:—

The appellant, on the 23rd July 1904, drove his motor-car over Sandwich Bridge, crossing the river Stour, from the direction of Ramsgate, being stopped by the respondent within a short distance of and before reaching the toll-gate, situated on the bridge at the side nearest to Sandwich.

No demand was made upon the appellant for payment of any toll before he entered on the bridge, although certain notices were exhibited in the roadway.

The appellant was informed by the respondent that a toll was payable for the p assage of the bridge, but he declined to pay, and told the respondent to take the registered number of the car and backed it off the bridge on the same side on which he had entered it—namely, the Ramsgate side, and turned it round with a view to proceeding in the direction in which he had come.

The respondent thereupon placed himself in front of the car with a view to preventing its proceeding further.

The appellant, having warned the respondent to keep clear, set the car in motion.

The respondent thereupon proceeded to the near side of the car with a view to seizing and detaining it, or some part of it.

The appellant proceeded along the road to Ramsgate at a pace which was admitted to be not more than twelve miles an hour, with the respondent hanging on to the side of the car, and the respondent was carried 213 yards in that position with his heels on the ground.

The respondent asked the appellant to stop, which he failed to do, and eventually the respondent let go the car and fell to the ground and was picked up in an insensible condition.

The speed of the car while the respondent was hanging thereon was in itself a reasonable speed, and no danger was caused to any person other than the respondent.

It was contended for the respondent that the driving away by the appellant of his motor-car under the circumstances above set out was reckless driving within sect. 1 (1).

It was contended on behalf of the appellant that these facts did not constitute the offence of reckless driving within the meaning of the section, as there was no evidence of recklessness in the driving of the car by the appellant.

The justices declined to go into the question of the payment of the toll, and only considered the question as to whether the appellant had been guilty of recklessly driving the car. They overruled the objections put forward on his behalf and convicted him of reckless driving, having regard to all the circumstances of the case.

C. W. Mathews for the appellant.—There was no evidence here of any offence within sect. 1 (1) of the Motor Car Act 1903. The words "having regard to all the circumstances of the case" do not qualify "drives a motor-car on a public highway recklessly or negligently," but refer to the other words of the section, "or at a speed or in a manner which is dangerous to the public." He referred to:

Smith v. *Boon*, 84 L. T. Rep. 593;
Mayhew v. *Sutton*, 86 L. T. Rep. 18.

The respondent was a trespasser on the car and was injured because he was trespassing.

Thorn Drury for the respondent.—There was plenty of evidence for the justices, and they have found as a fact on that evidence that the appellant was guilty of reckless driving, having regard to all the circumstances of the case. These words refer to all the section, and not only to driving at a speed and in a manner dangerous to the public.

Lord ALVERSTONE, C.J.—This case raises a question of considerable difficulty, which depends upon whether there was any evidence on which the justices could find that in the circumstances there had been a reckless driving within sect. 1 (1) of the Act. Now, sect. 1 (1) of the Motor Car Act 1903 provides: "If any person drives a motor-car on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway, that person shall be guilty of an offence under this Act." It is important to notice that the case finds that the speed of the car was a reasonable speed, and that no danger was caused to anyone but the respondent. It was contended for the appellant that the justices were wrong in taking into consideration in connection with the charge of reckless driving the words "having regard to all the circumstances of the case," but I think it is quite impossible to consider the question of negligent or reckless driving without having regard to the circumstances. It is said that those words only related to the words "at a speed or in a manner which is dangerous to the public," but I do not think so, because one must consider all the circumstances of the case before one can say whether there had been negligent or reckless driving. I have, however, come to the conclusion that this conviction cannot be supported, but nothing that I say must be supposed to support the view that the driver of a motor-car need not regard his obligations under the statute where there is only one person in the road, whether he is lawfully there or not, or whether he could or could not get out of the way. I think that the idea does prevail among some motor drivers that if they blow their horn they are justified in going on at any rate of speed, and that people are bound to get out of the way. This practice was not universal, but it does to a large extent prevail. In this case there was no evidence of any breach of the section in view of what was intended to be included by the section, although some question might arise between the toll-keeper and the appellant in regard to the latter's conduct, but a personal grievance as between the toll-keeper and the appellant in respect of the latter's conduct is not, however, sufficient to constitute evidence of driving which was reckless in itself or reckless in view of all the circumstances of the case as referred to in sect. 1 (1) of the Motor Car Act 1903. It is rather the case of a very unfortunate occurrence

which might, for all I know, have been caused by want of reasonable care on the part of the appellant towards the respondent, but we should be straining the sub-section if we held that there had been a criminal offence under it where there had been no reckless driving with regard to anybody on the highway. I should be slow to interfere where there was any evidence before justices that could fairly be said to be evidence of an offence, but we ought not to strain the statute and turn into a criminal offence a personal grievance of the complainant independent of what would be regarded as reckless or negligent driving within the statute.

KENNEDY, J.—I do not think that this was within the section, properly and fairly read, for my view of the intention of the section is to prevent misconduct in the management of a motor-car towards the public who were outside it on the highway. The section was not meant for the protection of persons on the car itself, but was for the protection of persons using the highway. I do not think that the intention was to punish anyone who was reckless as regards passengers on the car.

RIDLEY, J. concurred.

Appeal allowed.

Solicitors: *Sandford* and *Co.*; *Hare* and *Co.*, for *F. W. Hardman*, Deal.

Friday, April 7, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

WOLFENDEN (app.) *v.* MCCULLOCH (resp.). (*a*)

Food and drugs—Milk—Deficiency in fat—Sold as from cow—Not tampered with or adulterated—Sale of Food and Drugs Act 1875 (38 *&* 39 *Vict. c.* 63), *s.* 6.

The appellant was charged under sect. 6 *of the Sale of Food and Drugs Act* 1875 *for selling milk not of the nature, substance, and quality demanded, as such milk contained only* 2·81 *per cent. of milk fat.*

It was proved that there had been no adulteration of or abstraction from the milk, but that the deficiency of fat was due to the cows not having been milked for fourteen hours, and the fat becoming absorbed by the cows. The hours of milking adopted by the appellant were the hours usually adopted in the district.

The justices were of opinion that they were bound to convict by the decision in Smithies *v.* Bridge (87 *L. T. Rep.* 167; (1902) 2 *K. B.* 13).

Held, that the justices ought to have considered whether the milk was of the nature, substance, and quality demanded; that, unless the quantity of milk fat which was absent was so large as to point to an abnormal state of things, there was no evidence upon which they could convict under the circumstances.

CASE stated on an information preferred by the respondent against the appellant for that he sold a certain article of food—to wit, a pint of milk—which was not of the nature, substance, and quality of the article demanded by the respondent, the purchaser, contrary to the provisions of sect. 6 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63).

On the hearing of the information the following facts were proved:—

About nine o'clock in the morning of the 23rd July 1904, at Bootle, the respondent met the appellant's agent delivering milk in M.-road in the borough, and asked to be supplied with a pint of milk, and was served by the appellant's agent from a two-gallon can, and the respondent paid for the milk the sum of 2*d.*, which was the recognised price for new milk.

The respondent stated that he purchased the milk for analysis by the public analyst, divided the sample into three parts, and otherwise complied with the requirements of the Acts. The public analysts for the borough gave their certificate in the following terms:

We, the undersigned public analysts for the said borough of Bootle, do hereby certify that we received on the 23rd July 1904 from Inspector H. V. Smith a sample of milk for analysis, and have analysed the same and declare the result of our analysis to be as follows: We are of opinion that the said sample contained the parts as under—2·81 per cent. fat, 8·94 per cent. other solids, 11·75 per cent. total solids, and that it is slightly deficient in cream. Observations.—No change had taken place in the constitution of the sample that would interfere with the analysis.

It was proved by the production of the analysts' certificate, and not disputed by the appellant, that the milk supplied contained only 2·81 per cent. of fat, and, further, that the cows from which the milk had been obtained had been milked at about four o'clock in the morning of the 23rd July, and that the milk so sold as above-mentioned had not been tampered with or adulterated in any way, but was in the same condition exactly as it had come from the cows at that milking.

It was further proved that the cows before the four o'clock milking had not been milked for at least fourteen hours—that is to say, at about two o'clock in the afternoon of the previous day—and that the small percentage of fat above-mentioned was accounted for by the fact of that long interval between the two milkings, a portion of the fat of the milk during that interval of fourteen hours becoming absorbed by the cows.

It was also proved that the hours of milking adopted by the appellant—viz., four o'clock in the morning and two o'clock in the afternoon—were the hours usually adopted by the trade in the borough and also in the neighbouring city of Liverpool and district.

The regulations of the Board of Agriculture called the "Sale of Milk Regulations 1901," dated the 5th Aug. 1901, state as follows:

(1) Where a sample of milk (not being milk sold as skimmed or separated or condensed milk) contains less than 3 per cent. of milk-fat, it shall be presumed for the purposes of the Sale of Food and Drugs Acts 1875 to 1899, until the contrary is proved, that the milk is not genuine by reason of the abstraction therefrom of milk-fat or the addition thereto of water. (2) Where a sample of milk (not being milk sold as skimmed or separated or condensed milk) contains less than 8·5 per cent. of milk-solids other than milk-fat, it shall be presumed for the purposes of the Sale of Food and Drugs Acts 1875 to 1899, until the contrary is proved, that the milk is not genuine by reason of the abstraction therefrom of milk-solids other than milk-fat, or the addition thereto of water.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

The justices were of opinion that there had been no adulteration of or abstraction from the milk, but, having regard to the facts proved, they were of opinion that the offence charged had been proved and established, and that they were bound so to decide by the decision of the High Court in the case of *Smithies* v. *Bridge* (87 L. T. Rep. 167; (1902) 2 K. B. 13), and they convicted the appellant.

Horridge, K.C. and *Greer* for the appellant.—The conviction here was wrong, for the justices were not bound by the decision in *Smithies* v. *Bridge* (87 L. T. Rep. 167; (1902) 2 K. B. 13), for the circumstances here were very different from that case. In this case the cows were milked at the hours usually adopted throughout the district. The justices have not decided the point which they should have considered—namely, whether or not this milk was of the nature, substance, and quality demanded. *Smithies* v. *Bridge* does not lay down any hard and fast rule, which the justices seem to think that it does.

C. F. Pritchard for the respondent.—There was evidence here for the justices to find that the milk was not of the nature, substance, and quality demanded. They have considered the facts and applied *Smithies* v. *Bridge* to those facts. The conviction was therefore right.

Lord ALVERSTONE, C.J.—The only doubt I have had in this case since the point has been clearly put to us by the learned counsel is whether we are quite justified in quashing the conviction altogether or whether we must send the case back so that the magistrates may themselves find as they think fit upon such evidence as there is; but inasmuch as in my opinion the magistrates' decision, on the ground on which we can see it proceeded, went upon a wrong basis, I think that nothing would be gained by sending it back so that this particular case might be dealt with, as I am satisfied the magistrates did not mean to come to an independent conclusion that the offence had been proved. I think it is best in the first instance that I should say after the full argument we have had and a reconsideration of it, whatever may be individual opinions upon this kind of case, as to which there is ample room, of course, for difference, I see no reason to doubt that the judgment or the decision in *Smithies* v. *Bridge* (87 L. T. Rep. 167; (1902) 2 K. B. 13) was right, and that it laid down quite a different rule to that which I think the magistrates have imagined in this case it laid down. It was a very peculiar case. It had been before two tribunals of fact, the original justices and the justices at quarter sessions, and both the original justices and the appeal justices had come to the conclusion that the offence was made out, or, in other words, had come to the conclusion that the article supplied was not of the nature, substance, and quality of the article demanded. Then, upon appeal, it raised this difficult question: There being no *de facto* adulteration of the milk after it left the cow could there be an offence under the statute in that state of circumstances? It produced, as those who have heard the case know, a difference of opinion which may on such a point be not unnatural. On consideration I do not think that I should be disposed to vary what I laid down as the test: "If, however, the article produced, although it is produced by the cow, is the result of an abnormal condition of things arising either from disease, or as here from unusual treatment of the cow, I think that that does amount to evidence on which the magistrates can find that the article is not of the nature, substance, and quality of the article demanded." That meant to indicate in the clearest possible terms that given milk in fact defective in milk-fat it was a question of fact for the magistrates to deal with the matter. Perhaps I ought to add that that was certainly a very peculiar case upon the facts. There was a very large deficiency, no less than 30 per cent., and it was established that the person from whom the milk came had been told that the quality of the milk would be poor in that respect in consequence of the unusual and abnormal way in which he was milking his cows. Of course, when I say "abnormal" I do not mean to refer to any fixed rule; I mean such a method of treatment that the product is something different to what it would ordinarily and naturally be. If the magistrates had come to the conclusion that Mr. Pritchard asked us to say they have, upon an independent question of fact that the offence charged had been proved I should have hesitated very much to overrule them or to have suggested we could do more than send the case back, but I do not think that is what they meant. I think they have stated it very fairly, and have said that looking to the fact that there was this deficiency and looking to the fact that the cows were milked at intervals of fourteen hours and ten hours respectively, they thought they were bound by the decision of *Smithies* v. *Bridge* to decide in the way in which they did decide. I think that is wrong. They were not bound so to decide; they were bound to consider the matter for themselves, and to say whether the article, having regard to the way in which it had been produced, was of the nature, substance, and quality of the article demanded. In this case there was a very small deficiency of milk-fat—·19 out of 3. There was an excess of solids other than milk-fat above 8·5, and there was an express finding that there had been no adulteration and that there had been no abstraction of milk fat. The two points upon which the sample is *primâ facie* evidence that the milk is not genuine by reason of the abstraction therefrom of milk-fat or the addition thereto of water are both expressly negatived. Therefore, unless the quantity of milk-fat which was absent was of itself so large as to point to an abnormal condition of things, there is substantially no evidence on which the magistrates could act. I am quite clear the 3 per cent., although it is a standard for poor milk, is not intended to be a minimum, because the order of the Board of Agriculture says expressly: "It shall be presumed for the purpose of the sale until the contrary is proved." Therefore that the Board of Agriculture regulation contemplates that there may be milk with less than 3 per cent. and still be genuine is abundantly plain. That being so it seems to me that the magistrates ought to have asked themselves this question: Looking to the fact that there is this deficiency, and that there is this method of milking the cows, is the article produced different in nature, substance, and quality from that asked for. I have no doubt that if they asked themselves that question

they would have come to a conclusion in favour of the appellant. I have no doubt that they only decided otherwise in consequence of the view which they took of the extent to which *Smithies* v. *Bridge* was binding upon them. I think, therefore, there is no object in sending it back. I think the magistrates did proceed upon a view of the law which is not in accordance with the true view of *Smithies* v. *Bridge*, and therefore that this appeal ought to succeed and the conviction be quashed.

KENNEDY, J.—I am of the same opinion. It appears to me it is impossible reasonably to read this case without seeing that the magistrates meant to decide and did decide in favour of a conviction because they felt themselves bound so to decide by the case of *Smithies* v. *Bridge*, and that but for that decision they would have come to another conclusion. I can draw no other inference. Therefore, it seems to me there is no use sending the case back. With regard to *Smithies* v. *Bridge* I am quite satisfied with what my Lord has said, that without interfering with that case at all or without wanting to impugn the justice of the decision of the court, this case is not that case or within the facts of that decision. It is quite clear upon the facts that the state of things here in regard to the condition of the milk is very different from the state of things there. If there was any question of fact in any future case with regard to what I may call abnormal treatment, using those words in a popular sense, of the animal and serious consequences arising from the treatment, namely, a very serious difference in the quality of the article tendered or given to the buyer as milk, we are not now deciding otherwise than that it would be a question for the magistrates to deal with as the court held they might deal with it in that case. It is quite right they were bound by that case. On the facts in this case the decision is founded simply as it seems to me upon the supposed compulsory application of that case to the facts of this case, and I think they would not have made that application in any way except under the authority which they deemed must apply to the facts of this case, although those facts are not the same as there. I think, therefore, that this appeal must be allowed.

RIDLEY, J.—I am of the same opinion. I think in the present case when the evidence was given of the result of the analysis there was in accordance with the regulations issued by the Board of Agriculture a presumption until the contrary was proved that the milk was not genuine by reason of the abstraction therefrom of milk fat or the addition thereto of water; but in the evidence that was given before the magistrates it was proved that there had been no abstraction of milk fat nor any addition thereto of water. In the result, therefore, there was no presumption that the milk was not genuine. I do not think it follows that there was a presumption it was genuine, but at all events there was this, that the matter was left at large for the consideration of the magistrates. I feel certain that they would have come to a conclusion in favour of the appellant that the milk was genuine, and that it was of the nature, substance, and quality demanded had it not been for the previous decision in *Smithies* v. *Bridge*, which has been referred to by Kennedy, J. and the Lord Chief Justice. I can only say that it seems to me the case is different in its nature and in its facts from the case of *Smithies* v. *Bridge*, and that it is unnecessary any further to discuss whether the decision was right or whether it was wrong, but it is certainly a very different thing if you have to meet a set of facts in which to the knowledge of the farmer there is a special cause interfering with the cows and preventing them from giving what may properly be called milk of the normal value, and when it is merely a case in which the milking hours are so divided that there are fourteen hours on one side and ten upon the other. I cannot help thinking that the magistrates simply proceeded upon the idea that the former case made it necessary for them to convict when in the absence of that decision they would have acquitted. I think there was no such necessity upon them, and that therefore the proper course is to say that this conviction should be quashed.

Appeal allowed.

Solicitors: *Rutherford*, Liverpool; *Sharpe, Parker, Pritchard* and *Co.* for *J. H. Farmer*, Bootle.

Monday, April 10, 1905.

(Before KENNEDY and RIDLEY, JJ.)

FAULKNER *v.* THE KING. (*a*)

Criminal law—Arraignment—Offence after previous conviction—Indictment charging previous conviction after count for misdemeanour—Arraignment of prisoner on count charging previous conviction in first instance—Error—Larceny Act 1861 (24 *&* 25 *Vict. c.* 96), *s.* 116—*Prevention of Crimes Act* 1871 (34 *&* 35 *Vict. c.* 112), *ss.* 7, 9.

The provision in sect. 116 *of the Larceny Act* 1861 *regulating the proceedings upon any indictment for committing "any offence" after a previous conviction, and requiring that the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and that the jury shall be charged in the first instance to inquire concerning such subsequent offence only, is a general provision, and, notwithstanding the words in the beginning of the section "in any indictment for any offence punishable under this Act," the words "any offence" are not limited to "any offence punishable under this Act"—that is, the Larceny Act* 1861—*but apply to and include the case of an indictment for an offence not punishable under the Act followed by a count charging a previous conviction, in which case the fact of the previous conviction cannot be put before the jury in the first instance.*

A prisoner was arraigned at quarter sessions upon an indictment containing a count for the misdemeanour of attempting to commit a larceny, and also a count charging a previous conviction for felony. He was arraigned upon and pleaded not guilty to both counts at the same time and was given in charge to the jury upon both counts, and after the evidence had been given, but before verdict, objection was taken by his counsel to the arraignment, on the ground that the prisoner

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

ought not to have been arraigned in the first instance on the count charging the previous conviction. Effect was given to this objection; the jury were discharged before giving their verdict, and the prisoner was put back until the next sessions. At the next sessions he was again brought up for trial; there was no fresh arraignment of the prisoner upon the indictment, but he was given in charge to the jury upon the first count only, and he was tried, convicted, and sentenced upon the first count only, the fact of the previous conviction not having been mentioned to the jury.

Held, that, in arraigning the prisoner in the first instance on the count charging the previous conviction before he had been tried and convicted on the count charging the misdemeanour, there was a contravention both of the general principle of law that the previous conviction ought not, in the absence of statutory provision to the contrary, to be made known to the jury before conviction, and of the provisions of sect. 116 *of the Larceny Act* 1861; *that it made no difference that the trial had been postponed and that the fact of the previous conviction had not been made known to the jury who convicted; that the defect was a substantial one, which was not cured by verdict, and that therefore there was error on the record.*

WRIT OF ERROR in proceedings upon an indictment.

The prisoner, the plaintiff in error, Herbert George F. Faulkner, alleged certain errors to have been committed in reference to the record and proceedings of the Birmingham Quarter Sessions on the 13th May 1904, when he was convicted upon an indictment and sentenced to twelve months' hard labour.

The prisoner was indicted at the quarter sessions for the city of Birmingham held in Feb. 1904, upon an indictment which contained three counts.

The first count of the indictment charged that he, the prisoner, on the 8th Dec. 1903, did unlawfully attempt and endeavour feloniously to steal the sum of 1*l.* 18*s.*, the moneys of Albert Grove (the prosecutor) in attempting to rob a till.

The second count charged an offence under sect. 7 of the Prevention of Crimes Act 1871—namely, that on the 20th Feb. 1899 at the quarter sessions for the city of Birmingham the prisoner was convicted on indictment of a crime within the meaning of the Prevention of Crimes Act 1871 (to wit, felony), and a previous conviction of a rime (to wit, felony) was then proved against him, and the prisoner was thereupon on the 20th Feb. 1899 sentenced to be imprisoned and kept to hard labour for six calendar months, and that the prisoner within seven years immediately after the expiration of the sentence passed on him for the last of such crimes (to wit, on the 8th Dec. 1903 at the city of Birmingham) was found in a certain place (to wit, a shop of the said Albert Grove in Dudley-road) under such circumstances as to show that he was about to commit an offence punishable on indictment (to wit, feloniously to steal the moneys of the said Albert Grove).

The third count charged that before the misdemeanour in the first count mentioned the prisoner was convicted of felony at Stafford Quarter Sessions on the 1st July 1902, so that the third count charged a previous conviction in the ordinary form.

At the quarter sessions held in Feb. 1904 the prisoner was called upon to plead to the indictment in the second court presided over by the assistant recorder. He was arraigned upon all three counts of the indictment at the same time, and he was called upon to plead to all three counts, and he pleaded to all three counts, pleading "Not guilty" to all three. The prisoner was then given in charge to the jury on the whole indictment (including the third count charging the previous conviction), and the trial proceeded until the whole of the evidence had been given, and then, before the jury had considered their verdict, counsel for the prisoner objected to the validity of the arraignment, on all three counts, as being contrary to the provisions of sect. 116 of the Larceny Act 1861, in consequence of the irregularity of the proceedings through evidence of prior convictions having been given.

The assistant recorder, after consulting with the recorder, upheld the objection, and discharged the jury, and remitted the case for trial to the next sessions. The prisoner was then recommitted to the Easter Sessions and admitted to bail.

On the 13th May 1904 the prisoner again appeared for trial before the recorder. He was not again arraigned, nor was any fresh plea taken, and he was given in charge to the jury on the first count of the indictment only. The jury convicted the prisoner, and he was sentenced on the first count to twelve months' hard labour.

The prisoner then sued out a writ of error, assigning as grounds of error that

In the record and proceedings aforesaid and also in the giving of judgment against the said Herbert . . . Faulkner there is manifest error in this—to wit, that the provisions of sect. 116 of 24 & 25 Vict. c. 96, as extended by sect. 9 of 34 & 35 Vict. c. 112, were contravened inasmuch as the said George . . . Faulkner was arraigned upon and called upon to plead to and did plead to the three counts in the indictment at one and the same time, notwithstanding that the third count in the said indictment was a count charging a previous conviction, and his pleas to the three counts aforesaid were duly recorded; therefore in that there is manifest error. There is also error in this—to wit, that the indictment and proceedings aforesaid and the matters therein contained are not sufficient in law to warrant the said judgment so given against the said Herbert . . . Faulkner or to convict him of the misdemeanours or offences in the said indictment or any or either of them; therefore in that there is manifest error. . . .

The Larceny Act 1861 (24 & 25 Vict. c. 96) provides:

Sect. 116. In any indictment for any offence punishable under this Act, and committed after a previous conviction or convictions for any felony, misdemeanour, or offence or offences punishable upon summary conviction, it shall be sufficient, after charging the subsequent offence, to state that the offender was at a certain time and place or at certain times and places convicted of felony, or of an indictable misdemeanour, or of an offence or offences punishable upon summary conviction (as the case may be), without otherwise describing the previous

felony, misdemeanour, offence, or offences; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanour, or a copy of any such summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or to which such summary conviction shall have been returned, or by the deputy of such clerk or officer (for which certificate or copy a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of such conviction, without proof of the signature or official character of the person appearing to have signed the same; and the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows—that is to say: the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury shall be charged in the first instance to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again. . . .

The Prevention of Crimes Act 1871 (34 & 35 Vict. c. 112) provides:

Sect. 7. Where any person is convicted on indictment of a crime, and a previous conviction of a crime is proved against him, he shall, at any time within seven years immediately after the expiration of the sentence passed on him for the last of such crimes be guilty of an offence against this Act, and be liable to imprisonment, with or without hard labour, for a term not exceeding one year, under the following circumstances or any of them. . . . Thirdly, if he is found in any place, whether public or private, under such circumstances as to satisfy the court before whom he is brought that he was about to commit or to aid in the commission of any offence punishable on indictment or summary conviction, or was waiting for an opportunity to commit or aid in the commission of any offence punishable on indictment or summary conviction.

Sect. 9. The rules contained in the one hundred and sixteenth section of the Act of the session holden in the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-six, intituled "An Act to consolidate and amend the statute law of England and Ireland relating to Larceny and other similar offences," in relation to the form of and the proceedings upon an indictment for any offence punishable under that Act committed after previous conviction, shall, with the necessary variations, apply to any indictment for committing a crime as defined by this Act after previous conviction for a crime, whether the crime charged in such indictment or the crime to which such previous conviction relates be or be not punishable under the said Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-six.

Sect. 20. The expression "crime" means, in England and Ireland, any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanour under the fifty-eighth section of the Act passed in the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-six. . . . The expression "offence" means any act or omission which is not a crime as defined by this Act, and is punishable on indictment or summary conviction.

The prisoner was not represented upon the argument, but Joy, the counsel who defended him at sessions, was allowed to state the facts on the prisoner's behalf, as *amicus curiæ*.

H. H. Joy as *amicus curiæ*.—There is error on the face of the record, and the conviction is bad. The question is confined to the first ground of error alleged—namely, that by being arraigned on the third count charging the previous conviction against the prisoner at the same time as he was arraigned on the first two counts, the provisions of sect. 116 of the Larceny Act 1861 were contravened. The prisoner was in the first instance arraigned on all three counts in the indictment, which contravened the provision in sect. 116 requiring the prisoner to be arraigned in the first instance only upon so much of the indictment as charges the subsequent offence. It is said that sect. 116 only applies to "offences punishable under this Act"—that is, the Act of 1861—and that as the offence charged in the first count—namely, an attempt to commit larceny—was not an offence punishable under that Act, the provisions in that section as to proving previous convictions do not apply. But the words, "and the proceedings upon any indictment for committing 'any' offence after a previous conviction shall be as follows," are perfectly general, and are not limited to offences under that Act. No doubt in the second count, upon which the prisoner was also arraigned at the same time as on the first count, previous convictions were also charged, but no objection can be taken to that, as in that case the previous conviction was itself a necessary ingredient in the offence under sect. 7 of the Prevention of Crimes Act 1871, and therefore the offence charged in the second count could not be proved unless by proving the previous conviction, so that in that case it was not only necessary to charge the previous conviction, but it was also necessary to prove it before convicting the prisoner of the offence charged in that count. In *Rex* v. *Penfold* (86 L. T. Rep. 204; (1902) 1 K. B. 547) it was held that, on the trial of an indictment charging the prisoner with an offence under sect. 7 of the Prevention of Crimes Act 1871, the previous convictions are a necessary ingredient of the offence, and may be given in evidence before the jury in the first instance. The case, however, is wholly different with regard to the charging the previous conviction in the third count. There the previous conviction was charged simply in the ordinary form, and the prisoner was arraigned upon it before he had pleaded guilty or been found guilty upon the other counts. That is a contravention of sect. 116 of the Act of 1861, which expressly says "that it is only if the jury find the prisoner guilty, or if on arraignment he shall plead guilty, "he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment." That is a general provision. The prisoner's complaint was that the Crown, having adopted the course of putting the prisoner on trial on the first two counts, had no right to go further and arraign him at the same time on the third count. The first arraignment

was a bad arraignment, not because of the second count, but because of the third count. The second trial was all right, if the first arraignment had been right; when a prisoner has pleaded to an arraignment, then the arraignment is complete. The arraignment here was bad at first, and, unless there were a fresh arraignment, the subsequent proceedings would be bad. The error in this case was a substantial error which was not cured by the verdict; it could only be cured by a new indictment and a fresh arraignment; and where any evidence is given against a prisoner which is not legally admissible the conviction is bad:

Reg. v. *Gibson*, 56 L. T. Rep. 367; 18 Q. B. Div. 537.

J. G. Hurst for the Crown.—This case is one of the utmost technicality. On the second trial the prisoner was given in charge to the jury on the first count only, and no mention was made to the second jury who convicted the prisoner of the fact that there was a previous conviction. A writ of error lies only for a substantial defect; it lies "for every substantial defect appearing on the face of the record . . . provided such defect is not cured by verdict": (Archbold's Criminal Pleading, p. 252). This was not a substantial defect; even if it was a defect it was formal only, and it is one which is cured by verdict; and since 1851, by sect. 25 of the Criminal Procedure Act 1851 (14 & 15 Vict. c. 100), every objection for any formal defect apparent on the face of the indictment must be taken by demurrer, or motion to quash, before the jury are sworn. Even the failure to comply with the Vexatious Indictment Act 1859 is not ground for a writ of error:

Knowlden v. *The Queen*, 10 L. T. Rep. 691; 9 Cox C. C. 483.

The mode of arraigning prisoners is given at p. 169 in Archbold's Pleading, and it shows that there was no contravention in this case of sect. 116 of the Larceny Act 1861. The very first words of the section, "In any indictment for any offence punishable under this Act," show that the section is confined in its operation to offences punishable under "this Act" — that is, the Larceny Act 1861—and those limiting words must be taken as governing the subsequent words in the section, "and the proceedings upon any indictment for committing any offence after a previous conviction shall be as follows"; so that the words "any offence" in this clause must be read as "any offence punishable under this Act." Applying that in this case, the first count charged a crime which was not an offence under that Act; the offence charged was an attempt to steal, which was a common law misdemeanour, and not an offence under the Larceny Act. Therefore sect. 116 of the Act of 1861 does not apply. Nor does sect. 9 of the Prevention of Crimes Act 1871 apply. That section incorporates certain rules of procedure under sect. 116 of the Act of 1861 as to previous convictions; but sect. 9 applies only in the case of crimes as defined by "this Act," and therefore does not apply to the offence charged in the first count—namely, attempted larceny—as that is not a crime within the definition of "crime" as given in sect. 20 of the Act of 1871. Sect. 9 merely extends the rules of procedure given in sect. 116 of the Act of 1861 to indictments "for committing a crime as defined by this Act after previous conviction for a crime," and, by sect. 20, the expression "crime" does not include the offence charged in the first count, nor does it include the offence charged in the second count.

KENNEDY, J.—In our view this application in error on behalf of the prisoner ought to succeed, and we have to thank Mr. Joy for bringing before us, as *amicus curiæ*, the facts of the case and the points as to which he has informed us. The prisoner was charged on an indictment containing three charges in three different counts. The first count charged the commission of a misdemeanour in attempting to commit larceny. The second count charged that after two previous convictions for felony he was found in the prosecutor's shop under such circumstances as to show that he was about to commit larceny, which amounted to an offence under sect. 7 of the Prevention of Crimes Act 1871; and the third count charged that the prisoner had previously been convicted of felony. The prisoner was arraigned on that indictment on all the three counts, and he pleaded to all the three counts the plea of not guilty. The trial proceeded and the evidence was given, and then counsel on behalf of the prisoner took the objection that the arraignment was bad. Thereupon the deputy recorder, after consultation with the recorder, said that it appeared to him that the proper course to adopt in the exercise of his discretion was to discharge the jury. The jury was accordingly discharged, and the prisoner was put in the position of having his case postponed till the next sessions. At the next sessions the prisoner was again brought up for trial, and upon the same indictment; there was no fresh arraignment of the prisoner, but he was treated as a prisoner who had already pleaded to the old indictment, and the trial proceeded as a trial in which the prisoner was arraigned and had pleaded not guilty. The prisoner, however, was at this trial given in charge to the jury upon the first count only, and he was found guilty upon that count and sentenced upon it. It seems to me to make no difference that this was a trial after one jury had been discharged, and we think that upon the ground stated in the writ of error—the first ground—this application ought to succeed, and for this reason, that there was no question that in the third count there was a charge of a previous conviction for felony openly charged against the prisoner, and that he was called upon in the first instance to plead to that third count. It is a principle of our law that for the ends of justice, except where there is statutory provision to the contrary, the fact of a previous conviction against a prisoner ought not to be made known to the jury until after the prisoner has been convicted. It seems to me that that principle has been transgressed in this case, and that in an indictment for an attempt to commit a larceny the prisoner had been charged with committing that offence after a previous conviction. The second count in this indictment no doubt necessarily involved the allegation in the indictment of previous convictions primarily charged therein, and according to the decision in *Rex* v. *Penfold* (*ubi sup.*), where the previous conviction is a necessary ingredient of the offence, as it was in that case and as it is in the second count in this case under sect. 7 of the Prevention of

Crimes Act 1871, then that previous conviction may be given in evidence before the jury in the first instance. Therefore if the prisoner had been tried upon that second count alone the proceedings would not have been irregular. But the main charge here was the first count—an attempt to commit a larceny. Now, the difficulty of the prosecution is this: Assuming that it was proper to charge—as the prosecution did in this case—a previous conviction for felony in an indictment which charged a misdemeanour in attempting to commit a larceny, then they have no statutory authority which entitles them to have the fact of the previous conviction brought before the jury by arraignment in the first instance, and it appears to me, further, that the provision in sect. 116 of the Larceny Act 1861 has been contravened, which says in terms that, in proceedings upon any indictment for committing any offence after a previous conviction or convictions, "the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty . . . the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only." The prisoner had been arraigned in this case in respect of a count alleging a previous conviction, and it appears to me that the terms of the section which I have read are perfectly general. There has been in one sense an extension of the provisions of that section by sects. 7 and 9 of the Prevention of Crimes Act 1871; but it appears to me that neither of these sections shows anything which can justify the arraignment of the prisoner on these counts of the indictment in the way in which he was arraigned. The mischief was obvious, and it was impossible to say what injustice might not have been done by the publication before the tribunal of the fact that there was alleged against the prisoner a conviction for a previous offence. If it is said that the last count ought not to have been inserted at all, then it seems to me that it is not open to the prosecution so to allege. The count was there, and its being put before the jury might prejudice the prisoner in his defence. It is said, further, that, even if the arraignment was irregular and improper, after verdict the defect was cured by the fact of the conviction. In my opinion, however, this was a substantial defect. Except in cases where a statute has created an offence which can only be proved in a way that involves the proof of a previous conviction, then that proof cannot be said not to be substantial. I think that the provisions of sect. 116 of the Act of 1861, treated as extended by sects. 7 and 9 of the Prevention of Crimes Act 1871, have been contravened, and that the writ of error ought to succeed in this case.

RIDLEY, J.—I agree with the judgment just given, but I should wish to add a few words. I am sensible that we are doing what is unconnected with the merits of the question, and that the second trial which did take place was, as a trial, properly conducted and was not open to any of the objections that have been urged during the argument. But the objections with regard to the proceedings which took place at the previous sessions when the prisoner was arraigned cannot be got rid of by the argument of counsel for the Crown. We must deal with the matter as a question of principle in the way my brother has suggested, and if we find that there is, in view of what is stated on the record, a substantive objection, we must let it have its full force without giving too much consideration to the arguments that in the result injustice may be done. As to the way in which this offence, committed after a previous conviction, ought to be charged, I do not think that there is any enactment which deals with the mode of charging a misdemeanour after a previous conviction for felony, except the provisions in sect. 116 of the Larceny Act 1861 and in sect. 37 of the Coinage Offences Act 1861. Up to that time, so far as I am aware, there was no statute containing any such provisions; at all events, there is no mention of any such provisions in any of the books. The first Act in which the matter is dealt with is the Criminal Law Act 1827 (7 & 8 Geo. 4, c. 28), and in sect. 11 of that Act there is a general enactment with regard to indictments for felonies committed after a previous conviction for felony. Under that Act the whole inquiry went to the jury together, and the practice had been on the trial of any person for any subsequent felony to charge the jury to inquire at the same time concerning such previous conviction for felony. That practice continued until the Previous Conviction Act 1836 (6 & 7 Will. 4, c. 111), which, by sect. 1, declared that the subsequent felony was first to be tried, and that there was to be no mention of the previous felony until the subsequent felony was tried. That seems to have been the state of the law on this subject until the Code of 1861 came into existence, and then we come to sect. 116 of the Act of 1861, which is set out in Archbold at p. 401, where there is this note at the end of sect. 116: "This section was framed from 7 & 8 Geo. 4, c. 28, s. 11." Now, I think that there ought also to be added to that note that it was framed from sect. 11 of 7 & 8 Geo. 4, c. 28, and sect. 1 of 6 & 7 Will. 4, c. 111, because it is rather from the latter section that the provision in sect. 116 of the Act of 1861 which forbids the giving in evidence the previous conviction in the first instance is taken, and from which it is framed. That was the state of things when, in the year 1861, two Acts were passed—namely, the Larceny Act 1861 and the Coinage Offences Act 1861, which deal not only with previous convictions for felony, but also with the case of certain misdemeanours committed after a previous conviction for felony or misdemeanour. In all these cases the machinery provided by sect. 116 of the Larceny Act directs positively and affirmatively that the substantive offence is to be first put before the jury, and after that the proof of the previous convictions. That procedure was recognised in *Rex* v. *Penfold* (*ubi sup.*), but in that case the distinction was drawn between the general law and the case where it was a constituent part of the offence charged that the prisoner should have been previously convicted; and the court held that, where that was the case, there must be evidence given of the previous convictions, because otherwise there would be nothing against the prisoner before the jury at all. That procedure was under the Prevention of Crimes Act 1871, and is entirely opposite to the provisions applicable outside that Act. In this case, quite rightly, an alternative form of the misdemeanour charged in the first count was put into the second

count. Unfortunately, there being one count charging a previous conviction to which the general law as to previous convictions would have been applicable, the procedure adopted in the first instance was that which applied to the Prevention of Crimes Act 1871 only, and, with all the wish that I have to get over that difficulty, I do not find myself able to do so. We ought to remember what was said by Whiteside, C.J. in the Irish case of *Reg.* v. *Maria Fox* (10 Cox C. C. 502, at p. 505), and apply the principle there laid down, although we are conscious that no mischief was in this case done to the prisoner. That mischief might have been done is sufficient for us. I have not dealt with the point raised by counsel for the Crown as to whether this offence was an offence within the Larceny Act or not, as being an attempt to commit one of the larcenies dealt with by the Act; but, at all events, it seems to me to come within the latter part of sect. 116, which says that the proceedings for proving a previous conviction shall be as follows: [His Lordship read the provision in the section.] If it falls within that provision, it matters not whether it is a misdemeanour within the Larceny Act or not. It is not necessary to decide that point. For these reasons I agree with the judgment that has been given.

Judgment for the plaintiff in error. Conviction quashed.

Solicitor for the prosecution, *J. E. Hill*, Birmingham.

Wednesday, April 12, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

SMITH (app.) *v.* SAVAGE (resp.). (*a*)

Adulteration—Sample—Division for analysis—Article sold in packets—Purchase of a number of packets—Mixing contents of packets and dividing for analysis—Sale of Food and Drugs Act 1875 (38 *&* 39 *Vict. c.* 63), *s.* 14.

A purchaser went into a grocer's shop and asked for cream of tartar. A box containing packets labelled "cream of tartar" was produced. The purchaser, who was purchasing for the purpose of analysis, asked for four packets, and was supplied with four packets, which were all similar in size and outward appearance and label, and were taken from the same box, and he paid 4d. for them. The purchaser emptied the contents of the four packets into one place and then divided the whole of the contents into three parts and sealed them up:

Held, that the purchaser had not made four separate purchases, but had purchased one article only—namely, cream of tartar—and that, as the contents of the four packets were mixed up together and then divided into three parts, the purchaser had divided "the article"—which was the cream of tartar—into three parts in accordance with the requirements of sect. 14 *of the Sale of Food and and Drugs Act* 1875, *and that no objection could be taken to the analysis upon the ground that the provisions of the section had not been complied with in that respect.*

Mason *v.* Cowdary (82 *L. T. Rep.* 802; (1900) 2 *Q. B.* 419) *distinguished.*

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

CASE stated by justices of the peace for the county of Wilts, acting in and for the division of Marlborough and Hungerford.

At a court of summary jurisdiction at Hungerford, on the 28th Sept. 1904, the respondent, Henry Savage, a grocer, was charged upon an information preferred by the appellant (Smith), of Swindon, inspector of weights and measures for the northern district of Wilts, for that he, the respondent, on the 9th Aug. 1904, did unlawfully sell to the appellant, to his prejudice as the purchaser thereof, a certain drug—to wit, four penny packets of cream of tartar—which were not of the nature, substance, and quality of the article demanded by the appellant, such cream of tartar containing lead in the proportion of three-fourths of a grain per pound, contrary to sect. 6 of the Sale of Food and Drugs Act 1875. Upon the hearing before the justices the respondent was acquitted of the charge.

The following facts were proved or admitted.

The appellant was the officer duly appointed as the inspector under the Sale of Food and Drugs Act 1875.

On the 9th Aug. 1904 the appellant visited the respondent's place of business, and there saw the respondent, who carried on the business of a grocer. The appellant saw some packets of cream of tartar in the shop and asked the respondent if he sold cream of tartar, whereupon the respondent produced a box containing packets labelled "Finest cream of tartar — 98 per cent. bicarbonate of potassium, B. P. 1898." The appellant asked for four packets, and was supplied with four packets, which were all similar in size and outward appearance and label, and were taken from the same box. He paid 4*d.* for them, and told the respondent that the purchase had been made for the purpose of having it analysed by the county public analyst. The appellant emptied the contents of the four packets into one place, and then divided the whole of the contents or matter into three parts and sealed them up. One of the three packets was sent by registered post to the county analyst for Wilts. Another of the packets was handed to the respondent, and the third packet was retained and produced to the justices by the appellant.

The appellant said that cream of tartar mixed with bicarbonate of soda was used in baking powder, and also in the preparation of cakes, and was also used in the preparation of seidlitz powders, and in the preparation of summer drinks.

The analyst received the sample of cream of tartar (which then weighed about 1¾oz.), and he certified as the result of his analysis:

I am of opinion that the sample contained the parts as under, or the percentages of foreign ingredients as under—namely, that it contained lead in the proportion of three-fourths of a grain per pound.

The analyst was called in support of his certificate, and his evidence and analysis were undisputed. Cream of tartar prepared according to the B. P. should not contain lead.

The appellant, upon the above facts, asked for a conviction.

The respondent's solicitor raised the following point in answer to the charge—namely, that the appellant made four separate purchases, each packet being an article, and that the appellant

did not, by mixing together the contents of the four packets and then dividing the substance so mixed into three parts, comply with sect. 14 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict, c. 63). In support of this argument the justices were referred to the case of *Mason* v. *Cowdary* (82 L. T. Rep. 802; (1900) 2 Q. B. 419), which case was heard and decided by Darling and Bigham, JJ. on the 31st May 1900.

The appellant's solicitor contended that the respondent should be convicted; that the facts in this case were not similar to those in *Mason* v. *Cowdary* (*ubi sup.*), and that sect. 14 had been properly complied with in the present instance, inasmuch as the entire purchase had been properly divided into three parts as the Act directs. It was also pointed out on behalf of the appellant that in the case of *Mason* v. *Cowdary* (*ubi sup.*), there was no mixing and division of the entire purchase, and that the words of the judgment went far beyond what was necessary to decide that case, and could not be held applicable to the present case.

The question of law arising on the above statement for the opinion of the court was whether upon the facts as proved and found by the justices as stated above, the justices were right in so dismissing the summons.

If the court should be of opinion that the decision of the justices was correct, then the dismissal was to stand, but if the court should be of opinion to the contrary, then the case was to be remitted to the justices with such directions thereon as the court might be pleased to make.

Sect. 14 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63) provides:

> The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst, and shall [offer to] divide the article into three parts to be then and there separated, and each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall, if required to do so [proceed accordingly, and shall] deliver one of the parts to the seller or his agent.

By sect. 13 of the Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), the words above printed in brackets were repealed.

H. Gregory for the appellant.—The provisions of sect. 14 of the Sale of Food and Drugs Act 1875 were properly complied with, and the justices were wrong in dismissing the summons. The appellant asked for four packets of the cream of tartar; the packets were all of the same size and outward appearance and label and were taken from the same box, and he paid 4*d.* for the four packets. The reason he bought the four packets was to get a sufficient quantity to analyse. The making up of the article in packets was merely a means of measuring the articles, and if the appellant had asked for fourpence worth of the article, there would have been no question about it. The section says that the purchaser is to divide "the article," that is, the article purchased, into three parts, and so on. The appellant strictly complied with that provision in this case. The article purchased was cream of tartar; he emptied the contents of the four packets into one place, and then divided the whole of the contents, that is, the whole of "the article" purchased, into three parts, so that he complied with the section. The case of *Mason* v. *Cowdary* (82 L. T. Rep. 802; (1900) 2 Q. B. 419), which was relied upon by the respondent, is not in point. In that case the inspector purchased from the respondent, who kept a small general shop, six twopenny bottles of camphorated oil. There was no mixing of the contents of the six bottles, but the inspector simply divided the six bottles into three lots of two bottles each, sealing each separate lot of two bottles in a separate bag; and the justices were of opinion that the provisions of sect. 14 had not been complied with, and that decision was upheld by Darling and Bigham, JJ. The ground of the decision there was that there had not been a compliance with the provisions of sect. 14, in that the six bottles were really six articles, and that these were required to be divided into three parts, but not one of the articles was so divided. Darling, J. says: "He did not open any of the bottles, or mix or divide their contents." That was really the ground of that decision. The quality of the oil in each bottle might have been different. Here, however, the four packets were all opened and their contents mixed up, and after the mixing up the article was divided. That completely distinguishes the two cases.

H. D. Bonsey for the respondent.—The justices were right in the view they took of the case. What the justices have found here is that there were four separate articles purchased, and not one article. The section speaks of purchasing "any article," and then it says that the purchaser is to divide "the article" purchased. The purchaser asked for four distinct things just as if he had asked for four loaves of bread, and, if he had asked for four loaves of bread, then one of the loaves would have had to be divided. The provision in sect. 14 is a provision for the protection of the vendor in what is a penal Act, and it ought to be construed strictly in favour of the vendor. The present case is clearly within the decision in *Mason* v. *Cowdary* (*ubi sup.*). Darling, J. there said: "Six bottles are six articles;" so here the four packets of cream of tartar are four articles. It cannot be said that merely cream of tartar was demanded; what was demanded was the four packets of it. To satisfy the section, one of the packets ought to have been divided into the three parts and analysed, and if it be suggested that one of the packets would have been too small, the answer is that it does not matter whether the article is large or small or what the quantity is; all that has to be looked at is the article purchased. [Lord ALVERSTONE, C.J.—Clearly the article here was cream of tartar, and the respondent sold it as cream of tartar.] The only difference between this case and *Mason* v. *Cowdary* (*ubi sup.*) is that in that case the articles were sold in glass bottles, whereas here they were sold in paper packets, but whether an article is sold in a glass bottle or in a paper packet can make no difference. The justices were fully justified in holding that the section had not been complied with.

H. Gregory in reply.

Lord ALVERSTONE, C.J.—Upon the whole, I think that this appeal must succeed. Some ques-

tion might possibly arise in the case of different articles not of a similar name or of articles coming from different persons being mixed together in the shop, which for analysis the purchaser proposes to mix up in bulk. That, however, is not the case with which we have to deal here. In this case the purchaser asked for cream of tartar, which, for the purpose of measurement, was put up in penny packets. Thereupon the respondent produced a box containing the packets. The appellant then said he would take four packets; and we have to say whether because four packets of the same article, labelled in the same way and sold at the same time as cream of tartar, were mixed together and then divided into three parts, there is a good objection to the analysis that follows. It seems to me impossible to say that that is a good objection. The case is not at all the same as the case of *Mason* v. *Cowdary* (*ubi sup.*), where there was no mixing or dividing of the contents of each bottle. I think in this case the magistrates were wrong, and that the case must be remitted to them to be dealt with.

KENNEDY, J.—I agree.

RIDLEY, J.—I agree.

Appeal allowed. Case remitted to the justices.

Solicitor for the appellant, *E. Bevir*, for *Harry Bevir*, Wootton Bassett.

Solicitors for the respondent, *Neve, Beck*, and *Kirby*.

Thursday, April 13, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

WOOLWICH UNION (apps.) *v.* PARISH OF FULHAM (resps.). (*a*)

Poor law — Settlement — Illegitimate children— Removal—Wife living apart from husband— Settlement of children under sixteen living with their mother—Poor Removal Act 1846 (9 *&* 10 *Vict. c.* 66), *s.* 3—*Divided Parishes and Poor Law Amendment Act* 1876 (39 *&* 40 *Vict. c.* 61), *ss.* 34, 35.

Sects. 34 *and* 35 *of the Divided Parishes and Poor Law Amendment Act* 1876 *do not enable children, legitimate or illegitimate, under the age of sixteen, to acquire an independent settlement so as to affect their status before they attain the age of sixteen, and do not overrule the enactment that illegitimate children retain the settlement of their mother up to the age of sixteen. Sect.* 35 *does not deal with the settlement of children, legitimate or illegitimate, but only deals with the effect of their residence under sixteen upon their status when they are over sixteen.*

A wife left her husband and cohabited with a man named J., by whom she had several children, and after that time her husband did not contribute to her maintenance. The children lived in the parish of Lambeth with J. and their mother, whose residence in that parish continued without break and without relief from the guardians for a period exceeding three years prior to the year 1901, *and during that period the husband was settled in the Woolwich Union. In* 1903 *the children—all of whom were under the age of sixteen—became chargeable to another parish in which they had resided not quite a year. An order of justices having been obtained adjudging the children to be settled in the Woolwich Union, as being the settlement of their mother's husband:*

Held, that the children, being under the age of sixteen and being illegitimate, took their mother's settlement; that the mother, not having been deserted by her husband, took the derivative settlement of her husband, which was in the Woolwich Union, and that therefore the legal settlement of the children was in the Woolwich Union, and not in the parish of Lambeth.

CASE stated by the Quarter Sessions for the County of London, held at the Sessions-house, Clerkenwell, between the Guardians of the Poor of the Woolwich Union in the county of London, appellants, and the Guardians of the Poor of the Parish of Fulham, in the county of London, respondents, pursuant to the provisions of sect. 11 of the statute 12 & 13 Vict. c. 45.

On the 13th May 1904 the respondents obtained an order of two justices of the peace for the county of London, whereby it was adjudged that the parish of Charlton-next-Woolwich, in the Woolwich Union, in the county of London, was the place of the last legal settlement of the five children Johnson, properly Turpin, aged respectively from fourteen years to about six years, paupers chargeable to the parish of Fulham, and the appellants were ordered to receive and provide for such paupers. The appellants appealed against the order to the quarter sessions for the county of London, and afterwards, by consent of the parties and by the order of a judge, a special case was stated between the appellants and the respondents, the parties agreeing that judgment in conformity with the decision of the court, and for the costs of the appeal and entering the judgment, might be entered at the quarter sessions according to the provisions of the statute.

The facts stated in the case were as follows:

In or about the year 1880, William Turpin married Rosa Clark, and in or about the year 1884 Mrs. Turpin (the wife) left her husband, William Turpin, and went away and cohabited with a man named John Johnson, by whom she had seven children, the eldest being about sixteen and the youngest about three years old. William Turpin (the husband) had not since 1884 contributed in any way towards the maintenance of his wife, Mrs. Turpin. All the children were registered in the registers of births as the children of John Johnson.

Five of the children, aged from about fourteen to six years, lived with John Johnson and Mrs. Turpin in the parish of Lambeth, in the county of London, at various places in that parish, where the four younger children were born in 1895, 1896, 1898, and 1900 respectively.

The residence of John Johnson and Mrs. Turpin in the parish of Lambeth continued without break and without relief from the guardians for a period exceeding three years.

During the same period William Turpin resided for a term of three years and upwards at West-street, in the parish of Charlton-next-Woolwich,

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

in the Woolwich Union aforesaid, in such manner and under such circumstances as made him irremovable therefrom and settled therein.

In the year 1903 the paupers became chargeable to the parish of Fulham, having resided there not quite a year.

On the 13th May 1904 an order of the justices was obtained on behalf of the respondents, adjudging the paupers to be settled in the appellants' union (the Woolwich Union). Notice of such order was duly given to the appellants, and a copy of the grounds of removal which accompanied such order, dated the 13th May 1904, was annexed to and formed part of this case.

The appellants affirmed that the said five children Johnson, otherwise Turpin, acquired a legal settlement in the parish of Lambeth by reason of the residence therein of John Johnson and Mrs. Turpin hereinbefore mentioned; or by reason of the residence therein of the said five children Johnson, otherwise Turpin, for upwards of three years prior to 1901, in such manner and under such circumstances in each of such years as would (as the appellants affirmed) in accordance with the provisions of the several statutes in that behalf render them irremovable therefrom.

The respondents affirmed that the paupers took their mother's settlement, which was (as the respondents affirmed) the settlement acquired by the said William Turpin under the circumstances hereinbefore mentioned.

The question for the opinion of the court was whether, upon the facts above stated, the said five children Johnson otherwise Turpin, were settled in the parish of Charlton-next-Woolwich, in the Woolwich Union or not. If the court should be of opinion that they were so settled, the order of the justices should be confirmed, but otherwise it was to be quashed.

And the parties prayed that judgment in conformity with the decision of the court and for such costs as the court should adjudge herein and for the costs of the appeals to quarter sessions and entering the judgment, might be entered at the quarter sessions, according to the Act.

The Poor Law Amendment Act 1834 (4 & 5 Will. 4, c. 76) provides:

Sect. 71. Every child which shall be born a bastard after the passing of this Act shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen or shall acquire a settlement in its own right, and such mother, so long as she shall be unmarried or a widow, shall be bound to maintain such child as a part of her family until such child shall attain the age of sixteen; and all relief granted to such child while under the age of sixteen shall be considered as granted to such mother: Provided always, that such liability of such mother as aforesaid shall cease on the marriage of such child, if a female.

Sect. 3 of the Poor Removal Act 1846 (9 & 10 Vict. c. 66) provides:

No child under the age of sixteen years, whether legitimate or illegitimate, residing in any parish with his or her father or mother, stepfather or stepmother, or reputed father, shall be removed, nor shall any warrant be granted for the removal of such child from such parish in any case where such father, mother, stepfather, stepmother, or reputed father may not lawfully be removed from such parish.

Sect. 1 of the Poor Removal Act 1848 (11 & 12 Vict. c. 111) contained the following proviso, which was substituted for the last proviso in sect. 1 of the Poor Removal Act 1846, thereby repealed:

Provided always, that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the said recited Act, and should not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act . . .—the recited Act being the 9 & 10 Vict. c. 66.

The Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61) provides (under the heading "Provisions as to the law of settlement and removal"):

Sect. 34. Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or court think sufficient.

Sect. 35. No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. An illegitimate child shall retain the settlement of its mother until such child acquires another settlement. If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

Rawlinson, K.C. (*Cox-Sinclair* with him) for the appellants, the Woolwich Union.—For three reasons the order appealed against was wrong. First, the children having lived for over three years in Lambeth with their "reputed father," acquired a settlement of their own in Lambeth. Secondly, even if that is not so, they would have the settlement of their mother, and that could not possibly be Woolwich; if her settlement be a derivative settlement from her husband, then her settlement would be that of her husband in 1884, and the fact that after they had separated from each other in 1884 he acquired a fresh settlement does not give his wife that settlement. Thirdly, upon the facts in this case, since they separated in 1884 the husband has never in any way contributed to her support or the support of the children; that would constitute desertion within the meaning of the Act, and, that being so, she would have gained a settlement of her own in Lambeth. [Lord ALVERSTONE, C.J. — That point as to desertion is not raised in the case.] These children were living with their mother and their "reputed father" Johnson for more than three years in Lambeth, and, by sect. 3 of the Poor Removal Act 1846 (9 & 10 Vict. c. 66) they could not be removed where their mother or "reputed father"

might not lawfully be removed, and by sect. 34 of the Divided Parishes and Poor Law Amendment Act (1876 (39 & 40 Vict. c. 61) that residence for three years under such circumstances as would render them irremovable conferred a settlement in that parish. It is necessary to show not only that they were irremovable from Lambeth, which is shown by sect. 3, but that they acquired a settlement in Lambeth, and that is shown by sect. 34. It is said that the word "person" in sect. 34 does not apply to children under the age of sixteen, but by the decision of both the Divisional Court and the Court of Appeal in *West Ham Union* v. *Holbeach Union* (89 L. T. Rep. 609; (1903) 2 K. B. 627; 91 L. T. Rep. 304; (1904) 2 K. B. 121), under sect. 34 a child under the age of sixteen can, by three years' residence in a parish with his parent, acquire settlement in that parish. The whole *ratio decidendi* of the judgments in that case was that a child under sixteen could be a "person" within that section. *Reg.* v. *Elvet* (2 E. & E. 266) also shows that a child under the age of sixteen can acquire a status of irremovability and a settlement, and in that case the child had acquired everything before the age of sixteen. Then, assuming that a child under sixteen can acquire a settlement of his own, these children have acquired the settlement of their reputed father, and when they have resided with their reputed father for three years then sect. 34 operates. Johnson was clearly either the father or the reputed father of the children, and they lived with him for more than three years in Lambeth, and consequently they acquired a settlement in that parish. It is a settlement of their own and a status of irremovability acquired by the children themselves, and there is nothing contrary to this contention in *Reigate Union* v. *Croydon Union* (61 L. T. Rep. 733; 14 App. Cas. 465), where the general effect of this section was determined by the House of Lords. [Lord Alverstone, C.J.—The question really comes to this: whether illegitimate children living with their mother or their reputed father can acquire any settlement at all of their own under sixteen.] The broad point is that a child under the age of sixteen can acquire a settlement of its own, and that was assumed to be so in *Bodenham Overseers* v. *St. Andrews' Overseers* (1 E. & B. 465). It is said that there is something in sect. 35 which restricts the operation of sect. 34, but that section does not limit the express words of sect. 34. But, assuming that the children took the settlement of their mother, then that was not Woolwich. In 1884 the husband had a settlement somewhere, and if the wife derived any settlement at all from him, it would be derived from him in 1884, which would not be Woolwich. He also referred to

East Retford Union v. *Strand Union*, 3 B. & S. 122; *Reg.* v. *Inhabitants of Cudham*, 1 E. & E. 409; 32 L. T. Rep. O. S. 253.

Macmorran, K.C. (*George Humphreys* with him) for the respondents, the parish of Fulham.—The first consideration here is that this woman Turpin must be taken to have the settlement of her husband and of nobody else. The law as to that is so clearly laid down that it is only necessary to refer to it in Archbold's Poor Law (15th edit.), p. 510: "By marriage, the wife immediately acquires the settlement of the husband, if he have one. . . . And she continues, during his life, to follow his settlement — that is to say, to acquire every settlement he may gain in his own right; but she is not capable of gaining any settlement by any act of her own during her marriage, whether her husband have any settlement or not, unless she is deserted by her husband, in which case she may gain a settlement by residence after her desertion"; and there was no desertion of the wife here. The next proposition is that whether the children are to be deemed legitimate or illegitimate the result is the same. If they are deemed to be legitimate, then, being under the age of sixteen, they take the settlement of their father Turpin—which was in Woolwich; but if they are to be taken as illegitimate—and the case finds that they were children of Johnson—then they take the settlement of their mother (sect. 71 of the Poor Law Amendment Act 1834, 4 & 5 Will. 4, c. 76, and sect. 35 of the Divided Parishes and Poor Law Amendment Act 1876, 39 & 40 Vict. c. 61), and they do not take that settlement of their mother any the less because that settlement is a derivative one—that is, a settlement derived from her husband. In that case also their settlement would be in Woolwich. In *Reigate Union* v. *Croydon Union* (*ubi sup.*), the whole matter was considered in the judgment of Lord Watson, which is the leading judgment in the case, and the construction of sect. 35 of the Act of 1876 was fully dealt with by him, and he there points out that the effect of the second clause of sect. 35 is to place illegitimate, as nearly as may be, on the same footing as legitimate children. Up to the age of sixteen the illegitimate child follows the mother's settlement, whatever it may be, whether derivative or not; but above the age of sixteen it takes its birth settlement until it acquires a new settlement. That is in no way inconsistent with the decision in *West Ham Union* v. *Holbeach Union* (*ubi sup.*). The point to be dealt with here is quite different: Can an illegitimate child under sixteen acquire a settlement of its own at all? It is submitted that it cannot acquire either a settlement or a status of irremovability. [Lord ALVERSTONE, C.J., referred to *Manchester Overseers* v. *St. Pancras Guardians* (41 L. T. Rep. 218; 4 Q. B. Div. 409).] That case has been overruled by *Reigate Union* v. *Croydon Union* (*ubi sup.*), which was decided ten years later in 1889, and which is inconsistent generally with the *St. Pancras* case (*ubi sup.*). Reference has been made to sect. 3 of the Poor Removal Act 1846; but that section has really nothing to do with this case, which turns on the last proviso in sect. 1, which words were repealed by sect. 1 of 11 & 12 Vict. c. 111, and re-enacted as in that section. Sect. 3 is wholly intended to prevent the splitting up or separation of families, and nothing else, and does not confer any status of irremovability; and it means that, when you find children whose settlement is that of their parents, those children are removable if their parents are removable, and are not removable if their parents are not removable. The removability of these children is the same as that of their mother, and that is borne out by *West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green* (70 L. T. Rep. 818; (1894) A. C. 230), a case which is in all respects the same as this, except that there the pauper was legitimate. The

residence of the children with their mother is not a residence by them which would give them a settlement or a status of irremovability of their own—at all events, until they were sixteen. Therefore, whether the children are considered as legitimate or illegitimate, in either case their settlement is in Woolwich. He also referred to

Reg. v. *Inhabitants of Combs*, 5 E. & B. 892.

Rawlinson, K.C. in reply.

Lord ALVERSTONE, C.J.—In this case an order has been made to remove these children to the Woolwich Union. It is submitted as the basis of the argument that the order is wrong only if the children have acquired a settlement somewhere else. I have no doubt troubled myself by thinking that it might be possible to deal with this question merely as a question of preventing the removal of these children under sect. 3 of the Poor Removal Act 1846 (9 & 10 Vict. c. 66), but I think, for the reasons which counsel for the respondents stated and which counsel for the appellants most frankly gave, that that consideration is not sufficient for this purpose. We are obliged to put a construction on sects. 34 and 35 of the later Act—the Divided Parishes and Poor Law Amendment Act of 1876—I think after the interesting and exhaustive argument we have had, this seems to come out pretty clearly that if Lord Watson has correctly summarised the matter in *Reigate Union* v. *Croydon Union* (*ubi sup.*), as we must assume for the purpose of this case that he has done, there are certain clear landmarks and propositions, some of which counsel for the respondents has adopted, which I think are necessary for his argument and which seem to be pretty clearly defined—namely, that the Divided Parishes Act of 1876 did not mean to interfere with the settlement of children under the age of sixteen; that by re-enactment, if I may use that expression, so far as legitimate children are concerned, a child under sixteen has the settlement of its parent, and that by sect. 71 of the Poor Law Amendment Act 1834 (4 & 5 Will. 4, c. 76), an illegitimate child under sixteen has the settlement of its mother. If those statements of Lord Watson are correct—and I think I should have come to the same conclusion after this argument—we need not trouble ourselves with the complicated question which counsel for the appellants has endeavoured to introduce, because in addition to the mother there was Johnson, the reputed father, living with the mother of the children. Possibly that might have afforded some ground for the argument, if it had not been necessary to deal with the question of settlement, which enables us to say that, so far as the settlement of children under the age of sixteen is concerned, both in the case of illegitimate children and in the case of legitimate children, legitimate children have the settlement of their parents and illegitimate children have the settlement of their mother. That being so, unless there is something which has altered that state of things, these children have the settlement of their mother, which was the settlement of her husband, as she was not a deserted woman. Counsel for the appellants does not dispute that the wife takes the settlement of her husband, and although he did attempt to suggest that she was a deserted wife, and therefore had acquired a settlement in Lambeth under her own rights, so to speak, when the facts came to be examined it was quite clear that even if the question of desertion were raised in the case, there were no facts to enable us to assume that there was desertion or to enable that point to be clearly raised. Therefore we have it that the mother had the settlement of her husband from whom she was separated. Illegitimate children under the age of sixteen have the settlement of their mother. So far, if counsel for the appellants is not able to satisfy us that the children have acquired an independent settlement, this order is good. The question to be decided is, whether or no, the effect of the legislation of sects. 34 and 35 of the Divided Parishes and Poor Law Amendment Act of 1876 is such as to enable children under the age of sixteen to acquire a settlement, so to speak, during the time which will be effective so as to effect their status before they attain the age of sixteen. I need not again read the terms of sect. 34, which have been referred to. There is no doubt whatever that that section did purport to give a settlement to persons who had become irremovable under certain circumstances. Whether or not it intended by those words to include the case of irremovability where there was a living with the reputed father who could not himself give a settlement, I think is extremely doubtful. That point may arise at some future time, but it seems to me extremely doubtful. It is, however, sufficient for my purpose to say that there was a large class of persons who would become irremovable from the parish by virtue of the preceding enactments, and who would therefore be deemed to be settled therein, so as to give operation to sect. 34. Therefore it seems to me that unless the word "child" in the third paragraph of sect. 35 is to be construed to apply to children under the age of sixteen, the main argument for the appellants is to a large extent cut away. I quite agree that there is great difficulty when we have to look at an Act which begins as this section does by destroying or abolishing certain things, and then goes on to re-enact other things. There is no doubt that children under the age of sixteen are referred to in the first paragraph of sect. 35, and there is no doubt that illegitimate children are referred to in the second paragraph, and it is difficult as a mere question of construction to say why "any child" in the third paragraph should not include all classes of children. There has been one argument adduced which may possibly give the reason for the words "any child" being used. I think "any legitimate or illegitimate child" is one reason for the use of those words "any child." But we have the distinct opinion of Lord Watson in the case of *Reigate Union* v. *Croydon Union* (61 L. T. Rep., at pp. 735-6; 14 App. Cas., at p. 484) that the provisions of the last clause of sect. 30 "have no application to children under the age of sixteen, and do not qualify the preceding enactment of sect. 35 to the effect that a legitimate, or that of 4 & 5 Will. 4 to the effect that an illegitimate, child shall continue to retain its parentage settlement until it has reached that age. The clause assumes that the children whose settlements are the subjects of inquiry are not unemancipated, but are paupers in their own right, and capable of acquiring a settlement for themselves." Whether the judgment of Lord Watson went

further than this it is not necessary to consider. His extraordinary acumen and great power of crystallising the arguments of cases are well known to all of us who have practised before him; and that is undoubtedly a distinct opinion that this enactment relates to paupers who are not unemancipated and who are capable of acquiring a settlement in their own right, and it is an express statement that it does nothing in the way of qualifying the direct enactment as to what is to be the settlement of children who are living with their parents. I was a great deal troubled by the case of *Overseers of Manchester* v. *St. Pancras Guardians* (*ubi sup.*), because that was a distinct decision that these very words in sect. 35 did not apply where the settlement was derivative, and that an illegitimate child under sixteen did not take the settlement of its mother where such settlement had been derived from her marriage. If I had thought that the words were only to be held to apply to direct settlements and not to derivative settlements, so as to exclude the case of a mother's settlement, I think a great difficulty would have arisen; but it is quite clear, as has been pointed out, that that case of *Overseers of Manchester* v. *St. Pancras Guardians* (*ubi sup.*) is not consistent with the judgment of Lord Watson in the *Croydon* case (*ubi sup.*), and I cannot help thinking, as counsel for the respondents has pointed out, that Lord Watson did probably have that decision in his mind when he said he would not go through the cases which were inconsistent with his decision. Therefore, upon the construction of the sections, as interpreted by Lord Watson's judgment, I think counsel for the respondents is right in saying that the section does not enable children under the age of sixteen to acquire an independent settlement. But it is said that we meant to decide that point in the case of *West Ham Union* v. *Holbeach Union* (*ubi sup.*), and not unnaturally, and most fairly, the appellants' counsel relied upon passages in my judgment and upon passages in the judgment of my brother Wills in this court (89 L. T. Rep. 609; (1903) 2 K. B. 627), which certainly, taken by themselves, point to a wider interpretation to be put upon this section. I may say, however, that that point was never suggested to us in the argument of the case before us. It was not in the least necessary; we were not dealing with the case of children under the age of sixteen, and those particular sections with regard to what was to be the settlement of children under the age of sixteen, were only referred to historically for the purpose of seeing what was the position of children and what settlements they could acquire. Therefore as an authority that case cannot be said to govern the case of where the children in question are under the age of sixteen. It is only another instance of the importance of construing cases with reference to their subject-matter, and endeavouring as far as possible to use expressions which may not have a wider bearing than they ought to have. The difficulty of doing that in this class of cases everyone will recognise. When that case came to the Court of Appeal (91 L. T. Rep. 304; (1904) 2 K. B. 121), whether that point, as was highly probable, was present to the minds of the court, having, perhaps, had the matter more fully argued before them, or whether the point was raised in a way in which it was not raised before us, there are many passages in which Collins, M.R. in his most careful and elaborate judgment says that he, at any rate, was confining his decision in the case to the bearing of the previous residence upon the status of a person who was emancipated. Speaking of the case of *Reg.* v. *Elvet* (*ubi sup.*), he says, (at p. 128 of (1904) 2 K. B.): "The case, therefore, appears to be an authority that the residence of a child in a parish, with its parent, while unemancipated —for it is impossible to suggest that the pauper in that case was emancipated during her father's lifetime—may be relied on as conferring on that child after emancipation the status of irremovability"; obviously meaning thereby, and he was careful to say, not that it gave at once a status of irremovability, but that it was after emancipation that it did so. Then, speaking of the judgment of Lord Macnaghten in the case of *Reigate Union* v. *Croydon Union* (*ubi sup.*), he says (at p. 129): "He puts together the period of the pauper's residence while unemancipated and that of her residence while emancipated, and says nothing from which it can be implied that, if the whole period of residence had been prior to the pauper's attaining the age of sixteen, it would not have been equally effective, on the question arising after she had attained that age." Then further down on the same page he quotes what was said by the Lord Chancellor (Lord Halsbury) to this effect (14 App. Cas., at p. 486). "I have been unable to find in sect. 34 any provision, express or implied, to the effect that an emancipated child claiming a settlement under its provisions is not to have the benefit of residence whilst it was under the age of sixteen." There are other passages to the same effect. Romer, L.J. says (at p. 131): "The principle which appears to be there laid down is that a child, after attaining the age of sixteen, may claim to have acquired a settlement by reason of residence for three years in a parish before attaining that age." When that case was before us in this court I may not have noticed that point because I do not think it was put before us; but it is now pressed upon us that we decided that the child acquired a status at once on three years' residence independently of its mother. I think there are many considerations which are inconsistent with that view, as counsel for the respondents has pointed out, because we have to work the matter out with the irremovability sections; and how can we work it out with them, as my brother Kennedy has pointed out, if those children have acquired a separate settlement by virtue of residence for the specified period? I think it is now true that the family would not all go together, the children with the father and mother, but they would not be split up into sections according to their individual settlements acquired by them, as they would if the appellants' contention is right. I think, therefore, though I have not expressed it as clearly as I should have liked, that the broad view of this matter is that sect. 35 did not intend to deal with the settlement of children, legitimate or illegitimate, under the age of sixteen, but only meant to deal with what was the effect on the emancipated children of such residence, and that the cases which have been cited both here and in the Court of Appeal strongly support the view that the positive enact-

ment that the illegitimate children retain the settlement of their mother up to the age of sixteen, is still binding upon us. In those circumstances it is admitted that the mother had the settlement of her husband, and, therefore, I think this order was right. I may add that the very clear arguments of counsel on each side have been of very much assistance in enabling me to arrive at this decision.

KENNEDY, J.—I am of the same opinion. It seems to me, after the very careful argument of the appellants' counsel, that the strength of his case is, to my mind, practically gone unless it can be made out that according to the law a child living with a parent for the period within the Act of 1876, can, even before the age of emancipation, which is sixteen, acquire a settlement independently. With that proposition, if it were established, he would have a strong case; without it, he has none. That is what the matter really comes to, and as it comes to that, I have only to say that I am entirely in concurrence with my Lord in what he has more fully and argumentatively expressed. It seems to me that there is no authority which compels us so to hold, and for reasons, one of which occurred to me in the course of the argument, referred to by my Lord, it would, in my opinion, be unreasonable and inconvenient so to hold. Therefore, in the absence of authority, accepting the somewhat difficult explanation of the wording which the Legislature has thought proper to adopt in the last clause of sect. 35, and treating those words as referring only to persons who have attained the age of emancipation, and accepting the explanation of them which has been offered by so very great an authority as Lord Watson in the House of Lords, I think that the case of the appellants fails.

RIDLEY, J.—I agree. The appellants' counsel was obliged to contend and, indeed, did very forcibly contend, that the children in question had acquired a settlement by their three years' residence in Lambeth with their parents. But they were all of them unemancipated; they were all under the age of sixteen. I think, if we look at the authoritative decision upon the construction of this section, that that will not do. If there had been no previous authority upon the subject I think the matter would have been extremely arguable from the point of view of the argument which the appellants' counsel has addressed to us on the subject. But when I read the judgment of Lord Watson in the case of *Reigate Union* v. *Croydon Union* (*ubi sup.*), I come to the conclusion that the position which the appellants' counsel asks us to take up is entirely inconsistent with Lord Watson's opinion expressed in that case. I therefore agree that the appeal should be dismissed.

Appeal dismissed. Leave to appeal.

Solicitors for the appellants, *Callard* and *Vulliamy*.

Solicitor for the respondents, *T. Blanco White*.

Monday, April 17, 1905.

(Before KENNEDY and RIDLEY, JJ.)

BARNARD (app.) v. BARTON AND OTHERS (resps.). (a)

Licensing—Selling by retail without a licence— — Charge proved — Information dismissed because offence of trifling nature—Licensing Act 1872 (35 *& 36 Vict. c.* 94), *s.* 3—*Summary Jurisdiction Act* 1879 (42 *& 43 Vict. c.* 49), *s.* 16.

Selling intoxicating liquor without a licence for nine days is not an offence of a trifling nature which justifies justices in dismissing informations therefor, merely because the transfer sessions are not held for that period, and there is a bonâ fide *intention to apply for a transfer of the licence at such sessions.*

CASE stated on five informations preferred by the appellant against the respondent for unlawfully selling intoxicating liquor by retail which he was not licensed to sell, contrary to sect. 3 of the Licensing Act 1872, and on two informations against two other persons for aiding and abetting that offence contrary to sect. 5 of the Summary Jurisdiction Act 1848.

On the hearing of the informations the following facts were proved or admitted.

On the 13th April 1903 Joseph Henry Anstey was duly licensed to sell intoxicating liquors by retail at a house called the Fighting Cocks.

On the 15th Oct. 1904 J. H. Anstey gave up possession of the house, and on the same day the respondent took possession thereof as the tenant of the brewers who were the owners of the house, without previously having obtained any authority whatever from the justices to sell intoxicating liquor therein by retail.

The several sales of intoxicating liquor alleged in the above informations to have been made by the respondent were in fact made by him. The sales were made with the knowledge and consent and under the instructions of the two other respondents.

On the 24th Oct. 1904, proper notice having been given of such intended application, J. H. Anstey applied to the licensing justices and obtained a transfer of his licence to the respondent.

The justices sat only once a month, and there was no petty session at which the application could have been made for a temporary transfer of the licence to the respondent between the 26th Sept. and the 24th Oct. 1904.

In cases of transfers of licensed premises taking place on days on which no petty sessions are held it is the practice in some petty sessional divisions and in this division to apply for the temporary transfer at the next petty sessions.

For the prosecution it was contended that, under the circumstances aforesaid, the respondents, who had been proved to have committed the offences with which they were charged, ought to be convicted thereof.

For the defence it was contended that a transfer was applied for and obtained at the earliest opportunity after the house had changed hands. That it was impossible to arrange for new tenants of licensed houses to take possession only on days when petty sessions were held. That defendants followed what in their experience was the usual

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

custom, and did their best to comply with the law, and there being no other licensed house in the parish public inconvenience would have been occasioned had the house been closed until the transfer had been obtained.

The justices were of opinion that all the charges were proved against all the respondents, but considered the respondents had no intention of infringing the provisions of sect. 3 of the Licensing Act 1872, and that the offences proved to have been committed were of so trifling a nature that it was inexpedient to inflict any punishment, and thereupon they dismissed all the charges under sect. 16 of the Summary Jurisdiction Act 1879.

C. E. Jones for the appellant.

Poyser for the respondents.

KENNEDY, J.—In my view this case, as Mr. Poyser put it, is an important case. It is very important in my view not to limit the discretion which the justices have been intrusted with by the Act of Parliament under the important provision of the 16th section of the Summary Jurisdiction Act 1879, which has been referred to by those who have administered justice in this court on many occasions, and, amongst others, on the occasions of cases being before them which Mr. Poyser has so carefully referred to. That is a jurisdiction which is not to be limited. We are not to exercise a discretion, as it were, passing in review their discretion if there is really any ground for that discretion being exercised. It is a discretion which is conveyed in the following terms: "If the court of summary jurisdiction think that, though the charge is proved, the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment, the court, without proceeding to conviction, may dismiss the information, and if the court thinks fit may order the person charged to pay such damages not exceeding 40*s.*, and such costs as they may think reasonable, or the court on convicting the person may discharge him conditionally." Now I quite agree with Mr. Poyser, and, if I said anything to the reverse at first, I certainly now think he is quite right in pointing out that there may be in a particular case, to use the words of the section, something which makes the commission of that which otherwise but for those circumstances would be serious, because the nature of the offence is serious, trifling. I am not saying that that is not so. The mere casual breach, if I may call it so, of a by-law is in itself, in its nature as well as under the concurrent circumstances, of such a kind that the justices, there being no deliberate intention to break such a by-law, might treat it as trivial; but the words cover both cases of offences in the particular case of so trifling a nature that they may exercise their discretion. In this case there is really nothing suggested which could mitigate the offence or reduce the offence to a trifling nature if it was a serious one. That is not to be found in the case. If there had been, then, as I think Lindley, L J. says in the case which has been referred to, and to which I shall refer in a moment, it may be one would feel oneself bound not to interfere with the discretion of the justices. But it seems to me upon what is stated that they had nothing before them except what is in the case. Therefore we have to see from the terms of the case whether there has been such an exercise of the discretion as we have no right to review or not. Now, what was the nature of the offence here? To my mind it was a very serious offence. If the licensing laws are to be of any service to the public order, which the Legislature has emphatically by many statutes held most important, it seems to me for an unlicensed person deliberately for nine days to carry on business without a licence, and apparently from the case do a considerable business, is a serious breach of the law. The most that can be said is that the respondents had no intention of carrying on the house otherwise than reputably and really applying for the transfer when they got the opportunity of applying. But that they deliberately apparently under some sort of an idea of a custom did that which they knew the law did not justify there seems to be no doubt on the case itself. Therefore it seems to me that as it stands it is in its nature a serious offence, and I cannot find anything in the case which makes it trifling, because for nine days the only public-house had been carried on openly for all licensed hours, I think from the 16th Oct. to the 24th Oct., by an unlicensed person, and by the instructions of the brewers' managing director and agent. I cannot see anything which on the face of those facts makes this offence trifling. I cannot see anything which justifies the grounds suggested that they had no intention of infringing the provisions of which they perfectly wed knew. Under these circumstances can we be said to be prevented from saying, as we have to, whether that infringement was of so trifling a nature as to justify the course taken, there being really nothing suggested outside this case? Can we say that that position taken up can be in accordance with the law? That question was actually dealt with by a very important tribunal in the case which Mr. Jones cited to us of *Philips* v. *Evans* (74 L. T. Rep. 314; (1896) 1 Q. B. 305). The matter there came before Lindley, L J. and Kay, L.J., sitting together as the Divisional Court. There the justices against whose decision the appeal was were held to have "had no jurisdiction to review the decision of the commissioners as to granting or withholding a certificate of exemption, and that the offence of refusing to take out a dog licence was not an offence of a trifling nature to which sect. 16 of the Summary Jurisdiction Act of 1879 would apply." It seems to me the keeping open of a house for nine days and carrying on trade there without a licence and doing so intentionally (which is what these persons ought to have been convicted of) is not an offence of a trifling nature. Of course, if there were special facts in the case which were stated by the magistrates as facts making the offence trifling, it is not part of our province to review their decision, but there are none such stated here except that there was the *bonâ fide* intention to get a transfer when the time came, and they were quite prepared to break the law until that time came for their own convenience. That is what it really comes to, not making proper arrangements for the person who had been tenant to remain or the going out did not take place until after the date at which a proper transfer could be obtained. It appears to me there is nothing

which justifies such a finding of it being trifling. In my opinion the magistrates ought to have convicted. It is not at all necessary for us to say, nor, speaking for myself, do I intend to say, that there ought to have been a serious fine inflicted. They may inflict what they please. I do not say a nominal fine because, if they were entitled on account of the trifling nature of the offence to inflict a nominal fine, they would have been within sect. 16, which I do not think they were. I do not mean there ought to be a severe penalty, but I do not see anything which enabled them to treat this as a trifling offence nor to which they ought to have applied the wide power of sect. 16.

RIDLEY, J.—I quite agree with what my brother Kennedy has said, and he has so fully covered the ground that I do not think it necessary to add anything. *Case remitted to justices.*

Solicitors: *F. P. Sutthery*; *Toovey* for *Banks* and *Hooley*, Bury St. Edmunds.

Thursday, June 8, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

MUSGRAVE (app.) *v.* KENNISON (resp.). (*a*)

Motor-car—Speed limit in Royal park—Parks Regulation Act 1872 (35 *&* 36 *Vict. c.* 15), *s.* 9—*Statutory Rules and Orders* 1904, *No.* 979, *r.* 4.

By rule 4 *of the Statutory Rules and Orders* 1904, *No.* 979: "*Cars propelled or drawn by mechanical means shall only be admitted* [*into Royal parks*] *subject to such regulations as may from time to time be passed by the Commissioners of His Majesty's Works and Public Buildings, and published by notice exhibited in the parks.*"

These rules were made under the Parks Regulation Act 1872, *and were duly laid before Parliament.*

The commissioners published a notice, which was posted at the park gates, that no car propelled or drawn by mechanical means was to be allowed to proceed at a greater pace than ten miles per hour. This notice was not laid before Parliament.

Held, that the regulation contained in this notice was good.

CASE stated on an information preferred against the appellant by the respondent for that he on the 23rd Jan. 1905 in a certain Royal park called the Green Park did unlawfully drive a certain motor-car at a greater speed than ten miles an hour contrary to the regulations made by the Commissioners of His Majesty's Works and Public Buildings on the 28th April 1904, and published by notice exhibited in the park, contrary to the Parks Regulation Act 1872.

Upon the hearing of the information the following facts were proved or admitted.

The appellant drove a carriage propelled by mechanical means known as a motor-car in the Green Park on the 23rd Jan. 1905 at a greater speed than ten miles an hour.

A notice was posted at the gates of the park, with the following heading, "Notice to drivers of motor-cars and cyclists," and it is set out below.

Neither the last-mentioned nor any copy of the same had been laid before the Houses of Parliament, or either of them; but rules for the Green Park in connection with the regulations prescribed by the Parks Regulation Act 1872, known as the Statutory Rules and Orders of 1904, No. 979, and dated the 28th April 1904, had been laid upon the table of both Houses of Parliament in pursuance of sect. 9 of the Act, and the last-mentioned notice contained a correct copy of regulations by the Commissioners of Works on the 28th April 1904 under the 4th statutory rule.

On behalf of the appellant it was contended (*a*) that no rule had ever been made under the Parks Regulation Act 1872 limiting the speed of a carriage propelled by mechanical means (a motor-car) to ten miles an hour in the said park or any park; (*b*) that any valid rule must be made under and by virtue of and in pursuance of sect. 9 of the Parks Regulation Act 1872; (*c*) that no other regulation could be made under the Act of Parliament except such as were set out in the 1st schedule thereto, and sect. 4 of the Act was referred to in support of this contention; (*d*) that the regulations purporting to impose a ten-mile speed limit were unauthorised, that the public had never had any proper notice of the intention of the commissioners to make or publish the same, that the public had no opportunity of of seeing such regulations either by themselves or their representatives in the House of Lords or Commons; that the Parks Regulation Act only authorised the making of "rules," and that there was no authority for making "regulations" of a penal nature under the Act of Parliament, and that there is no provision in the Parks Regulation Act 1872 for the prosecution of any person doing any act in contravention of the aforesaid regulations; (*e*) that the speed of motor-cars was dealt with by the Locomotives or Highways Act 1896 and the Motor Car Act of 1903, and that sect. 9 of latter Act made provision for a ten-mile limit to be placed on motor-cars under the conditions therein set forth when the Local Government Board, after inquiry in due and proper form were of opinion that it was desirable and necessary that such a limit should be placed upon the speed of motor-cars, and that if it were desired to place any limit on the speed of motor-cars in the Green Park the same should be done under this statute.

On behalf of the respondent it was contended that the provisions of the Parks Regulation Act 1872, and of the Statutory Rules and Orders 1904, No. 979, were sufficient authority for making and publishing the regulations and notice, that the regulations are valid.

The magistrate convicted the appellant.

The questions of law arising for the opinion of the court therefore were: (1) whether any valid regulations could be made under the Parks Regulation Acts 1872 save and except such as appear in the 1st schedule to the Act; (2) whether "Rules of the Park," made pursuant to sect. 9 of the Parks Regulation Act 1872, confer powers enabling the commissioners to make other valid rules and regulations; (3) whether any regulations so made by the commissioners can be enforced in view of the provisions of sect. 4 of the Act or otherwise; (4) and whether any rule so made by the commissioners can be made otherwise than in the manner prescribed in sect. 9 of the Act.

(*a*) Reported by W. DE B. HARBERT, Esq., Barrister-at-Law.

custom, and did their best to comply with the law, and there being no other licensed house in the parish public inconvenience would have been occasioned had the house been closed until the transfer had been obtained.

The justices were of opinion that all the charges were proved against all the respondents, but considered the respondents had no intention of infringing the provisions of sect. 3 of the Licensing Act 1872, and that the offences proved to have been committed were of so trifling a nature that it was inexpedient to inflict any punishment, and thereupon they dismissed all the charges under sect. 16 of the Summary Jurisdiction Act 1879.

C. E. Jones for the appellant.

Poyser for the respondents.

KENNEDY, J.—In my view this case, as Mr. Poyser put it, is an important case. It is very important in my view not to limit the discretion which the justices have been intrusted with by the Act of Parliament under the important provision of the 16th section of the Summary Jurisdiction Act 1879, which has been referred to by those who have administered justice in this court on many occasions, and, amongst others, on the occasions of cases being before them which Mr. Poyser has so carefully referred to. That is a jurisdiction which is not to be limited. We are not to exercise a discretion, as it were, passing in review their discretion if there is really any ground for that discretion being exercised. It is a discretion which is conveyed in the following terms: "If the court of summary jurisdiction think that, though the charge is proved, the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment, the court, without proceeding to conviction, may dismiss the information, and if the court thinks fit may order the person charged to pay such damages not exceeding 40*s.*, and such costs as they may think reasonable, or the court on convicting the person may discharge him conditionally." Now I quite agree with Mr. Poyser, and, if I said anything to the reverse at first, I certainly now think he is quite right in pointing out that there may be in a particular case, to use the words of the section, something which makes the commission of that which otherwise but for those circumstances would be serious, because the nature of the offence is serious, trifling. I am not saying that that is not so. The mere casual breach, if I may call it so, of a by-law is in itself, in its nature as well as under the concurrent circumstances, of such a kind that the justices, there being no deliberate intention to break such a by-law, might treat it as trivial; but the words cover both cases of offences in the particular case of so trifling a nature that they may exercise their discretion. In this case there is really nothing suggested which could mitigate the offence or reduce the offence to a trifling nature if it was a serious one. That is not to be found in the case. If there had been, then, as I think Lindley, L J. says in the case which has been referred to, and to which I shall refer in a moment, it may be one would feel oneself bound not to interfere with the discretion of the justices. But it seems to me upon what is stated that they had nothing before them except what is in the case. Therefore we have to see from the terms of the case whether there has been such an exercise of the discretion as we have no right to review or not. Now, what was the nature of the offence here? To my mind it was a very serious offence. If the licensing laws are to be of any service to the public order, which the Legislature has emphatically by many statutes held most important, it seems to me for an unlicensed person deliberately for nine days to carry on business without a licence, and apparently from the case do a considerable business, is a serious breach of the law. The most that can be said is that the respondents had no intention of carrying on the house otherwise than reputably and really applying for the transfer when they got the opportunity of applying. But that they deliberately apparently under some sort of an idea of a custom did that which they knew the law did not justify there seems to be no doubt on the case itself. Therefore it seems to me that as it stands it is in its nature a serious offence, and I cannot find anything in the case which makes it trifling, because for nine days the only public-house had been carried on openly for all licensed hours, I think from the 16th Oct. to the 24th Oct., by an unlicensed person, and by the instructions of the brewers' managing director and agent. I cannot see anything which on the face of those facts makes this offence trifling. I cannot see anything which justifies the grounds suggested that they had no intention of infringing the provisions of which they perfectly wed knew. Under these circumstances can we be said to be prevented from saying, as we have to, whether that infringement was of so trifling a nature as to justify the course taken, there being really nothing suggested outside this case? Can we say that that position taken up can be in accordance with the law? That question was actually dealt with by a very important tribunal in the case which Mr. Jones cited to us of *Philips* v. *Evans* (74 L. T. Rep. 314; (1896) 1 Q. B. 305). The matter there came before Lindley, L J. and Kay, L.J., sitting together as the Divisional Court. There the justices against whose decision the appeal was were held to have "had no jurisdiction to review the decision of the commissioners as to granting or withholding a certificate of exemption, and that the offence of refusing to take out a dog licence was not an offence of a trifling nature to which sect. 16 of the Summary Jurisdiction Act of 1879 would apply." It seems to me the keeping open of a house for nine days and carrying on trade there without a licence and doing so intentionally (which is what these persons ought to have been convicted of) is not an offence of a trifling nature. Of course, if there were special facts in the case which were stated by the magistrates as facts making the offence trifling, it is not part of our province to review their decision, but there are none such stated here except that there was the *bonâ fide* intention to get a transfer when the time came, and they were quite prepared to break the law until that time came for their own convenience. That is what it really comes to, not making proper arrangements for the person who had been tenant to remain or the going out did not take place until after the date at which a proper transfer could be obtained. It appears to me there is nothing

which justifies such a finding of it being trifling. In my opinion the magistrates ought to have convicted. It is not at all necessary for us to say, nor, speaking for myself, do I intend to say, that there ought to have been a serious fine inflicted. They may inflict what they please. I do not say a nominal fine because, if they were entitled on account of the trifling nature of the offence to inflict a nominal fine, they would have been within sect. 16, which I do not think they were. I do not mean there ought to be a severe penalty, but I do not see anything which enabled them to treat this as a trifling offence nor to which they ought to have applied the wide power of sect. 16.

RIDLEY, J.—I quite agree with what my brother Kennedy has said, and he has so fully covered the ground that I do not think it necessary to add anything. *Case remitted to justices.*

Solicitors: *F. P. Sutthery*; *Toovey* for *Banks* and *Hooley*, Bury St. Edmunds.

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By rule 4 *of the Statutory Rules and Orders* 1904, *No.* 979: "*Cars propelled or drawn by mechanical means shall only be admitted* [*into Royal parks*] *subject to such regulations as may from time to time be passed by the Commissioners of His Majesty's Works and Public Buildings, and published by notice exhibited in the parks.*"

These rules were made under the Parks Regulation Act 1872, *and were duly laid before Parliament.*

The commissioners published a notice, which was posted at the park gates, that no car propelled or drawn by mechanical means was to be allowed to proceed at a greater pace than ten miles per hour. This notice was not laid before Parliament.

Held, that the regulation contained in this notice was good.

CASE stated on an information preferred against the appellant by the respondent for that he on the 23rd Jan. 1905 in a certain Royal park called the Green Park did unlawfully drive a certain motor-car at a greater speed than ten miles an hour contrary to the regulations made by the Commissioners of His Majesty's Works and Public Buildings on the 28th April 1904, and published by notice exhibited in the park, contrary to the Parks Regulation Act 1872.

Upon the hearing of the information the following facts were proved or admitted.

The appellant drove a carriage propelled by mechanical means known as a motor-car in the Green Park on the 23rd Jan. 1905 at a greater speed than ten miles an hour.

A notice was posted at the gates of the park, with the following heading, "Notice to drivers of motor-cars and cyclists," and it is set out below.

Neither the last-mentioned nor any copy of the same had been laid before the Houses of Parliament, or either of them; but rules for the Green Park in connection with the regulations prescribed by the Parks Regulation Act 1872, known as the Statutory Rules and Orders of 1904, No. 979, and dated the 28th April 1904, had been laid upon the table of both Houses of Parliament in pursuance of sect. 9 of the Act, and the last-mentioned notice contained a correct copy of regulations by the Commissioners of Works on the 28th April 1904 under the 4th statutory rule.

On behalf of the appellant it was contended (*a*) that no rule had ever been made under the Parks Regulation Act 1872 limiting the speed of a carriage propelled by mechanical means (a motor-car) to ten miles an hour in the said park or any park; (*b*) that any valid rule must be made under and by virtue of and in pursuance of sect. 9 of the Parks Regulation Act 1872; (*c*) that no other regulation could be made under the Act of Parliament except such as were set out in the 1st schedule thereto, and sect. 4 of the Act was referred to in support of this contention; (*d*) that the regulations purporting to impose a ten-mile speed limit were unauthorised, that the public had never had any proper notice of the intention of the commissioners to make or publish the same, that the public had no opportunity of of seeing such regulations either by themselves or their representatives in the House of Lords or Commons; that the Parks Regulation Act only authorised the making of "rules," and that there was no authority for making "regulations" of a penal nature under the Act of Parliament, and that there is no provision in the Parks Regulation Act 1872 for the prosecution of any person doing any act in contravention of the aforesaid regulations; (*e*) that the speed of motor-cars was dealt with by the Locomotives or Highways Act 1896 and the Motor Car Act of 1903, and that sect. 9 of latter Act made provision for a ten-mile limit to be placed on motor-cars under the conditions therein set forth when the Local Government Board, after inquiry in due and proper form were of opinion that it was desirable and necessary that such a limit should be placed upon the speed of motor-cars, and that if it were desired to place any limit on the speed of motor-cars in the Green Park the same should be done under this statute.

On behalf of the respondent it was contended that the provisions of the Parks Regulation Act 1872, and of the Statutory Rules and Orders 1904, No. 979, were sufficient authority for making and publishing the regulations and notice, that the regulations are valid.

The magistrate convicted the appellant.

The questions of law arising for the opinion of the court therefore were: (1) whether any valid regulations could be made under the Parks Regulation Acts 1872 save and except such as appear in the 1st schedule to the Act; (2) whether "Rules of the Park," made pursuant to sect. 9 of the Parks Regulation Act 1872, confer powers enabling the commissioners to make other valid rules and regulations; (3) whether any regulations so made by the commissioners can be enforced in view of the provisions of sect. 4 of the Act or otherwise; (4) and whether any rule so made by the commissioners can be made otherwise than in the manner prescribed in sect. 9 of the Act.

(*a*) Reported by W. DE B. HARBERT, Esq., Barrister-at-Law.

By the Parks Regulation Act 1872 (35 & 36 Vict. c. 15), s. 9:

Any rule made in pursuance of the 1st schedule to this Act shall be forthwith laid before both Houses of Parliament, if Parliament be sitting, or, if not, then within three weeks after the beginning of the then next ensuing session of Parliament, and if any such rules shall be disapproved of by either House of Parliament within one month after the same shall have been so laid before Parliament, such rules or such parts thereof as shall be disapproved of shall not be enforced.

The statutory rules and orders relating to the case were as follows:—

STATUTORY RULES AND ORDERS 1904, No. 979.

PARK.—ROYAL PARKS.—ST. JAMES'S AND THE GREEN PARKS.

Rules, dated the 25th April 1904, made by the Commissioners of Works for St. James's and the Green Parks in connection with the Regulations prescribed by the Parks Regulation Act 1872. (*a*)

1. No stage coach, omnibus, or hearse, no cart, waggon, dray, wheelbarrow, truck, or other vehicle for the conveyance of merchandise is allowed to enter. All other carriages are admitted.

2. No cattle, sheep, or pigs are allowed to enter, except for pasturage.

3. Carriages and horses are to enter and leave the park by the gates according to the notices affixed thereon. Drivers of all vehicles must conform to such orders for the regulation of traffic as may be given by the park keepers or published by notice exhibited in the parks

4. Carriages may use the Bird Cage Walk, Constitution Hill, and the direct roads between Buckingham Gate and Marlborough House Gate, and between Marlborough House Gate and Storey's Gate. Constitution Hill may, however, be closed for carriage traffic during the residence of His Majesty at Buckingham Palace, and at such other times as the commissioners may direct. Cycles, whether mechanically propelled or otherwise, and carriages, and cars propelled or drawn by mechanical means, shall only be admitted subject to such regulations as may from time to time be framed by the Commissioners of His Majesty's Works and Public Buildings, and published by notice exhibited in the parks. . . .

The notice posted at the gates of the park was as follows:—

ROYAL PARKS.

Notice to Drivers of Motor-cars and Cyclists.

Cycles, whether mechanically propelled or otherwise, and carriages and cars propelled or drawn by mechanical means, are admitted subject to the following regulations:—

1. Cycles, whether mechanically propelled or otherwise, and carriages and cars propelled or drawn by mechanical means, are allowed on all roads when open for carriage traffic.

2. No cycle, whether mechanically propelled or otherwise, or carriage or car propelled or drawn by mechanical means, is allowed to proceed at a greater pace than ten miles an hour, or so as in any manner to endanger or to be likely to endanger the safety, or so as to interfere with the convenience, of any person using the park.

3. No smoke or visible vapour shall be emitted from any cycle, carriage, or car propelled by mechanical means so as to in any manner to endanger or to be likely to endanger the safety, or so as to interfere with the convenience, of any person using the park.

4. Racing, unauthorised meets, plying for hire, the use of any part of the park for a standing place, riding or driving on the wrong side of the road, or driving two abreast, are forbidden.

5. No person shall drive or in any way use in the park a carriage or car propelled by mechanical means for the purpose of instructing, or of being instructed, in driving, managing, or repairing a carriage or car of this description.

Dated and sealed with the common seal of the Commissioners of His Majesty's Works and Public Buildings, the 28th April 1904.

[SEAL.] SCHOMBERG K. MCDONNELL, Secretary.

Any person doing any act in contravention of these regulations is liable to prosecution under the Parks Regulation Act 1872.

Avory, K.C. and *A. M. White* for the appellant. —The regulations made by the Commissioners of Works limiting the speed of motor-cars to ten miles an hour is *ultra vires*. All rules for the regulation of the parks must be made under sect. 9 of the Parks Regulation Act 1872, and, as this regulation as to speed has not been laid before Parliament, it is bad. By the Statutory Rules and Orders 1904, No. 979, the commissioners have made a rule purporting to give themselves statutory powers. By that rule they cannot overrule the section of the Act which says that the rules must be laid before Parliament. The speed of motor-cars is regulated by the Motor Car Act 1903. There has been no publication of the rule under the Rules Publication Act 1893 (56 & 57 Vict. c. 66), and it is therefore invalid, as it is not within the exception to that statute. They referred to

Bayley v. *Wilkinson*, 10 L. T. Rep. 543; 16 C. B. N. S. 161.

The *Solicitor-General* (Sir E. Carson, K.C.), *Bodkin*, and *G. B. Askwith*, for the respondent, were not called upon.

Lord ALVERSTONE, C.J. — I have not the slightest doubt on this point, and therefore it is not necessary to hear any further argument upon it. This question as to rules and regulations in parks has been a very thorny subject for a great many years, as those who have had to do with the regulations with regard to meetings very well remember, and I think that if the history of this matter be studied Mr. Avory will find the reason why all these details were inserted in the schedule was for the purpose of having what I may call certain specific matters to be dealt with by regulations. Among the regulations the commissioners are allowed to deal with are first: No person shall drive any vehicle in the park except in accordance with the rules, and that the rules of the park shall be deemed to be the rules made by the Commissioners of Her Majesty's Works from time to time. They are to be laid before Parliament under sect. 9 of this Act, and there is power of disapproval. The white paper document which is objected to was laid before Parliament, and all conditions of any statute relating to it were observed. Under the power contained in the white paper document, if I may use that expression—the statutory rules and orders—the commissioners have issued a notice to drivers of motor-cars under their seal. Therefore, every-

(*a*) These rules having been laid before both Houses of Parliament for one month were not disapproved.

thing has been done so far as form is concerned, but it is admitted that that notice, dated the 28th April 1904, with regard to the speed of motor cars was not itself put in the *Gazette*, and the question therefore is: Was it *ultra vires* of the commissioners to have issued that notice, and is the regulation which sanctioned the commissioners doing that in itself *ultra vires* so as to make the notice of none effect? Now, when we look at these rules which have been before Parliament, I really think it would be pressing technical points to an absurdity if we were to adopt this suggestion. It is perfectly plain that, dealing with this subject-matter, the circumstances from day to day are not the same; the conditions vary in the season, the conditions vary with public events, and the conditions vary with the necessity of allowing the public to have the fullest enjoyment of the parks subject to proper regulations. Although Mr. Avory, on behalf of his particular client, has fastened naturally and properly on the particular one to which he objects, it really is an objection which, if it is applied at all, goes to the root of these regulations having been sanctioned at all. It is important we should just look at it. If one looks at No. 3 it says: "Carriages and horses are to enter and leave the park by the gates according to to the notices affixed thereon." Now, there is nothing that is more important and has been more the subject of controversy than at what gates you should be allowed to drive in and out of the parks; therefore the particular gates, which are known, are not determined by the regulation itself, but by notices affixed thereon. Then: "Drivers of all vehicles must conform to such orders for the regulation of traffic as may be given by the park-keepers or published by notice exhibited in the parks." I will take it, as Mr. Avory said with regard to the orders given by park-keepers, it is something that may arise on the spur of the moment—some accident or some particular crowd, but "published by notice exhibited in the parks," must mean something that is to apply as long as the notice is in force. Then the commissioners have power to close Constitution-hill. I am not speaking of the time when His Majesty is in residence, but they have power to close Constitution-hill when they think right to do it. Then comes the regulation objected to: "Cars propelled or draw by mechanical means shall only be admitted subject to such regulations as may from time to time be framed by the Commissioners of His Majesty's Works and Public Buildings, and published by notice exhibited in the parks." I cannot conceive why, if it is right to allow notices to affect the gates and to affect the way in which traffic shall go, they shall not also affect the control of such a vehicle as a motor-car. Regulation 9 is: "Bath-chairs and perambulators are not allowed on any paths where they are prohibited by notices." That is a very thorny subject, as some who have had to do with the parks know. Then: "No chairs or other seats may be placed for hire except with the licence of the Commissioners of His Majesty's Works and Public Buildings, and subject to the terms and conditions of such licence." That is absolutely and entirely, of course, in the control of the commissioners. Then: "No performance or representation, either spoken or in dumb show, shall be given in any part of the parks, unless by permission of the Commissioners of His Majesty's Works and Public Buildings." Then there is a further one, regulation 18: "No person shall go on the ice, when this is prohibited by notice, or on any part thereof enclosed by order of the commissioners, except in accordance with such regulations as may from time to time be made by the commissioners in respect of the part so enclosed." All those powers dealing with private matters and public matters, and matters of wider public importance, in my judgment, than the particular speed at which a motor-car shall go, have been allowed by Parliament to be—not delegated in any improper sense, but to be controlled by the commissioners, because, as my brother Ridley pointed out, a detail of this kind cannot be worked out unless there are some such powers. Therefore the objection is not an objection to the regulations because this particular part of clause 4 has been inserted when it ought not to have been inserted; it is an objection taken by people who object to that particular regulation for the purposes of saying that it is *ultra vires* when there are a number of other rules or regulations which are open to the same objection. I for my part, if it is a reasonable and proper matter, should be very slow to say that, when Parliament has given its sanction and there has been the protection of objection by Parliamentary representatives to these rules if they are objected to, it could be said that a particular matter may be picked out and said to be *ultra vires* because it happens to be the particular thing which some person objects to. Now, no suggestion is made that the regulation or notice published is unreasonable or is improper in itself, or goes beyond what might have been written out at large in what I will call the statutory rules and regulations. Therefore it seems to me that the objection that rule 4, which sanctioned the commissioners making the regulations for motor-cars, is *ultra vires*, is not a good one. Then with regard to the last point taken, that the regulation with regard to speed was not itself published, that is only another form of taking the same point over again, because the statutory rules appearing on the white paper were published, and they contain the delegations of control to which I have already referred. Then, with regard to the other point which Mr. Avory took with reference to sect. 9 of the Motor Car Act, there being a power to limit speed by regulations of the Local Government Board with a view to the safety of the public, and sect. 20, which said that the Act should apply in the case of a roadway to which people were permitted access, it is said some argument may be deduced from the fact that people have been convicted under the Motor Car Act of going too fast in the park. I do not know whether they have or not, and I do not express any opinion that they may or may not be so convicted. All I say is it has nothing to do with the point before us. It is not a question whether it may be an offence under another statute, but whether the regulation that it may be made the subject of proceedings if broken is *ultra vires*. I am clear proceedings were properly taken under rule 4, and I am of opinion that the regulation sanctioned on the 28th April 1904, and laid before Parliament, was a perfectly good regulation, and that this conviction should be affirmed.

KENNEDY, J.—I am entirely and clearly of the same opinion, and wish to add nothing to what my Lord has said.

RIDLEY, J.—I am of the same opinion also, and I do not think I can usefully add anything to what my Lord has said.

Appeal dismissed.

Solicitors: *Firth* and *Co.*; *The Treasury Solicitor.*

CROWN CASES RESERVED.

Saturday, March 18, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY, LAWRANCE, PHILLIMORE, and CHANNELL, JJ.)

REX *v.* CHANDRA DHARMA; REX *v.* COURT; REX *v.* HUTCHINSON AND SLATER. (*a*).

Criminal law—Interpretation of statute—Repeal of limitation—Extension of period for prosecution—Retrospectiveness—Offence against child—Unlawful carnal knowledge—Criminal Law Amendment Act 1885—*Prevention of Cruelty to Children Act* 1904—48 *&* 49 *Vict. c.* 69, *s.* 5 (1); 4 *Edw.* 7, *c.* 15, *s.* 27.

An amendment by a subsequent statute of a period of limitation prescribed by a statute is retrospective, and applies to offences committed before the amending statute is in operation.

By the Criminal Law Amendment Act 1885 (48 *&* 49 *Vict. c.* 69), *s.* 5 (1), *it is provided that no prosecution shall be commenced for an offence under that sub-section (having unlawful carnal knowledge of a girl of or above the age of thirteen years and under the age of sixteen years) more than three months after the commission of the offence.*

By the Prevention of Cruelty to Children Act 1904 (4 *Edw.* 7, *c.* 15), *s.* 27, *it is enacted that the limit of time mentioned in the proviso to sect.* 5 (1) *of the Criminal Law Amendment Act* 1885 *shall be six months after the commission of the offence. The Prevention of Cruelty to Children Act* 1904 *came into operation on the* 1*st Oct.* 1904.

The prisoners were severally indicted for offences under the Criminal Law Amendment Act 1885, *s.* 5 (1), *committed before the* 1*st Oct* 1904, *and more than three months before the institution of the prosecution against them; and were convicted.*

Held, that the Prevention of Cruelty to Children Act 1904 *relates to past Acts as well as future, and that prosecutions could be instituted for offences committed before the Act came into operation, but within six months from the commencement of proceedings.*

CASES stated respectively by Channell, J.. Mr. Hammond Chambers, K.C. as a commissioner of assize, and Mr. J. A. Rentoul, K.C. as a commissioner of the Central Criminal Court. The point of law being the same in each case, the cases were heard together.

The prisoners had been convicted under sect. 5 (1) of the Criminal Law Amendment Act 1885 of having carnal knowledge of girls under the age of sixteen. Each of these offences had been committed more than three months before the commencement of the prosecution, and before the coming into operation of the Prevention of Cruelty to Children Act 1904.

By sect. 5 of the Criminal Law Amendment Act 1885 (48 & 49 Vict. c. 69) it is provided that no prosecution shall be commenced for an offence under sub-sect. 1 of the section more than three months after the commission of the offence.

By sect. 27 of the Prevention of Cruelty to Children Act 1904 it is enacted that the limit of time mentioned in the proviso to sect. 5 of the Criminal Law Amendment Act 1885 shall be six months after the commission of the offence.

The question for the opinion of the court was whether this extension of time applied to offences committed before the 1st Oct. 1904, the date on which the Prevention of Cruelty to Children Act 1904 came into operation.

Compton Smith (with him *C. W. Nicholson*) for Chandra Dharma.—The statute cannot be construed as extending the time during which a prosecution may be instituted for a past offence. The extension merely substitutes a period of six months for the period of three months in cases which may arise after the Act comes into operation. This is not a question of procedure, for the contention of the prosecution is that persons who had ceased to be liable under the Criminal Law Amendment Act 1885 before the coming into operation of the Prevention of Cruelty to Children Act 1904 became again liable to prosecution for the old offence. On principle, therefore, the Act ought not to be construed as being retrospective:

Michell v. *Brown*, 1 E. & E. 267;
Bacon's Maxims, r. 8.

If two interpretations are possible, the court will adopt that which is most favourable to the prisoner. He also referred to

Tuck v. *Priester*, 19 Q. B. Div. 629;
Reg. v. *Griffiths*, (1891) 2 Q. B. 145.

McCardie for Hutchinson and Slater.—A statute cannot be retrospective if it imposes a new disability:

Bourke v. *Nutt*, 70 L. T. Rep. 639; (1894) 1 Q. B. 725; 9 R. 395;
Maxwell on the Interpretation of Statutes, 3rd edit., pp. 298-9.

Here it is desired to construe the statute as imposing a liability on persons who were, when it came into operation, free from liability.

Gathorne Hardy (with him *Percival Hughes*) for Court—The provisions of the section do not deal with mere procedure, but contain a penal enactment. They should therefore be construed in favour of the prisoners.

Hutton and *H. F. Dickens*, for the Crown, were not called upon.

Lord ALVERSTONE, C.J.—We have none of us any doubt that the judgments in these cases were correct. I think that, as was stated in the House of Lords, the rule is clearly established that alterations in statutes are retrospective. I agree that this proposition is established in the case cited by Channell, J. (*The Ydun*, 81 L. T. Rep. 10; (1899) P. 236), and, if the action of a statute which shortens the period within which proceed-

(*a*) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

ings may be taken is retrospective, I see no reason why the action of a statute which lengthens that period should not also be retrospective. If a new right is given, or a new disability imposed, then, of course, the statute would not be retrospective. If it could fairly be argued that a new offence had been created or that the ingredients of the old offence were materially altered by the new statute, then I should consider that the statute was not retrospective. But here the offence is not altered; the only alteration effected by the statute is that the time within which a prosecution may be brought is extended.

KENNEDY, LAWRANCE, and PHILLIMORE, JJ. concurred.

CHANNELL, J.—I have only a few words to add as a mere verbal criticism of the judgment of the Lord Chief Justice. The view which I take is that a statute dealing with procedure applies to past Acts as well as future; it is not that the Act is retrospective.

Convictions affirmed.

Solicitors: *Rex* v. *Dharma*, *Coburn* and *Co.* and *Morton Phillips*; *Rex* v. *Court*, *Maugham*; *Kingsford*, *Dorman*, and *Co.*, for *Kingsford*, *Arrowsmith*, and *Co.*, Canterbury; *Rex* v. *Hutchinson* and *Rex* v. *Slater*, *Walker* and *Terry*, Belper.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

April 12 *and May* 12.

(Present: The Right Hons. Lords MACNAGHTEN, DAVEY, and ROBERTSON, and Sir FORD NORTH.)

BASTINGS AND OTHERS *v.* CALLAGHAN. (*a*)

ON APPEAL FROM THE SUPREME COURT OF NEW ZEALAND.

Law of New Zealand—Magistrates' Courts Act 1893 (56 *Vict. No.* 55)—*Jurisdiction of stipendiary magistrates.*

The effect of the Magistrates' Courts Act 1893 *is to abolish all separate local jurisdiction in the Magistrate's Court, and to make every stipendiary magistrate appointed under the Act a magistrate throughout the whole colony, and therefore any magistrate who receives in his official capacity a petition presented under the Alcoholic Liquors Sale Control Act Amendment Act* 1895, *and assumes the duty of dealing with it, has jurisdiction to act in the matter.*

Judgment of the court below reversed.

APPEAL from a judgment of a majority of the Court of Appeal of New Zealand, affirming a judgment of Williams, J. ordering a writ of prohibition to issue prohibiting Mr. Graham, a stipendiary magistrate at Port Chalmers, from proceeding to hear a petition presented under the Alcoholic Liquors Sale Control Act Amendment Act 1895 praying that the declaration of the result of a poll taken under the Act might be declared void.

The facts, and the Acts of Parliament upon which the question turned, appear sufficiently from the judgment of their Lordships.

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Haldane, K.C. and *H. Courthope Munroe* appeared for the appellants.

The respondent did not appear, and the appeal was heard *ex parte*.

At the conclusion of the arguments for the appellants, their Lordships took time to consider their judgment.

May 12.—Their Lordships' judgment was delivered by

Lord MACNAGHTEN.—The question raised on this appeal is whether Mr. Graham, a stipendiary magistrate within the colony of New Zealand, duly appointed under the Magistrates' Courts Act 1893, had jurisdiction to hear a petition in the matter of the Alcoholic Liquors Sale Control Act Amendment Act 1895, which was filed in the office of the Magistrate's Court, Port Chalmers. The question turns upon the construction of the Act of 1895, and involves the consideration of provisions of three other Acts, the Regulation of Local Elections Act 1876, the Act of 1893, and the Resident Magistrates Act 1867, which the Act of 1893 repealed. There was no appearance at their Lordship's Bar on behalf of the respondent. But, inasmuch as the question depends simply on the meaning and effect of certain statutory provisions, and as the arguments on the one side and on the other are presented very fully and ably by the learned judges in the Court of Appeal, who differed in opinion, their Lordships are at less disadvantage than usual in dealing with an appeal *ex parte*. By sect. 3 of the Act of 1895 it is provided that no licence shall be granted or renewed until the electors of the district shall have determined whether the number of licences in the district shall be continued or be reduced, or whether no licences shall be granted in the district. Then follow provisions for the taking of a licensing poll. By sect. 7 (1) (*o*) it is provided that if the result of any poll is disputed, any fifty electors may require an inquiry to be held in manner provided by sect. 48 and the subsequent sections of the Act of 1876, and that the matter in dispute shall be determined in the same manner, *mutatis mutandis*, as if the licensing poll were an electoral poll. By sect. 48 of the Act of 1876 it is provided that if within fourteen days after any election any six electors make and sign a declaration in the form set out in the 6th schedule to the Act and "file the same in any resident magistrate's court in the district in which such election took place, or if there is no such court in the district, then in the resident magistrate's court nearest thereto, the resident magistrate of such court shall hold an inquiry as to the matter alleged in such petition." On the 25th Nov. 1902 a licensing poll was taken in the electoral district of Chalmers. The result of the poll was declared to be that no licences should be granted in the said district. On the 9th Dec. 1902 the appellants and other electors of the electoral district of Chalmers, being above fifty in number, filed a petition in the office of the Magistrate's Court of Port Chalmers praying that the declaration of the result of the poll might be declared void. The petition was brought before Mr. Graham, who occasionally sits at Port Chalmers, though Mr. Carew usually sits there, while Mr. Graham is in the habit of presiding at Dunedin, which is outside the electoral district of Chalmers. Mr.

Graham was proceeding to deal with the application when the respondent, who is a storekeeper near Dunedin, and an elector of the electoral district of Chalmers, appeared by counsel and objected to the petition being heard by Mr. Graham on the ground that he had no jurisdiction in the matter, and that the jurisdiction was vested in Mr. Carew. On motion before the Supreme Court Williams, J. ordered that a writ of prohibition should issue out of the Supreme Court prohibiting Mr. Graham from proceeding to hear the petition. On appeal the judgment of Williams, J. was affirmed by the Court of Appeal (Stout, C.J., Connolly and Cooper, JJ.), Denniston and Edwards, JJ. dissenting. At the date when the Act of 1876 was passed there were in the colony of New Zealand resident magistrates appointed and holding office under the Act of 1867. By that Act the Government was authorised to constitute throughout the colony districts to be called resident magistrates' districts, and to appoint for each district a resident magistrate to exercise his office therein, who should hold courts in and for such districts at such time and places as should be deemed most convenient by the resident magistrate, or as should from time to time be appointed by the governor. The 19th section of the Act provided that the resident magistrate's court of any district should have jurisdiction only where the cause of action had arisen either wholly or in some material point within the district in which the action was brought, or the party sought to be charged was residing or carrying on business, or was served with the process of the court, within such district. The jurisdiction, therefore, of resident magistrates and resident magistrates' courts under this Act was purely local. The Act of 1867 was repealed by the Act of 1893, which contains the following provision in sect. 6: "Where in an unrepealed Act . . . reference is made to any Act repealed by this Act, or to any provisions thereof, or to any court, office, or officer established, constituted, or appointed under any Act hereby repealed, such reference shall be construed and shall operate as if made to this Act, or to the provisions of this Act corresponding to the provisions referred to, or to the court, office, or officer constituted or appointed under this Act." By the Act of 1893 the system in force under the Act of 1867 was entirely changed. Magistrates were no longer to be appointed or to hold office for particular districts. There were no longer to be separate courts with merely local jurisdiction. The very name of the office was altered. Instead of resident magistrates there were to be stipendiary magistrates appointed to hold office "within the colony." The magistrates' court was no longer a collection of separate courts. It was to be one court throughout the whole colony. There is no provision in the Act making one stipendiary magistrate subordinate to another. Apart from any question of "ordinary" or "extended jurisdiction" as provided for by the Act, all stipendiary magistrates are of equal rank and of equal authority. In this respect the magistrates' court has been assimilated to the Supreme Court. "Before the Supreme Court Act," as Denniston, J. observes, "the judges were appointed to specific districts in which alone they (except under special circumstances) had jurisdiction. In some cases two judges were appointed to the same district. In such case each judge would be the judge of such district. Under the Supreme Court Act 1882 these territorial appointments were abolished. Every judge is appointed and acts as judge in every court in the colony. In practice judges are in fact resident in and act in separate judicial districts. But this does not affect their jurisdiction or right to sit and act in any part of the colony. The Supreme Court judge who in practice takes, say, the Wanganui sitting is no more the judge of that court than is his colleague" The opinion of Edwards, J. is to the same effect: "Wherever there are two judges or two magistrates," says his Honour, "exercising the same jurisdiction in the same court and at the same places, the work of the court must of necessity be distributed by arrangement between then, but neither derives his jurisdiction from such arrangement nor is his jurisdiction limited by such arrangement. That jurisdiction depends entirely upon his appointment, and it is general. The sphere within which it is to be exercised is, in the case of magistrates, undoubtedly controlled in practice by departmental arrangements, but the jurisdiction is general. Any stipendiary magistrate who, as part of his official duty in accordance with departmental arrangements, from time to time as occasion requires exercises jurisdiction at any place is, in my opinion, one of the magistrates of the magistrate's court at that place." In these observations their Lordships concur. This view is sufficient for the determination of the present case, because Mr. Graham, as part of his official duty in accordance with departmental arrangements, does from time to time exercise jurisdiction at Port Chalmers, though he sits there less frequently than Mr. Carew. By arrangement with Mr. Carew, Mr. Graham has taken up this matter, and is apparently peculiarly qualified to deal with it, being chairman *ex officio* of the Licensing Committee of Chalmers under sect. 19 of the Act of 1895. Their Lordships, indeed, are prepared to go further. They think that as every magistrate is now a magistrate throughout the colony and all separate local jurisdiction has been abolished in the magistrate's court, a stipendiary magistrate who in his official capacity receives a petition presented under the Act of 1895 and assumes the duty of dealing with it has jurisdiction to Act. Their Lordships are therefore of opinion that the appeal should be allowed. And they will humbly advise His Majesty to allow the appeal and dismiss the action with costs in the Supreme Court and Court of Appeal. The respondent must pay the costs of this appeal.

Solicitors for the appellants, *Long* and *Gardiner*.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, May 23, 1905.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

IMPERIAL AND GRAND HOTELS COMPANY LIMITED (appls.) *v.* CHRISTCHURCH UNION (respts.). (*a*)

ON APPEAL FROM THE KING'S BENCH DIVISION.

Rating — Poor rate — Appeal — Objection before assessment committee—Appeal to next quarter sessions after hearing by committee—All steps taken within current year—"Next practicable sessions"—Poor Relief Act 1743 (17 *Geo.* 2, *c.* 38), *s.* 4 — *Union Assessment Committee Amendment Act* 1864 (27 *& 28 Vict. c.* 39), *s.* 1.

By sect. 4 *of the Poor Relief Act* 1743 *a person aggrieved by any rate may appeal to the "next general or quarter sessions"; and by sect* 1 *of the Union Assessment Committee Amendment Act* 1864 *no person can appeal to any sessions against a poor rate unless he has given notice of objection—which might be given "at any time"—to the assessment committee against the valuation list, and has failed to obtain relief.*

A poor rate was made for the ensuing twelve months, payable in two instalments. A ratepayer, after two meetings of the assessment committee had been held, and after payment of the first instalment of the rate, gave to the assessment committee notice of objection to the valuation list, which objection was heard by the committee at their next meeting. The ratepayer appealed to the quarter sessions next after such hearing by the assessment committee, two courts of quarter sessions having previously been held since the making of the rate. Objection was taken that the appeal was out of time, as the appeal was not to the "next quarter sessions." The quarter sessions overruled the objection, heard the appeal, and reduced the assessment.

The objection to the assessment committee had been lodged and determined and the appeal to quarter sessions brought within the period of the current rate appealed against.

Held, that the quarter sessions had jurisdiction to hear the appeal.

Judgment of the Divisional Court (91 *L. T. Rep.* 691) *affirmed.*

CASE stated by Recorder of Bournemouth.

At the quarter sessions for the borough, on the 2nd Jan. 1904, the appellants appealed against a rate made by the overseers of the parish, the appellants having objected to the valuation list before a meeting of the assessment committee held on the 12th Nov. 1903 and failed to obtain relief thereat, as required by sect. 1 of the Union Assessment Committee Amendment Act 1864.

When the appeal was called on for hearing, counsel for the respondents objected that the recorder had no jurisdiction to hear the appeal, inasmuch as the appellants had not appealed to the next quarter sessions for the borough, as required by sect. 4 of the Poor Relief Act 1743.

The rate was made on the 21st April 1903, to provide for expenses to be incurred before the 31st March 1904, payable by two equal instalments on the 1st May and on the 1st Nov. 1903.

The assessment committee of the union held meetings for the purpose of hearing objections to the valuation list on the 15th May, the 13th Aug., and the 12th Nov. 1903, and quarter sessions were held on the 27th June and the 27th Oct.

The appellants first gave notice of objection to the valuation list, on which the rate was based, on the 26th Oct. 1903, and this objection was heard and determined by the assessment committee on the 12th Nov. 1903.

The appellants on the 5th Dec. 1903 gave notice of appeal to the quarter sessions to be held on the 2nd Jan. 1904. The appellants had paid the first instalment of the rate, payable on the 1st May 1903, in Aug. 1903, before they gave the notice of objection to the valuation list.

The recorder overruled the objection, being of opinion that the appeal was made to the next quarter sessions within the meaning of the Poor Relief Act 1743, s. 4, and the Union Assessment Committee Amendment Act 1864, s. 1.

Having heard the appeal on the merits on the 2nd Jan. 1904, the recorder delivered judgment in favour of the appellants, and ordered that the gross estimated rentals should be reduced, but, inasmuch as the appellants had not taken steps, as they might have done, to appeal against the rate at an earlier date, he ordered that the alteration of the assessment should only operate in respect of the second instalment of the rate, and refused to order that the excess paid by the appellants in respect of the first instalment should be refunded to them.

It was contended for the appellants that the proviso to sect. 1 of the Act of 1864, which makes it a condition precedent to an appeal that an appellant should have given notice of objection to the assessment committee and should have failed to obtain relief, had not affected the duty of an appellant under sect. 4 of the Act of 1743 to appeal to the next practicable sessions after the rate, and that the appellants had not done so.

It was held by the Divisional Court (Lord Alverstone, C.J., Kennedy and Ridley, JJ.) that the appellants had brought their appeal in time (91 L. T. Rep. 691).

Sect. 4 of the Poor Relief Act 1743 (17 Geo. 2, c. 38) provides:

In case any person or persons shall find him, her, or themselves aggrieved by any rate or assessment made for the relief of the poor or shall have any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any person or persons therein, or shall have any material objection to such account as aforesaid, or any part thereof, or shall find him, her, or themselves aggrieved by any neglect, act, or thing done or omitted by the churchwardens and overseers of the poor or by any of His Majesty's justices of the peace, it shall and may be lawful for such person or persons in any of the cases aforesaid giving reasonable notice to the churchwardens or overseers of the poor of the parish, township, or place to appeal to the next general or quarter sessions of the peace for the county, riding, division, corporation, or franchise where such parish, township, or place lies, and the justices of the peace there assembled are hereby authorised and required to receive such appeal and to hear and finally determine the same;

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

but if it shall appear to the said justices that reasonable notice was not given then they shall adjourn the said appeal to the next quarter sessions and then and there finally hear and determine the same.

Sect. 2 of the Union Assessment Committee Act 1862 (25 & 26 Vict. c. 103) provided that the board of guardians in every union should at their first meeeing appoint from among themselves an assessment committee of the union, and by sect. 18 any person who might feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein might at time after the deposit of such list and before the expiration of twenty-eight days after the notice of such deposit of the list give to the committee a notice in writing of his objection specifying the grounds thereof, and by sect. 19 the committee were to hold meetings to hear such objections.

Sect. 1 of the Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39) provides:

Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act 1862 applies the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal and the grounds thereof to the assessment committee of such union: Provided that after the 1st day of August next no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear with full power to call for and amend such list, although the same has been approved of and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment of the overseers, who shall thereupon alter their then current rate accordingly.

W. C. Ryde and *P. M. Francke* for the Christchurch Union.—By sect. 4 of the Poor Relief Act 1743, a person aggrieved by a poor rate may appeal to the next general or quarter sessions, and that has been decided to mean the next practicable sessions. The Union Assessment Committee Amendment Act 1864 makes it a condition precedent to the right of appeal to sessions that notice of objection should be given to the assessment committee, and no relief should have been obtained from them. In this case there were two meetings of the assessment committee and one sessions before the notice of objection. An appellant must use expedition in going to the assessment committee, and he cannot make by his own laches a sessions impracticable which would otherwise have been practicable. They referred to

Reg. v. *Sevenoaks*, 7 Q. B. 136; 68 R. R. 423;
Reg. v. *West Riding Justices*, 31 L. T. Rep. O. S. 232; E. B. & E. 713;
Liverpool Gas Company v. *Everton*, L. Rep. 6 C. P. 414; s.c. *Reg.* v. *Recorder of Liverpool*, 23 L. T. Rep. 813;
Reg. v. *Wiltshire Justices*, 40 L. T. Rep. 681; 4 Q. B. Div. 326;
Reg. v. *Great Western Railway*, 38 J. P. 822;
Reg. v. *Biggleswade Union*, 21 L. T. Rep. 494.

Clavell Salter, K.C. and *Haydon*, for the hotel company, were not called upon to argue.

COLLINS, M.R.—This is an appeal from the judgment of the Divisional Court on this point affirming the decision of the learned recorder, and the question is whether the party appealing has brought his appeal in time; and that turns upon the provisions of the statutes, going back to the first one in point—that is, 17 Geo. 2, c. 38. That, by sect. 4, obliges the person aggrieved to appeal to the next general or quarter sessions of the peace, and it is a condition that he gives reasonable notice. "It shall and may be lawful for such person or persons in any of the cases aforesaid, giving reasonable notice to the churchwardens or overseers of the poor of the parish, &c., to appeal to the next general or quarter sessions of the peace for the county." That was construed, necessarily it seems to me, having regard to the fact that some notice has to be given, as meaning the next practicable sessions. That is how the law stood up to the year 1862, and in the year 1862 a provision was introduced whereby it was made competent to the person aggrieved to go before the assessment committee; by the 18th section thereof any overseer or overseers or any person who may feel himself aggrieved by any valuation list on the ground, &c., &c, may at any time after the deposit as aforesaid of such list, and before the expiration of twenty-eight days after the notice of the deposit aforesaid, give the commissioners and overseers notice in writing specifying the ground, &c., of any objection. That proceeding under this Act was optional and was not compulsory. Then came the Act which is now the most material, the Act of two years later, of 1864. That made it no longer optional, but compulsory to go before the assessment committee. Sect. 1 is the most material section. "Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act 1862 applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof to the assessment committee of such union: Provided that after the 1st day of Aug. next no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly." The result of that is that taking the provisions of the Act of George II., which in itself involved a reasonable notice before the appeal to quarter sessions could be heard, but still enacted in terms that the appeal must be brought at the next sessions, with the qualification that though it must be brought at the

next sessions it must be brought after a reasonable notice, which might involve the impossibility of being brought at the actual next sessions, there was introduced by these later Acts I have mentioned two fresh conditions, one, that before going to the quarter sessions at all the aggrieved party should go before the assessment committee and, the other, that he should go before the assessment committee with a given notice—a notice of twenty-one days. Therefore we have two more conditions interposed, we had only reasonable notice before, and an optional right to go before the assessment committee; we have now a compulsory application to the assessment committee based upon a notice of twenty-one days, and still further it provides "which objection after notice given at any time in manner prescribed by the said Act the committee shall hear." So that in point of fact these conditions precedent are interposed before the right and the obligation to give notice to the quarter sessions arises; therefore I do not think we can measure the question whether there has been a failure to go to the next quarter sessions, with these modifications introduced, without seeing whether the conditions precedent have been performed or not, and those conditions precedent it seems to me are performed if they are performed according to the conditions laid down by the legislation which imposes them; and the condition precedent of going before the assessment committee is in terms conditioned in the Act which imposes an only limit by the words "notice at any time," so that the person fulfils these conditions precedent before his obligation to give notice to the quarter sessions, it seems to me, if he avails himself of the latitude which they have given him of giving his notice to the assessment committee at any time. It is said some limitation must be put on those words, and it would seem as a matter of reasonable common sense that some limitation must be imposed. It seems to me impossible to lay down any interpretation of what that rule must be, and it seems to me in this case at all events that limitation, if one could formulate it, was not exceeded; the application was made at all events during the time that the rate these appellants were interested in was actually current. The earlier half had no doubt been paid, but as to the second half it was actually current at the time the notice was given, and having the latitude which is conferred by the terms of the section imposing the condition it seems to me that there was no default in giving the notice to the assessment committee, and from the time that was done there has been no suggestion of any delay. Further, they went to the next practicable quarter sessions after the decision of the assessment committee. I agree, therefore, with the decision of the Divisional Court that the learned recorder was right in holding that he had jurisdiction. In my judgment, therefore, this appeal must be dismissed.

Mathew, L.J.—I am of the same opinion. It is clearly a condition precedent to calling on the quarter sessions to exercise its appellate jurisdiction that there shall have been a decision of the assessment committee, and, when we turn to the terms upon which that decision of the assessment committee may be invoked, we find that the appellant has power at any time to offer his objection to the rate; then, when the assessment committee has dealt with that and pronounced an opinion upon it, for the first time the appellant is in a position to go to the quarter sessions. The effect of the argument that Mr. Ryde addressed to us, which certainly was a very able one, was that the assessment committee ought not to have entertained this objection because there had been laches and delay. If they had done so they would have been departing from the language of the Act of Parliament, which gives the appellant the right at any time to urge an objection for their consideration. That being so, the appellant clearly comes within his right. But then it is said that "at any time" must receive some reasonable construction. I quite agree, and when the time comes it may be very desirable that the court should say whether or not "at any time" means "at any reasonable time"; and, in deciding what a reasonable time may be, it will, perhaps, be very desirable that those objections that Mr. Ryde has urged as objections, which might possibly arise in some future case, should be entertained by the quarter sessions. That is not the case here. There must be a compliance with the terms of sect. 1 of the Act of 1864, and there is no reasonable suggestion that the compliance here has not been sufficient. I also agree that, in considering what is reasonable and what is not, it might be desirable to see what the facts of the particular case may be. No evidence of any sort was given here. I see no reason for not giving the appellant the full benefit of the language of the Act of 1864. I think therefore the appeal must be dismissed.

Cozens-Hardy, L.J.—I am of the same opinion. Mr. Ryde's very able argument would have deserved much weighty attention if it had been addressed to a body who could legislate, but that, however, is not our function. In substance what he really asks us to do is to insert in that sect. 1 of the Act of 1864 words to this effect: "That any ratepayer shall not appeal to quarter sessions unless he shall have given to such committee for their next practicable meeting a notice of objection." I must say I fail to see any justification for inserting words like that in the language of this section. I think that the assessment committee, under the express language of that section, are not tied down to any such next meeting, but that, in other words, they had jurisdiction if they thought fit on the application of the present respondents during the currency of the rate to allow the objection which the respondents made. If the committee had power to deal with it, it seems to me very easy, and an almost inevitable step to hold, that it was an application which the ratepayer was justified in making when he did, making it, moreover, as a necessary step to enable him to appeal to the quarter sessions. It is only necessary to say that I desire to express no opinion on the point as to what might happen in an extreme case which Mr. Ryde has put. In the present case, I see no ground for differing from the view of the Divisional Court, which is that the learned recorder had ample jurisdiction to deal with the matter when it came before him.

Appeal dismissed.

Solicitors: *Lovell, Son,* and *Pitfield,* for *Druitt* and *Druitt,* Christchurch; *C. F. Ingram,* for *C. Lacey,* Bournemouth.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

May 3, 4, 5, *and* 11, 1905.

(Before BUCKLEY, J.)

MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF SWANSEA *v.* NATIONAL TELEPHONE COMPANY LIMITED. (*a*)

Telephone—Rival systems in same exchange area — Intercommunication — Proper facilities — Telegraph Act 1899 (62 & 63 *Vict. c.* 38), *s.* 3, *sub-s.* 1, 4, 5.

The 3rd section of the Telegraph Act 1899 *provides that where a company have before the passing of the Act, under licence from the Postmaster-General, provided a system of public telephonic communication in any exchange area, and it is proposed to grant another licence to the local authority or to another company to provide public telephonic communication in the same area. Then subject to certain conditions being complied with sub-sect.* 1 *confers benefits in respect of underground wires, and sub-sect.* 2 *a benefit by way of extension of the term of its licence upon the existing company, sub-sect.* 5 *confers a benefit upon the new company, and provides that if the licence of the existing company is under the Act extended for a certain time the new licensee can require the existing company under circumstances and on terms and conditions to be laid down by an order of the Postmaster-General, to afford all proper facilities for the transmission of telephonic messages between persons using the system of the existing company and persons using the system of the new licensee, provided that the new licensees so requiring intercommunication shall in such case afford similar facilities.*

The Telegraph (Telephonic Inter-communication) Order 1899 *provides* (*art.* 1) *that the new licensee must have a certain number of subscribers before it can demand inter-communication*; (*art.* 4) *that certain terminal charges may be made by the old company and the new licensee respectively*; (*art.* 5) *that the new licensee, who requests the facilities, shall satisfy the Postmaster-General that he has complied with art.* 1.

The N. T. Company had before Sept. 1902 *established a system of public telephonic communication in the S. area. Under the Telegraph Act* 1899 *the Postmaster-General granted a licence to the S. Corporation over the same area, and extended the then existing licence of the company for a period such as to call sect.* 3, *sub-sect.* 5, *into operation.*

The corporation established and opened their system, and made a request for inter-communication within sect. 3, *sub-sect.* 5, *having at that time the number of subscribers required to satisfy art.* 1 *of the order.*

The company refused to allow the corporation to connect with their system, unless they provided junction circuits to directly connect their exchange, both with its central exchange and also with each of its subsidiary exchanges within the area.

Held, that proper facilities within the meaning of sect. 3, *sub-sect.* 5, *of the Telegraph Act* 1899 *were facilities for using all the several component parts of the system, and that the object of the Act was that the customer of each company should use the trunk line of the other company.*

Held, also, that the defendants had improperly refused to give such proper facilities.

WITNESS ACTION.

The plaintiffs in this action were the corporation of Swansea, who, under a licence from the Postmaster-General, constructed, after the passing of the Telegraph Act 1899, a telephonic system in the borough of Swansea.

The defendants were the National Telephone Company Limited, who, also under a licence from the Postmaster-General, had a telephonic system in the borough established prior to the passing of the Act.

Under sect. 3 of the Telegraph Act 1899 and an order of the Postmaster-General made under it, the plaintiffs, on the 1st Jan. 1904 required the defendants to allow them to connect their telephone system with the existing system of the company at Swansea.

The defendants refused to allow them on the ground that the corporation must connect their system with all the company's subsidiary exchanges within the area.

The Telegraph Act 1899 provides:

Sect. 3. (1) Where an existing company have before the passing of this Act, under a licence from the Postmaster-General, provided a system of public telephonic communication in any exchange area, and it is proposed to grant a new licence to a local authority or to another company to provide public telephonic communication in the same exchange area, or any part thereof, then if the existing company consents to it being made a condition of their licence—(*a*) that they will not give favour or preference to any person whomsoever within the area specified in the new licence, and will not, within that area, as a condition of giving a service, require from any person the grant of any facility except for the purpose of supplying telephonic communication to that person; and (*b*) that their charges shall not, within the area specified in the new licence, exceed the maximum rates or fall below the minimum rates authorised in that behalf by the Postmaster-General within that area—it shall be a condition of the grant of the new licence that where it is proved to the satisfaction of the Postmaster-General that the existing company have incurred or contracted to incur, in the area specified in the new licence, material expenditure in laying down underground wires and have by agreement with any local authority within the area acquired powers for that purpose, those powers shall continue for the period specified in the new licence for the duration thereof, but, subject as aforesaid on the terms and conditions specified in the agreement (. . .) except so far as they may be varied by any subsequent agreement with the local authority. (4) Where a local authority or a new company, under a licence from the Postmaster-General, provides a system of public telephonic communication in the whole or any part of an exchange area in competition with an existing company licensed by the Postmaster-General before the passing of this Act, then if the existing company consent to it being made a condition of their licence—(*a*) that they will not give favour or preference to any person whomsoever within the whole of the exchange area in question, and will not within that exchange area as a condition of giving a service require from any person the grant of any

(*a*) Reported by W. HUNTER BOND, Esq., Barrister-at-Law.

facility except for the purpose of supplying telephonic communication to that person; and (*b*) that their charges shall not within the whole of the exchange area in question exceed the maximum rates and (when the company are empowered by agreement with the local authority to lay underground wires) shall not fall below the minimum rates authorised in that behalf by the Postmaster-General within the area specified in the new licence—the licence of the existing company shall within the whole of the exchange area in question be extended and continue for the period specified in the new licence of the local authority or new company for the duration of such new licence, but except as varied by this Act, the provisions of the licence of the existing company (. . .) shall remain in force. (5) If the licence of an existing company is under the provisions of this section extended in respect of any exchange area for a period of not less than eight years beyond the term existing at the passing of this Act, the company shall at the request of any other licensee of the Postmaster-General providing public telephonic communication in the whole or any part of that exchange area and under such circumstances and on such terms and conditions as may, within six months from the passing of this Act, be prescribed by an order of the Postmaster-General made with the approval of the Treasury, afford all proper facilities for the transmission of telephonic messages between persons using the system of the company . . . and persons using the system of such other licensee, provided that the licensee so requiring inter-communication shall in such case afford similar facilities.

The Telegraph (Telephonic Inter-communication) Order 1899 provides:

Art. 1. When the subscribers of the new licensee at the date when inter-communication is requested equal or exceed in number one-fourth of those of the company at that date in the area specified in the new licence or number 500, whichever first happens, but not before, mutual inter-communication shall be afforded by the company and the new licensee between their respective subscribers and other persons using their respective systems in the area specified in the new licence only. Such inter-communication as aforesaid is hereinafter referred to as "restricted inter-communication."

Art. 4. The company and the new licensee may make terminal charges not exceeding the following:—In the case of restricted inter-communication: (*a*) When the subscribers of the new licensee at the date when inter-communication is requested number 500, but are less than one-fourth in number of the company's subscribers at that date in the area specified in the new licence, 1½*d.* per call. (*b*) When the subscribers of the new licensee equal or exceed in number one-fourth (but do not exceed in number one-half) of the company's subscribers for the time being in the area specified in the new licence, 1*d.* per call. (*c*) When the subscribers of the new licensee equal or exceed in number one-half of the company's subscribers for the time being in the area specified in the new licence, nil.

Art. 5. Any new licensee requesting facilities for inter-communication shall satisfy the Postmaster-General that such licensee possesses the required number of *bonâ fide* subscribers actually working.

Art. 7. The term "subscriber" means any person with whom the company or the new licensee (as the case may be) has entered into an agreement for at least one year, for the purpose of enabling such person to communicate from time to time with other persons through the medium of an exchange, and does not include persons using call offices on an exchange.

The plaintiffs by their statement of claim sought:

1. A declaration that, under or by virtue of sect. 3, sub-sect. 5, of the Telegraph Act 1899, and an order of the Postmaster-General made under it, and in the events which had happened, the plaintiffs were entitled to be afforded by the defendants all proper facilities for "restricted intercommunication" within the meaning of the said order between the respective telephonic systems of the plaintiffs and defendants, and that the defendants were bound to connect the telephonic junction lines which had been laid by the plaintiffs with the central switchboard in the defendant's telephone exchange in the borough of Swansea, and by means of such connection to afford to the subscribers of the plaintiffs the same facilities for such intercommunication as were thereby given by the plaintiffs to the defendants' subscribers.

2. To have it determined what further works ought to be done, and by whom, for securing intercommunication between the respective telephone systems of the plaintiffs and defendants as contemplated by sub-sect. 5, of sect. 3, of the Act of 1899 and the order, and how the costs of all works done or to be done for securing such intercommunications ought to be borne.

The facts are fully set out in the judgment.

Buckmaster K.C. and *R. J. Parker* for the plaintiffs.—The defendant company have had a telephone system under licence from the Postmaster-General since 1884. But it is not an exclusive licence. The Telegraph Act 1899 was passed with the object of defining the conditions upon which subsequent licensees should be admitted, and the obligations that existing companies would be under when subsequent licences were granted. Sect. 3 of the Act conferred a benefit (subject to certain conditions) upon the defendants by extending their licence, and sub-sect. 5 provides that if their licence is extended they must give "proper facilities" for intercommunication to the new licensee under such circumstances as are prescribed by the Postmaster-General's order. The defendants have put every obstacle in our way, and have tried to prevent our obtaining the rights which this statue confers upon us for establishing intercommunication. The only thing that is necessary for the purpose of putting the two systems into intercommunication within the meaning of the Act, is to connect the two central exchanges at Swansea; but the defendants refuse to do that, and say that the corporation are bound to connect their central exchange with each of their sub-exchanges. The statute says nothing of the sort, but that there are to be equal intercommunication facilities given between the two systems. If the corporation complied with the defendants' request they would be establishing in effect, subject to the question of the exchanges, an entirely new system for themselves. The object of the Act and of the order, beyond doubt, as I submit, is this, that where you have got two rival systems working together in one area, it should be possible to connect the two systems up together and put them under such circumstances that each subscriber on each system will have the same facilities as a subscriber on the other system, and certainly there is nothing whatever in the Act to say that even if some delay might in the first instance arise from its being done, that that will entitle the party who is requested to afford facilities to deny facilities. The corporation have laid a cable to a manhole opposite the

defendants' main exchange for the purpose of connecting the two central exchanges, and they are prepared to connect the two sub-exchanges at Mumbles and at Morriston. The consideration for this intercommunication is that the company's licence has been extended; they get good consideration for it, although there it a possibility of inconvenience to the subscribers. Now, take the subscriber's benefit, he can communicate with double the number of people, although he cannot do it quite so rapidly. I submit that the only question is what are the "proper facilities" which put the users of the one system into communication with the users of the other system. The obvious simple way to do this is to connect the central exchanges. With regard to the construction of the Act and the order, I agree that it is in a sense unfortunate that no provision is made in the order for ascertaining what is to be done and at whose expense. One would expect that it would be referred to somebody in case of dispute. Now, in case of dispute like this, as to what is a "proper facility" or what are reasonable facilities I submit that the only way to determine it under the circumstances is by coming to the court.

Astbury, K.C., *Danckwerts*, K.C., and *H. H. Gaine* for the defendants.—This case has been opened as if the National Telephone Company had obstructed the right to inter-communication, that is not the case. The first duty of the company is to their subscribers, and they are merely guarding the interests of such subscribers. The courts have laid down the principle that when the construction of an Act of this kind comes before the court, the court will assume that the Legislature was fully informed as to the tecnicalities and difficulties of the system with which it is going to deal. Now, making that assumption, this Act contemplates several matters, the first is that it shall be in the power of the Postmaster-General within six months to lay down conditions upon which the inter-communication shall be brought about. If he does not lay down those conditions then inter-communication can only be brought about by agreement between the parties. [BUCKLEY, J.—There is a statutory right to inter-communication; you cannot have a statutory right to something that has to be agreed upon.] The court has no jurisdiction to lay down terms and conditions, either they must be agreed upon, or else the parties must go to the court, not for the court to lay down terms and conditions, but to say whether the "proper facilities" offered by the existing company are a breach of the Act. If the existing company refuse "proper facilities" then the court can grant a *mandamus* to order them to assent to inter-communication. The whole of the jurisdiction of this court flows from sect. 5. There is no jurisdiction to prescribe terms and conditions, all the company has to do is to afford "proper facilities"; the court cannot order the company to do a particular thing it can only say whether that which they offer is reasonable or not:

South-Eastern Railway Company v. *Railway Commissioners*, (1881) 44 L. T. Rep. 203; 6 Q. B. Div. 586;

Browne and Theobald, 3rd edit., p. 405.

In order to construe an Act of Parliament one must construe it according as it stood at the moment it was passed. And in arriving at what are "facilities" it must be borne in mind what was the nature of telephonic communication, and how it was afforded in 1899:

Gas Light and Coke Company v. *South Metropolitan Gas Company*, (1889) 62 L. T. Rep. 126.

The Postmaster-General may have not made an effective order on purpose, as, if the parties cannot agree there will never be an effective service. "Affording facilities for transmission" is an act that must be done from day to day and year to year. The court has never ordered anything which involves doing something from day to day for an indefinite period:

Powell Duffryn Steam Coal Company v. *Taff Vale Railway Company*, (1874) 30 L. T. Rep. 208; L. Rep. 9 Ch. App. 331, approved in the Court of Appeal in *Ryan* v. *Mutual Tontine Westminster Chambers Association*, 67 L. T. Rep. 820; (1893) 1 Ch. 116.

They also referred to

National Telephone Company Limited v. *Kingston-upon-Hull Corporation*, 89 L. T. Rep. 291.

Buckmaster, K.C. replied.

BUCKLEY, J.—In my judgment the defendants are wrong, and the plaintiffs are entitled to relief. I cannot at present formulate the exact form of relief to which I think they are entitled. This case is, I am told, the first under this Act of Parliament, and it is of considerable importance, no doubt, to both parties. I shall put my judgment into writing in order to express as clearly as lies in my power the view which I take of the proper construction of this Act of Parliament.

Cur. adv. vult.

May 11.—BUCKLEY, J.—This, I am told, is the first case in which application has been made to the court to construe or enforce the Telegraph Act 1899, with reference to intercommunication between competing telephonic systems within the same area. As the matter is one of considerable public importance, I reserved my judgment with a view to expressing as clearly as I am able the view which I take of the Act and of the remedies available for its enforcement. The 3rd section of the Telegraph Act 1899 contemplates a state of circumstances in which an existing company, enjoying a non-exclusive licence from the Postmaster-General, has provided a system of public telephonic communication in an exchange area, and it is proposed to grant another licence to the local authority, or to another company, to provide public telephonic communication in the same area. Subject to certain conditions being complied with, sub-sects. 1 and 4 give the existing company certain benefits, the former a benefit in respect of underground wires, and the latter a benefit by way of extension of the term of its existing licence. Then follows sub-sect. 5, upon which the question in this action arises. It is a sub-section in favour of the new licensee. It provides that if the licence of the existing company is, under the Act, extended for a certain substantial time (not less than eight years), the new licensee shall have the benefit of a certain option. The new licensee can, by request addressed to the existing company, require the existing company to afford all proper facilities for the transmission of telephonic messages between persons using the system of the existing company and persons using the system of

the new licensee, provided that the new licensee so requiring intercommunication shall in such case afford similar facilities. The sub-section provides that these facilities shall be afforded under such circumstances, and on such terms and conditions as may within six months from the passing of the Act be prescribed by an order of the Postmaster-General. It is obvious that, if a right to intercommunication arises, many questions may present themselves as to the terms which may be fair as between the existing company and the new licensee in the matter. I may instance the following: First, the question as to how the expenses of connecting the two systems are to be borne between the two companies, or by one and which of them; secondly, the question who is to do the work of making the connections, whether each company can call on the other to do the necessary work on its own land, or can without trespass go upon the land of the other party for the purpose of doing the work itself; thirdly, the question whether, as between the two undertakings, the one ought to make to the other any and what payment for the advantages arising from intercommunication to their respective customers. The one undertaking might be of extensive mileage, with a large number of exchanges, having a complicated reticulation of junctions between them, and a large staff of clerks. The other might be of very small dimensions in all these respects. It is not self-evident that intercommunication would in justice be given without providing for a payment to be made by the one undertaking to the other. As to all this and other like matters which might be suggested the Act is silent. If they are to be provided for, it must be by the order which the Postmaster-General had power to make. It was, I think, competent to him to have dealt with all these under the words "terms and conditions." He might probably have dealt with other matters under the words "under such circumstances." The defendants argued that under one or other of those expressions the Postmaster-General could have done more, and could have determined what are proper facilities, and that he ought to have done so, and, further (for the argument was actually carried to this length), that, inasmuch as he has not done so, I cannot determine, and no authority can determine, what are proper facilities, and that the parties must agree amongst themselves as to what they are, and, failing agreement, the Act breaks down. I do not accede to the argument or any part of it. The Postmaster-General could by his order determine the circumstances under which, and the terms and conditions upon which, proper facilities shall be afforded. But the Act does not remit it to him to say what proper facilities are, and the statutory right cannot be a right to that which the parties agree. That is equivalent to saying that there is no statutory right, for either party could in that case defeat the statute by refusing to agree. Within the six months the Postmaster-General did make an order within the Act of Parliament. Its effect, for any purpose relevant to the matter before me, is only this, that by art. 1 it provided that the new licensee must have a certain number of subscribers before it could demand intercommunication, and by art. 4 provided for certain terminal charges which might be made by the old company and the new licensee respectively, and by art. 5 that the new licensee who requested the facilities should satisfy the Postmaster-General that he had complied with art. 1. The order did not deal in any way with any of the questions which I have said above would seem to require adjustment as between the two undertakings. A system of public telephonic communication comprises and includes, I think, at least the following factors: First, one or more exchanges, at which by means of switchboards any particular subscriber can be put into communication with any other subscriber; secondly, where there is more than one exchange, junction or trunk lines running between the exchanges; thirdly, a staff of persons at each exchange to control the switchboards and make the communications; and, fourthly, separate lines from what is called a station (that is to say, a customer's residence or place of business) to the exchange which is nearest to that place. The proper facilities mentioned in sub-sect. 5 are facilities for the transmission of telephonic messages between the customers using the one sysem and the customers using the other system, and those must be, I think, proper facilities for using all such of the several component parts of the system, which I have described, as are in a proper course of the business appropriate for the transmission of the messages. If intercommunication is established, then the customer of company A is to have proper facilities for using all those parts of the system of company B which are appropriate for the purpose of communicating telephonically with the customer of company B. It is singular, no doubt, that if undertaking A be a large one, with extensive mileage, a number of exchanges, a large staff employed, and the like, and company B an undertaking small in all those respects, the Act and the order made under it should have entitled B to call upon A for intercommunication without providing for any payment to be made by B to A for the advantage. I see, however, two grounds upon which this may not be unreasonable. First, when the customer of company A and the customer of company B enjoy the benefit of telephonic communication, it may be said that each enjoys equally the reciprocal advantage of hearing from and speaking to the other. The customer of company A has the right as between himself and his company to use all the appropriate wires and other parts of the system of company A; the customer of company B has a like right as regards the wires and other parts of the system of company B. The intention of the Act and order may be, and, I think, is, that when the statutory right of intercommunication has arisen each of the two customers shall be entitled to converse over the aggregate mileage, over some part of which each has by contract with his company the right of communication. Whether this be so or not, it seems to me that the Act and order have created the right, and that if the right to intercommunication has arisen, and intercommunication has been established, the right of the customer of company B is to have proper facilities over every part of the system of company A, just as much as if he were a customer of company A. Secondly, it is noticeable that the new licensee need not request intercommunication unless he desires it, so that no consideration necessarily arises as to whether it would be fair that that company should

receive a payment, and that the existing company only becomes bound to give intercommunication upon request, if it has availed itself of the right within sub-sect. 4 of having the term of its licence extended, so that no consideration necessarily arises as to whether it would be fair that that company should receive a payment. In other words, each company may, if so minded, so conduct itself as that intercommunication under the Act will not result, so that it cannot be said that anything unfair is being imposed upon either company if it does result. Having said thus much upon the Act of Parliament, I pass to a statement of the facts on this case. The relevant facts are that the defendants had before Sept. 1902 established a system of public telephonic communication in the Swansea area, and that in Sept. 1902 the Postmaster-General granted a new licence to the plaintiffs over the same area. At the same time the Postmaster-General, again under the Act, granted the defendants an extension of their then existing licence for a period such as to call sect. 3, sub-sect. 5, into operation. In Nov. 1903 the plaintiffs had established and then opened their system. On the 1st Jan. 1904 they made a request for intercommunication within sect. 3, sub-sect. 5. They had at that time the number of subscribers required to satisfy art. 1 of the order of the Postmaster-General. Before the 2nd Feb. 1904 they had, within art. 5 of the Postmaster-General's order, satisfied him as to that fact, and the defendants, by a letter of the 2nd Feb. 1904, were informed by the Postmaster-General that he was so satisfied. That the corporation had the requisite number of subscribers is not now in dispute, but I must say something further as to it, because it goes to costs. By a letter of the 8th Aug. 1904 the defendants waived any objection based upon their allegation that the facts were not as above stated, and by another of the 1st Sept. they repeated that they were prepared to accept the Postmaster-General's certificate as to the fact. Notwithstanding this, by par. 6 of the defence they denied it. It is only by reason of the fact that at the Bar their counsel again admitted it that the plaintiffs have been relieved from calling evidence to prove it. The defendants upon the correspondence raised various other contentions to which I need not refer beyond saying that I am satisfied, as, indeed, Mr. Gaine admitted in the box, that the defendants desired to raise every objection which could be (Mr. Gaine says legitimately could be) put forward to prevent the plaintiffs from obtaining the intercommunication which they had a right to request, and requested, under the Act. The defendants had received the benefit of the extension of their licence, but intended to put every obstacle (they say legitimate obstacle) in the way, to prevent the resultant benefit to the new licensee of obtaining intercommunication. With one exception these objections are not now relied upon. The remaining contention is that upon which arises the whole question which I have to decide in the action. That contention is as follows: The defendants have a central exchange at Swansea, and eleven or twelve subsidiary exchanges. After a contention which varied from time to time, and which is to be found in its several forms in letters from the defendants of the 7th March, the 10th Aug., the 1st Sept., and the 20th Sept. 1904, the defendants, by their last contention, as stated in the letter of the 20th Sept., required that the plaintiffs should provide junction circuits to directly connect the plaintiffs' exchange in Swansea with the defendants' exchange in Swansea, and with each of nine of the defendants' subsidiary exchanges in different parts of the area, and junction circuits to connect the two Mumbles exchanges and the two Morriston exchanges. A reference to plan A, which for the purpose of illustration has been used in the course of these proceedings, is the shortest way of conveying what this contention involves. There existed already junction or trunk lines running from Swansea (that is, from the defendants' exchange in Swansea) to each of these subsidiary exchanges. The defendants say that there must be duplicate junction or trunk lines from Swansea—that is, from the plaintiffs exchange in Swansea—to each of these same subsidiary exchanges. In other words, they contend that every line running from Swansea to a subsidiary exchange must be duplicated by laying another junction or trunk line from Swansea to the same point. To make plain that which follows I must state that the defendants discriminate between the case in which, after intercommunication is established, the originating call comes from a customer of the plaintiffs and that in which it comes from a customer of the defendants. They say that when a customer of the plaintiffs makes the originating call, the plaintiffs must perform upon their own trunk lines the whole service of the message until it reaches that exchange of the defendants which is nearest to the station of the customer to whom the call is addressed, and they say that they are willing to accept the like obligation when the originating call is made by the defendants' customer. I fail to find any justification in the Act of Parliament, or founded upon reason or good sense, for this contention. On the contrary, it seems to me to be directly in contravention of that which the Act of 1899 intended to secure. The object is not to duplicate the systems so that each of the two undertakings shall have junction or trunk wires running to every exchange in the area, but that the customer of each company shall use the trunk line of the other company running to the customer of the other company whom he wishes to address. A concrete instance will probably most readily convey the contention put forward. The plaintiffs have a junction or trunk line from Skewen to Swansea. The defendants have a junction or trunk line from Swansea to Pontardulais. Assuming the plaintiffs' exchange at Swansea to be connected with the defendants' exchange at Swansea, I understand the Act to mean that the plaintiffs' customer at Skewen is to have from the defendants all proper facilities for the transmission of his telephonic message to Pontardulais, and for that purpose to have the use of all the appropriate parts of the defendants' system. The defendants say, "No, you are not entitled to use our trunk line from Swansea to Pontardulais: the only part of our system which you shall use for the purpose of this message shall be our exchange at Pontardulais, our staff at that place, and the subscriber's separate wire from that place to his house." There are, however, other parts of the defendants' system appropriate for use for telephonic communication from Skewen to Pontardulais—namely, the defendants' exchange at Swansea, the defen-

dants' staff at Swansea, the defendants' trunk line from Swansea to Pontardulais. The defendants say, "No, you have no right to use any of these for the purpose of this message; you, the plaintiffs, must bring the communication on your own wires to our Pontardulais exchange, and you cannot require anything more from us than that we should from that point send it on to our subscriber." The contention is extravagant and directly in destruction, as it seems to me, of that which the Act intended to give. But further, say the defendants, "Our junction or trunk lines are now fully occupied," meaning by that expression that at the busiest hour of the day they can carry no heavier load, and, of course, it is desirable that the system shall be competent to deal with the busiest hour of the day without congestion. This is a matter to which consideration is due, I think, in the sense that an obligation to give proper facilities does not necessarily involve that the servient company shall, at a moment's notice and without reasonable time to adjust itself to the new demand, accept and deal with a large addition of traffic. But except in this sense the consideration is not relevant. The defendants are bound to give to every intending customer within the area telephonic communication on proper terms. Their undertaking is one which, from its nature, requires extension by increase in the trunk lines as traffic develops. The effect of the Act is to introduce to the defendants, and to require them to provide for additional customers who are entitled to service by virtue of the provisions of the Act, and if the defendants' lines are insufficient to carry the load, then I apprehend it is their business, after, of course, a sufficiently reasonable margin of time, to provide the lines necessary for its transmission, just as much as it would have been their business so to provide for any new customers of their own. The Act nowhere contemplates that the new licensee shall, to the extent of any deficiency in the system of the existing company to meet the new traffic, increase for the existing company the capacity of the system of the existing company. Moreover, the defendants' lines are not congested in the sense that they cannot bear a heavier load at times, other than the busiest hour of the day. There is plenty of margin at other times, and if inter-communication were established at once there would be a reasonable possibility of dealing with the additional traffic, not necessarily as speedily as is desirable, but nevertheless to the advantage of the customers, and by degrees the service could be improved, when by increase in the number of lines the congestion which I will assume would at first result at the busiest hour could be removed. Eighty-five per cent. of the plaintiffs' traffic is in Swansea, and a junction between the Swansea exchanges would at once give the means of dealing with this without raising any question of trunk lines being congested. Throughout the arguments addressed and evidence adduced by the defendants there has run a fallacy which was continually repeated — namely, that they are being called upon to do something for the plaintiffs' customers to the injury of their own customers. When inter-communication is established the increased facilities enure not for the plaintiffs' customers only, but for the defendants' customers equally. The latter are able to enjoy a facility which they could not enjoy before—namely, that of communicating telephonically with persons lying outside the defendants' service. In the events which have happened, the defendants' customers are entitled as much as the plaintiffs' customers to the benefit of inter-communication. Every conversation which takes place by way of inter-communication is a conversation to which a customer of the defendants is necessarily a party, and of which he has the benefit. Many months ago the plaintiffs, at their own expense, laid from their Swansea exchange to a manhole closely adjacent to the defendants' Swansea exchange junction lines, said to consist of 217 pairs, for the purpose of connecting the two exchanges at Swansea The defendant refused to connect them. The plaintiffs on the 31st Aug. 1904, offered further to make connections at each place at which the two undertakings have sub-exchanges closely adjacent to each other—namely, at Mumbles and at Morriston, and they further offered to connect any further sub-exchanges which the plaintiffs might provide in other parts of the area where the defendants already had an exchange if the defendants on their part would do the like. The defendants did not accede. Their letter of the 20th Sept. 1904, to which I have already referred, constituted, in my opinion, a refusal to give inter-communication except upon the terms there stated. And that refusal was repeated by Mr. Gaine in the box. On the 3rd Nov. 1904, the writ was issued. The question for determination is whether the defendants have refused to afford proper facilities. In my opinion they have. But "then," say the defendants, "the remedy of the plaintiffs, if any, is only in damages; they cannot have an order that the defendants do afford proper facilities." They so contend upon two grounds—first, that this court cannot determine what proper facilities are; and secondly, that if it can, an order to afford facilities would involve that the court should enforce the performance of a continuous act. As to the former of these, it may well be that the court could not order a definite number of junction lines to be laid, or a staff of a defined number to be employed, or the business to be conducted in a particular way, or anything of that kind. But the court may, in my judgment, indicate that a certain way of carrying out inter-communication is the proper one, leaving it to the companies to determine how, as matter of working, it can be carried into effect, and negatively the court can interfere by determining, as I have in the the former part of this judgment, that a particular way of carrying out intercommunication is not the right one. This is a course familiar in many cases that might be adduced. In cases of nuisance, for instance, the court does not take in hand the conduct of the business which is causing the nuisance and continuously supervise it and ensure that it be so carried on as that there shall not be a nuisance. The court grants an injunction, indicates sometimes for the benefit of a defendant the course which, upon the report of an expert referee, the court thinks may be adopted to abate the nuisance, and gives the defendant an opportunity to take that course. He may take it with or without modification, or refuse to take it if he likes, but if he does refuse the court holds the means of compelling him. So here, I

do not propose to order the defendants to give facilities in any defined or exhaustive form, but I will indicate what I think upon the evidence they at least ought to do, and if they do not, in that way with or without such modifications as the nature of their business requires, give proper facilities, I shall have the means of enforcing the order. The details, no doubt, must be left to those who have the conduct of the undertaking, but the powers of the court are not rendered nugatory if the defendants will not apply their minds so to conduct their undertaking as to give effect to the plaintiffs' statutory rights. As regards the second, I am not pressed with the contention. The defendants do not come here to say that they refuse to give inter-communication. On the contrary, Mr. Gaine has said in the box that if he cannot legitimately support any of the objections which he has raised, he is prepared to comply with the defendants' statutory obligation to give intercommunication. The question between the parties is, not whether intercommunication shall be given, but how it shall be given. Upon the evidence before me, I think that proper facilities include the establishment of junctions between the following exchanges of the plaintiffs and defendants respectively—viz., first, between the two exchanges at Swansea; secondly, between the two exchanges at the Mumbles; and thirdly, between the two exchanges at Morriston, and I think that the cost ought to be borne equally by the parties. The proper incidence of the cost has not been disputed before me. The order which I propose to make will not involve that the court shall intervene to enforce the continuous doing of a succession of acts. The order will enforce the establishment of intercommunication. Under the instruments which governs the defendants they are bound, as between themselves and the Postmaster-General, not to give favour or preference to any person whomsoever as a customer of the company. They must serve the customers of the plaintiffs, who under the Act become entitled to facilities for transmission of their messages, as much as the customers of the defendants themselves. The court may safely leave it to the Postmaster-General to ensure that the obligations of the service shall be observed after the intercommunication as been established. The judgment which I pronounce is as follows: I declare that under sect. 3 (5) of the Telegraph Act 1899 and the order, and in the events which have happened, the plaintiffs are entitled to be afforded by the defendants all proper facilities for restricted intercommunication within the meaning of the order between persons using the defendants' system and persons using the plaintiffs' system, and I declare that the defendants have improperly refused to give such proper facilities. There will be an order that the defendants do give such proper facilities, and there will be liberty to apply. The defendants must pay the costs of the action. Under the liberty reserved either party can apply to the court; and, if the defendants are really in any difficulty as to the connections which they ought to make or the facilities they ought to give, they can come to the court under this liberty and not leave the matter to be determined in the most inconvenient way—viz., by a motion for sequestration. I may say for their guidance that, as at present advised, I think that junction circuits at the three places which I have named and facilities for using them will be, for the present at any rate, a compliance with the order; and experience will best show whether anything and what further is required. *Judgment for the plaintiffs.*

Solicitors for the corporation, *Sharpe, Parker, Pritchards, Barham,* and *Lawford,* agents for *John Thomas,* Town Clerk, Swansea.

Solicitor for the defendant company, *W. E. L. Gaine.*

KING'S BENCH DIVISION.

April 10 *and* 11, 1905.

(Before KENNEDY and RIDLEY, JJ.)

WINCANTON RURAL DISTRICT COUNCIL (apps.) *v.* PARSONS (resp.). (*a*)

Public health—Drain or sewer—Nuisance—Discharging sewage into drain—Persons "by whose act or default the nuisance arises"—Notice to abate nuisance—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 94, 95, 96.

The respondent discharged the sewage from his house into a drain laid in a ditch running alongside between his premises and the public highway, and this drain emptied into a catchpit, which had been previously erected by an adjoining occupier for the purpose of receiving the surface water from the highway and preventing such water from overflowing on to his premises, and from the catchpit there was a drain which passed for some distance under the highway, and thence continued through private property and ultimately emptied into a stream. The drain, at a point under the highway and some few feet below the catchpit, became broken, and the stoppage caused the water and sewage to overflow from the catchpit and cause a nuisance. The drain at the point in question conveyed only the sewage from the respondent's house and the surface water from the highway. Before the respondent sent his sewage into the drain, it was simply a channel for carrying off surface water, and the local authority had never repaired it as a sewer. In proceedings by the local authority under sect. 94 *of the Public Health Act* 1875, *against the respondent as being "the person by whose act, default, or sufferance" the nuisance arose, the respondent contended that the drain, from the catchpit downwards, was a sewer by reason of its receiving and conveying the surface water from the highway, as well as the sewage from his own house, and was therefore repairable by the local authority.*

Held, that the nuisance having been caused by the discharge of the respondent's sewage into the drain, the respondent was the person "by whose act, default, or sufferance the nuisance arose," and was liable to abate the same.

Semble: *The drain was not a sewer at all within the meaning of the Act.*

CASE stated by justices of the peace for the county of Somerset.

At a petty sessions held at Wincanton, in the county of Somerset, an information and complaint was preferred against the respondent by the Wincanton Rural District Council (the appellants), that, on the 8th July 1904, there

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

existed a nuisance within the meaning of the Public Health Act 1875, at the Manor Farm, in the parish of Charlton Horethorne, within the district of the council, arising from a drain being defective and broken, which was a nuisance and injurious to health; and that the council, being satisfied of the existence of the nuisance, and that the same was caused or continued by the act, default, or sufferance of the respondent (Parsons), did on the 8th July 1904 duly serve upon the respondent a notice in writing requiring him to abate the nuisance within fourteen days, and for that purpose to take up, clean, and replace any broken or defective pipes by good glazed stoneware pipes, and properly cement the joints; and that the respondent had made default in complying with the requisitions of the notice, and that the nuisance was not abated in accordance therewith, or, though temporarily abated, was likely to recur, contrary to the provisions in that behalf of the Public Health Act 1875.

On the hearing it was admitted by the respondent, and the justices found as a fact, that the nuisance did exist at the time and place mentioned, though temporarily abated by the appellants at the time of the hearing.

It was admitted by both parties, and the justices found as facts, that the drain in question was laid and covered over in a ditch alongside a wall belonging to the premises occupied by the respondent, known as the Manor House, and between such wall and a highway under the control of the appellants for a distance of 250ft., where it discharged into a catchpit marked B on the plan, and continued from such catchpit for 70ft. under a highway under the control of the defendants to a spot marked C on the plan annexed to the case, where it was joined by a drain from another house, and subsequently continued through private property for about 350ft. and emptied into a stream. That the drain, down to the point where it joined the second drain, was used only for the drainage of the respondent's house and stables, and from the catchpit downwards it was used also for carrying off the surface water from the highway. That the part of the drain above the catchpit was made by the owner or tenant of the Manor Farm within the last fifteen years; the part below the catchpit existed many years before. That the catchpit was erected sixteen or twenty years ago by the orders of the tenant of the kennel and premises situate below the same for the purpose of preventing the surface water from the highway from overflowing into his premises. That neither the drain nor catchpit had within recent years been repaired by the appellants, but that their workmen had from time to time cleared away a grip leading from the highway through the turf to the catchpit for the purpose of inducing the surface water of the highway going into the catchpit. That the portion of the drain leading from the catchpit had from some cause unknown become broken where it passed under the highway and about 6ft. below the catchpit, and that this breakage prevented the water from flowing from the catchpit, where it collected and caused the nuisance complained of.

It was contended by the appellants that the drain from the Manor House down to the point where it joined the second drain, including the catchpit, was a drain within the meaning of the section.

It was contended by the respondent that it was a sewer within the meaning of the section; also, that the words "likely to recur" ought to have formed part of the summons. On the latter point the chairman remarked that the summons could be amended if necessary, but the objection was not persisted in, and the case proceeded.

A plan was put in by the respondent and was admitted to be correct by the appellants.

The justices dismissed the information against Mr. Parsons, the occupier, but they did not state their grounds for so doing.

The question for the opinion of the court was whether the justices were right in so acting.

If the court should be of opinion either (1) that the nuisance complained of arose from defective construction, or (2) that the drain or the broken part thereof constituted a sewer or a part of a sewer, within the meaning of sect. 4 of the Public Health Act 1875, then the determination of the justices, in dismissing the information, was to stand confirmed; otherwise, the court was to remit the case to the justices with the opinion of the court thereon, or to make such other order as to the court might seem fit.

By sect. 94 of the Public Health Act 1875, the local authority are required, if satisfied of the existence of a nuisance, to "serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice," and so on; and sects. 95 and 96 enable proceedings to be taken before a court of summary jurisdiction, in case the person on whom a notice to abate a nuisance has been served, has made default in complying with the notice.

R. Cunningham Glen for the appellants.—The respondent says that this channel was, below the catchpit, a sewer, and was therefore vested in the local authority. In the first place, it is immaterial whether this was a drain or a sewer, because the question is not whether it was a drain or a sewer, but whether the respondent was the person by whose act, default, or sufferance the nuisance arose. Sect. 91 of the Public Health Act 1875 sets out what things are to be deemed to be nuisances liable to be dealt with summarily; sect. 94 provides for the service of the notice on the person "by whose act, default, or sufferance the nuisance arises or continues," and sects. 95 and 96 provide for the proceedings to be taken for failure to comply with the notice. The nuisance in this case was caused through the overflowing of the catchpit in consequence of the stoppage of the channel immediately below it. The respondent had no right to discharge his sewage into the catchpit so as to cause a nuisance. The person by whose act the sewage is discharged is the person who causes the nuisance, and in proceedings under these sections, it is immaterial whether such person had a legal right to discharge his sewage into this channel:

Brown v. *Bussell*, 18 L. T. Rep. 19; L. Rep. 3 Q. B. 251.

In the second place, this drain was not a sewer at all, and the justices were wrong in holding that

it was. "Drain" and "sewer" are defined in sect. 4 of the Act of 1875, and upon that two answers may be given to the respondent's contention—namely, that the fact that surface water from the highway is drained into this channel does not make it a sewer; and, secondly, even if it is a sewer by reason of the surface water being discharged into it, it was a surface water sewer, into which the respondent was not entitled to drain his sewage. Surface water from a highway is not the same as water drainage from a house or premises, and although a drain which takes the sewage of one house and the rain water only of another house is a sewer (*Silles* v. *Fulham Borough Council*, 88 L. T. Rep. 753; (1903) 1 K. B. 829), that would not be so if the rain water were merely surface water from the highway. Sect. 17 of the Act also shows that this could not be a sewer for the conveying of ordinary sewage. The case finds that this drain ultimately emptied into a stream. By sect. 17 a local authority is not authorised under the Act to make or use any sewer, drain, or outfall for the purpose of conveying sewage into any stream, so that this could not be a sewer for conveying sewage, though it might be a sewer for surface water. There can be no sewer without a lawful outfall, and this drain had not a lawful outfall for ordinary sewage, the outfall being into a stream. The respondent was discharging this sewage into the catchpit, and a drain which merely ends in a catchpit or cesspool cannot be a sewer. In that respect this case is very similar to the cases of *Meader* v. *West Cowes Local Board* (67 L. T. Rep. 454; (1892) 3 Ch. 18), *Button* v. *Tottenham Urban District Council* (78 L. T. Rep. 470), and *Butt* v. *Snow* (89 L. T. Rep. 302), in each of which cases it was held that a similar construction was not a sewer. Lastly, even assuming that this catchpit was a sewer, the respondent was not entitled to drain his sewage into it, for it was made for the purpose of receiving surface water from the highway only, and of preventing that surface water from overflowing. That fact prevented it from being a sewer into which the respondent had a right to empty his drain, though it might be a sewer for some purposes:

Kinson Pottery Company v. *Poole Corporation*, 81 L. T. Rep. 24; (1899) 2 Q. B. 41;
Wilkinson v. *Llandaff and Dinas Powis Rural District Council*, 89 L. T. Rep. 462; (1903) 2 Ch. 695.

R. Vaughan Williams (*B. F. Williams*, K.C. and *George I. Phillips* with him) for the respondent. The respondent is not liable for any nuisance that may have existed at this catchpit. It was a sewer. There is no evidence to show that he constructed it, or that he was in any way responsible for it. It was constructed for taking the water from the road, and it received in addition to the sewage from the respondent's premises, the water from the road. If a person has a drain and somebody for his own purposes enlarges that drain, that does not necessarily constitute it a cesspool so as to prevent its being a sewer. The addition of the surface water from the road into the catchpit, which was already receiving the drainage of one house, constituted the catchpit and the drain below it a sewer. The first step is that this was a sewer and not a drain, and there is no foundation for saying that because this sewer is out of order the respondent is liable. "Sewer" is defined in sect. 4, and it includes sewers and drains of every description, except drains to which the word "drain," as previously defined, applies. It is clear that this drain comes within the word "sewers and drains of every description," and must be a sewer unless it comes within the exception of "drains" as defined in the section. "Drain" is defined as meaning any drain used for the drainage of one building, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage. It cannot be said here that this piece of pipe from the catchpit to the point C was used for the drainage of one building only. It is used for the drainage of the water from the roads as well as for the drainage of the respondent's house. It does not come within the definition of drain, and therefore it must come within that of "sewer." It is not necessary to constitute a drain a sewer that the matter it receives should be fœcal or filthy matter or that the water should be foul. In *Ferrand* v. *Hallas Land and Building Company* (69 L. T. Rep. 8, at p. 11; (1893) 2 Q. B. 135, at p. 144), Smith, M.R. says: "A sewer need not necessarily convey sewage matter to constitute it a sewer. It would be none the less a sewer within the Act of 1875 if it conveyed only rain or surface water. The draining off of rain or surface water, collected from different premises by different feeders into one main drain, would constitute that main drain a sewer within the meaning of the Act." A drain which, in addition to the sewage of one house, receives the rain water only—as in this case—of other premises, thereby becomes a sewer:

Silles v. *Fulham Borough Council* (*ubi sup*);
Durrant v. *Branksome Urban District Council*, 76 L. T. Rep. 739; (1897) 2 Ch. 291;
Croysdale v. *Sunbury-on-Thames Urban District Council*, 79 L. T. Rep. 26; (1898) 2 Ch. 515, at p. 519.

The quality of the liquid cannot be the test; the test is whether the contents come from two different premises or sources. The moment this drain receives any liquid, even pure water or surface water, from the roads, then it becomes a sewer, as it then serves two different purposes; and, being a sewer, the respondent would have a right to drain into it, and if there were a nuisance he would not be liable for it, as the duty of keeping it in repair would, under sect. 15, be upon the local authority. A drain cannot be a sewer for some purposes of the Act, and not a sewer for other purposes: (per Williams, L.J. in *Wilkinson* v. *Llandaff and Dinas Powis Rural District Council* (*ubi sup.*), where he says that if *Kinson Pottery Company* v. *Poole Corporation* (*ubi sup.*), decided otherwise he could not agree with it). The local authority cannot by taking proceedings under these sections get rid of their obligation to repair the sewer:

Wycombe Union v. *Parsons*, 71 L. T. Rep. 428; (1894) 2 Q. B. 780;
Molloy v. *Gray*, 24 L. Rep. Ir. 258.

R. C. Glen in reply.

Kennedy, J.—In this case I think that the appellants ought to succeed, and that the case must go back to the justices with an intimation of the opinion of the court. The prosecution

was under sect. 94 of the Public Health Act 1875 against the respondent, Mr. Parsons, who was the occupier of a house called the Manor House, described on the plan before us, alleging that there existed a nuisance within the meaning of the Public Health Act 1875, within the district, and that he had made default in complying with the requisitions of the notice served on him to abate the nuisance, and that the nuisance was not abated as it ought to have been. In other words, that he was the person who, under sect. 94 of the Act, had caused and and was continuing a nuisance, which it was his duty to put an end to; and that he was the person by whose act, default, or sufferance the nuisance arose or continued. There is, in fact, no doubt that he sent and was continuing to send fœcal matter from the Manor House down this channel into the catchpit, and from the catchpit, through the overflow which had arisen from some stoppage below, over the place, and so caused the nuisance. But for that the nuisance would never have arisen; and he could, by ceasing to send that sewage matter down this channel to the catchpit, stop any nuisance arising. Whether or not he chooses to pot a stop to it by erecting a cesspool on his own land, or by making repairs to the portion of the channel which is between B and C below the catchpit, is for him to consider, with this advantage as regards repairing the portion between B and C —namely, that if hereafter he can make out that it was the duty of the public authority to keep that in repair, and that through their neglect of that duty the mischief arose, then he may be enabled to recover from them any expenses that he had incurred. The justices in giving judgment, as they did, for the respondent, have put their question in a form which does not appear to me to be a desirable one. They say that they dismissed the information as against the respondent, but that they did not state their grounds for so doing. I think they should have stated their grounds for so doing; and further, they go on apparently to limit the way in which the court should deal with the matter. In our view this court is not bound to deal with the matter exactly in that manner. We are of opinion that the justices upon the facts stated in the case have gone wrong. With regard to the two grounds I will very shortly state what my view is, and for that purpose refer to the plan and the facts stated in the case. There is a channel from the Manor House to the catchpit, below which there is some breakage or obstruction, the nature of which does not appear, between the points B and C on the plan. As to that portion between B and C and below the catchpit it is not very clear either how it was originally made, or exactly upon whose land it is. The suggestion seems to be that it is on land probably belonging to the owner of the Manor House, but land over which the appellant council have a public highway. From the facts stated in the case there is no proof at all that the part of this channel from B to C was in any way either created originally or adopted by the appellants as a sewer. It seems to be stated that it was created by private persons in the neighbourhood for a private purpose, to prevent water there collected on the surface of the highway from overflowing into adjoining premises, and there is nothing to make that a sewer unless it be that it receives surface water and that for some time past the occupier of the Manor House had, in fact, sent his fœcal matter into that portion of the drain through the catchpit. I am not prepared to say, under these circumstances, that any portion of this channel is a sewer within the meaning of the Public Health Act. It is a channel for simply carrying off the surface water, into which the respondent—and probably his predecessors also —has chosen to send his fœcal matter from the Manor House, but which really ought not to have been used as a sewer, because the effect of using it as a sewer would be that, without right or title to do so, the fœcal matter would ultimately be carried into the brook below, into which there is no right to drain a sewer on the part even of the local authority, if they wished to do so. I do not think there is anything in the authorities cited to us to show that it is necessary to hold that, where one adjoining owner creates in a highway a channel for the purpose of taking water from his premises and keeping the water in the channel, it can be constituted a sewer, for the maintenance of which the public authority are solely responsible, merely because another owner in the neigbourhood has chosen to send sewage matter from his house into the channel. It was never intended or made for a sewer, and, so far as I can see at present—though I leave that question open for the further discussion of the parties—there is no evidence that satisfies me that, as to the part between B and C, the public authority could from any point of view be responsible. They have gone to the person who unquestionably had alone caused the nuisance. It is not a case of his contributing with other adjoining owners or occupiers of property to send filth into this place; he is the only person who sends this fœcal matter into what would otherwise be only a surface channel, and he had caused and was continuing to cause the nuisance, and if he ceased to cause the nuisance there would be none. There was some obstruction in the channel under the highway, but how it was caused the case does not show, though it is certainly not shown to have arisen through defective construction; and it is said, truly, no doubt, that unless there were some block between the catchpit and the point C there would possibly be no nuisance at all; but, unless the respondent is discharged by the fact that he can show that there was a duty on the authority to keep this portion of the channel as a sewer into which he was entitled always to discharge his sewage, the fact that there was a block does not excuse him for causing the mischief which undoubtedly arose from his own act, an act for which, so far as I can see, he ought properly to be held responsible on the facts before us. The justices ask for our opinion, first, whether the nuisance complained of arose from defective construction. Even assuming that there was some fault on the part of the person—probably the owner of adjoining premises—who constructed the channel from B to C, that would not discharge the present respondent from the duty of not creating a nuisance. On the facts before us it appears to me that, unquestionably for the purpose of this case, the nuisance arose from the acts of the respondent. Secondly, the justices ask whether the drain, or the broken part thereof, constituted a sewer, or part of a sewer, within

the meaning of sect. 4 of the Public Health Act 1875. I am of opinion that it is not proved to my satisfaction that it is a sewer. Upon the evidence before me I should have said it was not a sewer, and I see no authority in obedience to which I ought to hold that this was a sewer as distinguished from a drain within the meaning of the Act, merely because the respondent sends from the manor house fœcal matter into it; and, moreover, the channel was originally constructed for holding and conveying surface water only. The authorities cited for the respondent, so far as they go, might justify another conclusion; but assuming for the moment that for certain purposes this might be treated as a sewer, still, to my mind, it is certainly not proved to be a sewer in such a sense as would, as a necessary conclusion of law, cast the responsibility for this nuisance upon the appellants, or relieve the respondent from the duty which, it seems to me, is imposed upon him to put an end to a nuisance which he, through his occupation of the manor house, has created. In my opinion, therefore, the case must go back to the justices to hear and determine the information, with this intimation of our opinion.

RIDLEY, J.—I agree that the case should go back to the justices with an expression of our opinion thereon. The finding of the justices does not appear to me to be a logical one; that is to say, the findings of fact at which they have arrived do not necessitate the conclusion that the summons ought to be dismissed. It seems to me abundantly clear that, as a matter of fact and quite apart from any question of the Public Health Acts, the nuisance was caused by the respondent. He was the only person who had discharged any of this sewage into the particular pipe between B and C, and it seems to me to be really a waste of time to endeavour to contend, as counsel for the respondent did, that in such a case as the present the person who causes a nuisance is the person whose duty it is to mend the pipe. I am unable to follow that argument. I think that the nuisance arose from the sewage and that the sewage caused the nuisance, and that it is the person who put the sewage there who is responsible for that nuisance. That is the consequence, as it seems to me, of the act of the respondent in this case. But we are bound to deal with the matter as one arising under the Public Health Act 1875, and we are bound also by the decisions upon that statute. The main argument for the respondent was that this was a sewer, and that, this being a sewer within the meaning of the Act, the responsibility for what occurred rested on those in whom the sewer was vested. I am not prepared to say that it was a sewer; I do not think it was, and I agree with my brother Kennedy in thinking that it was not. One very substantial objection to so holding it to be a sewer is sect. 17, because the public authority in this case is found to have laid it to communicate with the public stream. That they are not allowed to do under sect. 17 if it were a sewer; but, independently of that, it does not appear to me that there is in the present case so strong a collection of facts as there was in the case of *Kinson Pottery Company* v. *Poole Corporation* (*ubi sup.*) to induce us to say that this was a sewer. That case, in my opinion, governs the present one. The facts there were somewhat different from those in this case. They were that the respondents, as the highway authority, had themselves laid down at the side of the highway a drain for the purpose of receiving water from the highway. It was not the fact, as it is in the present case, that the private owner had used in this way a ditch not constructed by the highway authority immediately near his house. In that case the local authority had laid down the surface-water drain themselves, and it had been dealt with by them before the private owner had anything to do with it. In that case also there were twelve houses or more, as to which the respondents, as the highway authority, had given permission that the rain water from them should be turned into the same surface-water drain. In this case there is but one house, or rather one set of premises within the same curtilage, which can be said to have used what corresponds in this case to the surface-water drain in the case of *Kinson Pottery Company* v. *Poole Corporation* (*ubi sup.*). Under those circumstances a question might very well arise under the definition clause—sect. 4—whether this pipe is not merely a drain, whereas the pipe in the case of *Kinson Pottery Company* v. *Poole Corporation* (*ubi sup.*) might have been held to be a sewer, because there were more premises than those which were occupied within the same curtilage, which were drained into it. That was not the case here, because the only water that came into this pipe was that which came from the premises within the same curtilage. That would apparently bring this pipe into the definition of drain and exclude it from that of sewer. I do not, however, think it is necessary that the decision in this case should rest on the distinction between a sewer and a drain, for, having considered the matter, I am prepared to adopt the judgment of the court in *Kinson Pottery Company* v. *Poole Corporation* (*ubi sup.*), which, as I have said, I think governs this case. In that case Darling and Channell, JJ. came to the conclusion that for certain purposes it might be that a surface-water drain was a sewer. I hardly think it was so in this case. Darling, J. there said: "I agree that for certain purposes the surface-water drain was a sewer, but it is contended that therefore the appellants have a right to turn into it any refuse they please, and then it is for those who own the sewer to deal with the state of things so caused. In my opinion that is not the law. Sect. 21 of the Public Health Act 1875 entitles an owner to cause his drains to empty into the sewers of a local authority, on giving notice and complying with the local authority's regulations; but that does not entitle an owner to empty all kinds of filth into a small roadside drain, and leave the local authority to deal with it as best they can, and moreover here no notice was shown to have been given. To hold otherwise would lead to an absurd result." Then Channell, J. says: "The argument for the appellants in the present case amounts to this, that anyone, if he finds a drain in a highway, can turn his sewage into it and say that it is a sewer, and vested in the local authority, who are liable for the consequences, while he himself escapes liability." I agree with the reasoning in those judgments. I think this is simply a case in which the present respondent had done the very thing which is so defined in that case. For these reasons I think

the respondent is liable, under sects. 94 and 95, as a person "by whose act, default, or sufferance, the nuisance arises or continues." I ought, perhaps, to notice the subsequent decision in the case of *Wilkinson* v. *Llandaff and Dinas Powis Rural District Council* (*ubi sup.*), cited for the respondent, because in that case some remarks were made about the judgment which I have just quoted. In that case, the facts of which are not identical with those in the present case, a question arose upon which it was necessary to discuss the previous decision in *Kinson Pottery Company* v. *Poole Corporation* (*ubi sup.*), and Williams, L.J. said that the case of *Kinson Pottery Company* v. *Poole Corporation* was not a decision that a drain may be a sewer for some of the purposes of the Public Health Acts, and not for others. That, I think, is perfectly plain, but in the same passage in which he said that, he also said: "When the judgments of the learned judges, and in particular that of Channell, J., are carefully read, it does not seem to me that they did decide anything of the sort." Nor did they. Those judges there said that if the thing was a sewer it was a sewer for all purposes of the Public Health Act; but it does not in the least follow that, when these sections are being put into operation with regard to a nuisance, the fact that it must be regarded as a sewer within the meaning of the Public Health Act prevents the authority from taking proceedings against anyone who has been guilty of having caused a nuisance by his act, default, or sufferance. In my opinion, that is really the meaning of the previous decision, and I think it governs us in the present case. I think, therefore, that this case must go back to the justices with our opinion thereon.

Appeal allowed.

Solicitor for the appellants, *J. Trevor Davies*, London and Yeovil.

Solicitors for the respondent, *Robins, Hay*, and *Co.*, for *Ffooks* and *Douglas*, Sherborne.

Thursday, April 13, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

ANDERSON (app.) *v.* JACOBS (resp.). (*a*)

Seashore—Taking shingle from — Prohibition by Board of Trade—Encroachment of sea—Erection of sea-wall—Owner removing shingle from below high-water mark from land which formerly belonged to him—Claim of right—Board of Trade order—Harbours Act 1814 (54 *Geo.* 3, *c.* 159), *s.* 14—*Harbours Transfer Act* 1862 (25 *& 26 Vict. c.* 69), *s.* 16.

Under the powers given by sect. 14 *of the Harbours Act* 1814 *the Board of Trade, for the protection of a certain port, made an order prohibiting the taking or removing of any shingle from the shores or banks of the sea between certain points. The appellant, acting with the authority of the owner of land adjoining the seashore, removed shingle from the foreshore below the then ordinary high-water mark and within the limits prohibited by the order, to another part of the foreshore above high-water mark belonging to the same owner, where it was used to form concrete for the building of a sea-wall to protect the owner's adjoining property from the encroachment of the sea. The point from which the shingle was taken had a few years before been the property of the owner, but owing to the encroachment of the sea, the sea now ebbed and flowed over the land at the point in question. The shingle was removed solely for the construction of the sea-wall, and to prevent any further encroachment of the sea over the owner's property. Upon an information against the appellant for removing the shingle from the foreshore, in contravention of the order:*

Held, that an offence had been committed against the order and the appellant was properly convicted, notwithstanding that the land from which the shingle was taken was before the encroachment the property of the owner, and that the owner was acting under a bonâ fide *claim of right to take the shingle from one part of his property for the protection of another part of his property.*

CASE stated by justices of the peace for the county of Kent.

An information was preferred on the 31st Oct. 1904 by Thomas Jacobs (the respondent), a superintendent of police in the Kent County Constabulary, against Charles Anderson (the appellant), for that he, the appellant, on the 2nd July 1904, at the parish of Herne Bay, in the county of Kent, did take and remove certain shingle from the shores and banks of the sea between the disused pier at Hampton, Herne Bay, and a point one hundred yards east of the brook discharging at Swalecliffe Point and within the port of Faversham, the removal of shingle or ballast between the points before mentioned having been prohibited by an order of the Board of Trade, acting in pursuance of the Harbours Act 1814 (54 Geo. 3, c. 159), as amended by the Harbours Transfer Act 1862 (25 & 26 Vict. c. 69).

This information was heard and determined by the justices at a petty sessions held at Canterbury on the 5th Nov. 1904.

At the same petty sessions similar informations were also heard and determined by the justices against four workmen in the employ of the appellant for removal of beach at various specified dates between the 19th July and the 21st Oct. 1904.

The informations were, by the consent of all the defendants, heard and determined as one case, but no appeal had been brought in the case of the four workmen, upon whom only nominal penalties were imposed.

The justices convicted the appellant of the offence with which he was charged by the information, and fined him the sum of 5*l.*, and ordered him to pay the sum of 1*l.* 16*s.* 6*d.* for costs.

Upon the hearing of the information a copy of the *London Gazette* of the 22nd Jan. 1904 was put in, containing an order of the Board of Trade dated the 21st Jan. 1904, of which the following is a copy:—

Shores or banks of the sea at Swalecliffe and Hampton, Herne Bay.—Removal of materials prohibited.—Whereas the Board of Trade, acting in pursuance of the Harbours Act 1814, as amended by the Harbours Transfer Act 1862, find it necessary for the protection of the port of Faversham to prohibit the taking or

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

removing of any shingle or ballast from the shores or banks of the sea at Swalecliffe and Hampton, Herne Bay, between the now disused pier at Hampton and a point 100 yards east of the brook discharging at Swalecliffe Point, being within the said port. Now the Board of Trade do hereby, by this order, prohibit the taking or removing of any shingle or ballast from the shores or banks of the sea between the points above mentioned.—FRANCIS J. S. HOPWOOD, Secretary to the Board of Trade.—Dated the 21st day of Jan. 1904.—Note. Any person removing shingle or ballast in contravention of this notice is liable, on conviction, to a penalty not exceeding 10*l*.

The following facts were proved in evidence before the justices: (*a*) That the point from which the beach was alleged to have been removed by the appellant was within the Port of Faversham and within the prohibited limits mentioned in the above order; (*b*) that in the month of Feb. 1904 copies of the Board of Trade order were posted by the police, the coastguard, and the rural district council at Hampton and in the adjoining district; (*c*) that, notwithstanding such notices, on the 2nd July and almost daily thereafter up to the 21st Oct. 1904, the appellant by his workmen and servants acting under instructions from a Mr. Frederic Ramuz removed shingle from the foreshore below ordinary high-water mark some considerable distance westwards on to the foreshore above high-water mark, where it was mixed by the appellant's workmen with cement to form concrete for the construction of a sea-wall then in course of erection there by the appellant on behalf of Mr. Frederic Ramuz for the protection of property lying behind the foreshore and admitted to belong to him; (*d*) that the sea had encroached at the point in question about 50ft. within the last four years, and now ebbed and flowed over land which was formerly the property of Mr. Frederic Ramuz, so that that portion of the foreshore from which the shingle was removed by the appellant was no doubt formerly land belonging to Mr. Frederic Ramuz.

It was admitted by the respondent that such shingle was not removed for the purposes of sale, but for the construction of the sea-wall, and to prevent any further encroachment of the sea on Mr. Ramuz's property.

For the defence the appellant was called on his own behalf, and stated that he was erecting the sea-wall for Mr. F. Ramuz. He admitted taking the shingle from the foreshore for the purpose named, and also admitted that he might have taken some of it from below ordinary high-water mark.

It was contended by the solicitor for the appellant: 1. That the shingle had been taken from land actually the fee-simple property of Mr. Ramuz, and he therefore claimed the right to take the shingle from one point of his property to another for the protection of his land adjoining, and that the jurisdiction of the justices was therefore ousted by a *bonâ fide* claim of right. 2. That no offence had been committed within the true meaning of sect. 14 of 54 Geo. 3, c. 159 (the Harbours Act 1814).

On the evidence before the justices they found as a fact that the appellant had removed the shingle from the shores and banks of the sea at Hampton, Herne Bay, within the limits prohibited by the Board of Trade order. They also found as a fact that he had removed such shingle from the foreshore below the present ordinary high-water mark.

On this finding, the justices decided that the right to remove shingle claimed by the appellant was not a *bonâ fide* right which could exist in law so as to oust their jurisdiction to hear and determine the information, and that he was guilty of the offence with which he was charged in the information. The questions for the opinion of the court were: (1) Whether upon the above-mentioned facts the appellant had a legal right to remove the shingle from the foreshore, notwithstanding the order of the Board of Trade; (2) whether the justices came to a correct determination in point of law, and, if not, what should be done in the premises; (3) whether any offence was committed under the circumstances.

Sect. 14 of the Harbours Act 1814 (54 Geo. 3, c. 159) provides:

And, in order to prevent damage being done to the shores or banks of the ports, harbours, or havens in this kingdom, be it further enacted, that no person or persons shall take any ballast or shingle from the shores or banks, or any portion of the shores or banks, of any port, harbour, or haven of this kingdom, from which the commissioners for executing the office of Lord High Admiral of the United Kingdom for the time being shall find it necessary for the protection of such port, harbour, or haven, or the works thereof, by order under their hands, or the hands of any three of them, or the hands of his or their secretary, and published in the *London Gazette*, shall prohibit the taking or removing of such shingle or ballast, upon pain of forfeiting for every such offence the sum of ten pounds.

Sect. 28 provides:

Nothing in this Act contained shall extend or be construed to extend to prejudice, diminish, abridge, alter, or take away, any right of property, privilege, or jurisdiction, or any powers of conservancy, held, possessed, used, exercised, or enjoyed, by any body corporate or politic, or by any lord or lords, lady or ladies, of any manor or manors, or any person or persons whatsoever, in, to, upon, or over, any of the ports, harbours, havens, roads, roadsteads, sounds, channels, creeks, bays, or navigable rivers of the United Kingdom, or to the banks, shores, or sides thereof, . . . but that such respective rights of property, privileges, jurisdictions, and powers of conservancy, shall be respectively and exclusively enjoyed, in as full, ample, and beneficial a manner in every respect, to all intents and purposes, as if this Act had never been made, anything herein contained to the contrary notwithstanding.

By sect. 16 of the Harbours Transfer Act 1862 (25 & 26 Vict. c. 69)—under the heading "Ballast," 54 Geo. 3, c. 159—sects. 14 and 16 of 54 Geo. 3, c. 159, and all provisions in that Act relative thereto, "shall be read and construed as if the Board of Trade were named in the said sections instead of the Admiralty."

J. G. Joseph (*Hohler* with him) for the appellant.—The conviction was wrong. It is submitted that there was no offence within the Act, because Mr. Ramuz, for whom the appellant was acting, was entitled to erect a sea-wall for the protection of his property from the sea, and for the reclaiming of his property from the sea, and for that purpose to take the shingle from the beach at the place from which it was removed. Sect. 28 of 54 Geo. 3, c. 159, expressly reserves all the rights and privileges of the owners of lands to the

banks and shores of the sea, which they had before the passing of the Act. That applies here, and the privilege of Mr. Ramuz, as owner of the land, was that, as long as he could show by metes and bounds what his property was although covered by the sea, he was entitled to reclaim it from the foreshore of the sea. Sect. 28 gives him the right to save his property from the sea, and this place from which the shingle was removed was his property before the sea covered it, and if he could reclaim it from the sea it would be his property again. In Moore on the Foreshore and Seashore (p. 804), there is given a quotation from Dyer's Reports (p. 326*b*, note) as follows: "If the sea-marks are gone, so that it cannot be known if ever there was land there, the land gained from the sea belongs to the King. But if the sea cover the land at flux of the sea, and retreat at the reflux, so that the sea-marks are known, if such land be gained from the sea, it belongs to the owner." So Lord Hale lays it down that "if a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that there be yet reasonable marks to continue the notice of it, or though the marks be defaced, yet if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave the land again, or it be by art and industry regained, the subject doth not lose his property . . . though the inundation continue forty years." The land from which the shingle was taken was formerly the property of Mr. Ramuz, and according to the above authorities it was so still at the time in question, so that what the appellant did he had a right to do, and his act in digging the shingle from a spot which a few years ago was his property, was not within the mischief aimed at by the Act. In the second place, what was being done here by the appellant was being done by Mr. Ramuz for the protection of the harbour, as well as of his own property, and the effect of it was not to injure, but to protect, the harbour; and he justifies the doing of it under sect. 28.

George Humphreys for the respondent.—The conviction of the appellant was clearly right. He was taking the shingle from the shore at a point which was admittedly within the limits prescribed by the Board of Trade order. The act of the appellant came within sect. 14 of the Act, and the order of the Board of Trade, which in express terms prohibited the taking or removing of any shingle from this place. The statute merely gave a summary remedy, but did not alter the old common law on the point. That law is stated in Callis on the Statute of Sewers, pp. 90, 91, dealing with Sea Banks, where it is said that the owner of the soil cannot justify the digging or cutting away of the sea bank. What the appellant did in taking away the shingle to reclaim his other property was contrary to the statute. [He was stopped.]

Lord ALVERSTONE, C.J.—In this case it was admitted that the appellant had dug and removed shingle from the foreshore at points below ordinary high-water mark; although it was also true that the high-water mark had within the last three or four years changed, owing to the encroachment of the sea at the place in question. The information stated that the appellant had taken and removed certain shingle from the shores and banks of the sea, between certain points therein described, the removal of shingle between those points having been prohibited by an order of the Board of Trade. The justices have found as a matter of fact that the appellant had dug and taken the shingle at these points below high-water mark. *Primâ facie*, therefore, an offence had been committed by the appellant. Counsel for the appellant, however, ingeniously contended that, as the spot from which the appellant took the shingle was formerly his, and that as he had a legal right to reclaim land which was formerly his, but of the use of which he had been deprived by the encroachment of the sea, he was entitled to take shingle from that land to be used for that purpose. Ingenious, however, as that argument is, it seems to be beside the mark. Whether or not the appellant could lawfully build a wall for the purpose of reclaiming his land at the places where he had dug the shingle, it is not necessary to decide in this case. My present impression is that he might be able to do so. That, however, is not the point which we have to decide in this case. It seems to me that, it having been proved that the appellant had committed the acts complained of, it is impossible to say that the fact that the shingle was used for the purpose alleged by the appellant, prevented those acts from being an offence against the order of the Board of Trade. I think, therefore, that the point taken by the appellant was not a good one. In my opinion an offence had been committed, and the appeal should therefore be dismissed.

KENNEDY, J.—I agree.

RIDLEY, J.—I agree.

Appeal dismissed.

Solicitors for the appellant, *Briggs* and *Son*.

Solicitors for the respondent, *Kingsford, Dorman*, and *Co.*, for *Kingsford, Arrowsmith*, and *Wightwick*, Canterbury.

April 12 *and* 18, 1905.

(Before Lord ALVERSTONE, C.J. KENNEDY, and RIDLEY, JJ.)

SQUIRE (app.) v. MIDLAND LACE COMPANY LIMITED (resps.). (*a*)

Employers and Workmen—Wages—Deductions—Legality of—Work given to outworkers—Person not bound by contract to do the work personally—"Workman"—Truck Act 1896 (59 *&* 60 *Vict. c.* 44), *s.* 2. *sub-s.* 1—*Truck Amendment Act* 1887 (50 *&* 51 *Vict. c.* 46), *s.* 2—*Employers and Workmen Act* 1875 (38 *&* 39 *Vict. c.* 90), *s.* 10.

The respondents were lace manufacturers and occupiers of a factory. After lace has been removed from the machines it has to be "clipped," that is, the superfluous threads and materials have to be removed, and there were in the district a number of women known as clippers, who applied to the manufacturers for and took home laces to be clipped. These clippers were not employed exclusively by any one firm, but took laces for clipping from different firms. They might and did employ other persons to assist them in the clipping, the firms having no control over them. They were responsible for non-return of the lace, and they were paid

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

weekly according to the work done. They were required to pay for any damage done to the lace, and the course of business was well known in the place. Two women applied for and obtained from the respondents lace for clipping, which they took home and subsequently returned clipped but damaged, and a small sum, not exceeding the amount of damage, was deducted in each case for the damage. One of the women was employed in the factory during the day and took the lace home in the evening, and she did the clipping at home assisted by her daughter; the other was not employed in the factory, but the work was given out to her and she did the clipping at home herself. The respondents were not aware of the persons who actually did the clipping, and there was no contract that the women should do the work personally. Upon informations against the respondents for unlawfully making these deductions from the wages:

Held, that, as neither of the women was bound by the terms of the contract with the employers to do any part of the work personally, but might do it themselves or give it to other persons to do for them, they were not "workmen" within the definition of "workman" in sect. 10 *of the Employers and Workmen Act* 1875, *and were therefore not entitled to the protection of the Truck Acts, and the deductions were not thereby unlawful.*

CASE stated by justices for the city of Nottingham.

At a court of summary jurisdiction sitting at Nottingham on the 10th Aug. 1904, the appellant appeared before the justices to support two summonses issued upon informations laid against the respondents.

The first summons charged that the respondents on the 13th June 1904, in the city of Nottingham, being the occupiers of a certain factory within the meaning of the Factory and Workshop Act 1901, and being employers within the Truck Act 1896, did unlawfully make a deduction from the sum contracted to be paid to a "workman"—to wit, Mrs. Annie Flinders, in that the deduction was not made in pursuance of such a contract as is required by sect. 2 (1) of the Truck Act 1896.

The second summons charged against the respondents a like offence, in like terms, on the 23rd June 1904 as to a Mrs. Lamb.

Upon the hearing of each summons the following facts were admitted or proved: (*a*) The appellant (Rose Elizabeth Squire) was one of His Majesty's inspectors of factories. (*b*) The respondents were lace manufacturers and occupiers of a factory within the meaning of the Factory and Workshop Act 1901, and would have been employers within the meaning of the Truck Act 1896 if the last-mentioned Act had applied under the particular circumstances of the cases. (*c*) After lace has been removed from the machines it has to go through the process of being clipped—that is, superfluous threads and material have to be removed. (*d*) In the city of Nottingham there were a large number of women known as clippers, who carried on the business of clipping, and undertook to get laces clipped, and with that intent applied to the manufacturers for and took lace home to be clipped. (*e*) Such clippers were not employed exclusively by any one firm, or for any definite time, but were independent, and might and did take laces from different firms. They might and did employ other persons to assist them, the firms having no control whatsoever over them. Clippers might refuse to take work, and having taken it might execute it or give it to other persons to execute, or might return it unexecuted, and the manufacturers might refuse to give them work as they pleased. Clippers were responsible in case of non-return of the lace. (*f*) Such clippers were paid at the end of each week, when the account was made up according to the amount of work done. (*g*) The lace was examined, and if any damage had been done to the lace the clipper was required to pay damage in respect thereof. (*h*) This course of business had been in vogue in the city of Nottingham for considerably over twenty-five years, and clippers were generally well aware of it. (*i*) Mrs. Flinders sought to obtain lace for clipping from the respondents, and some was handed to her. She took it home and subsequently returned it clipped but damaged, and on the 13th June 1904 a sum of sixpence was deducted from the amount due to her for clipping. (*j*) Mrs. Lamb, under circumstances similar to the above, obtained laces from the respondents and returned them damaged; on the 23rd June 1904 the sum of sixpence was deducted for damages in respect thereof from the amount due to her. (*k*) The respondents were not aware of the person or persons who actually did the clipping. (*l*) There were no notices posted up in the factory of the respondents relative to the alleged offences under the Truck Act, nor was there any contract in writing signed by the clippers. (*m*) The deductions did not exceed the amount of damage done, and were fair and reasonable.

In the case of Mrs. Flinders it was further proved that the lace was given out to her only as an outworker, that she had never worked in the factory, and that she did the clipping at home herself.

In the case of Mrs. Lamb it was also further proved that she had been employed daily in the respondents' factory since the Whitsuntide of the previous year, and occasionally after the factory closed at night took work home to do; that she knew that her home work was not considered as part of her work at the factory; that she also knew that deductions from her wages were made for damaged goods, and that her daughter assisted her in the clipping and did part of the damage in respect of which the deduction was made.

The respondents' counsel contended that the appellant had failed to prove in both cases any contract of service; that the term "wages" had been wrongly used and was simply money for work done; that there was no contract to execute the work personally and that neither Mrs. Flinders nor Mrs. Lamb was a "workman" within the definition contained in sect. 10 of the Employers and Workmen Act 1875 (38 & 39 Vict. c. 90).

The justices being of opinion that neither Mrs. Flinders in the one case nor Mrs. Lamb in the other was a workman within the meaning of the Truck Act, dismissed both the summonses.

The question for the opinion of the court was whether upon the facts the determination of the

justices in either or both of the cases was right, and, if not, what should be done in the premises.

The Truck Act 1896 (59 & 60 Vict. c. 44) provides:

Sect. 2 (1). An employer shall not make any contract with any workman for any deduction from the sum contracted to be paid by the employer to the workman, or for any payment to the employer by the workman for or in respect of bad or negligent work or injury to the materials or other property of the employer, unless—(*a*) the terms of the contract are contained in a notice kept constantly affixed at such place or places open to the workmen and in such a position that it may be easily seen, read, and copied by any person whom it affects; or the contract is in writing, signed by the workman; and (*b*) the deduction or payment to be made under the contract does not exceed the actual or estimated damage or loss occasioned to the employer by the act or omission of the workman, or of some person over whom he has control, or for whom he has by the contract agreed to be responsible; and (*c*) the amount of the deduction or payment is fair and reasonable, having regard to all the circumstances of the case. (2) An employer shall not make any such deduction or receive any such payment unless—(*a*) the deduction or payment is made in pursuance of, or in accordance with, such a contract as aforesaid; and (*b*) particulars in writing showing the acts or omissions in respect of which the deduction or payment is made and the amount thereof are supplied to the workman on each occasion when a deduction or payment is made.

By sect. 12, this Act and the Truck Acts 1831 and 1887 are to be construed together as one Act.

By sect. 2 of the Truck Amendment Act 1887 (50 & 51 Vict. c. 46) it is provided:

The provisions of the principal Act [that is, the Truck Act 1831 (1 & 2 Will. 4, c. 37)] shall extend to, apply to, and include any workman as defined in the Employers and Workmen Act 1875, section ten, and the expression "artificer" in the principal Act shall be construed to include every workman to whom the principal Act is extended and applied by this Act, and all provisions and enactments in the principal Act inconsistent herewith are hereby repealed.

By sect. 10 of the Employers and Workmen Act 1875 (38 & 39 Vict. c 90), it is provided:

The expression "workman" does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years, or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour.

G. S. Robertson (*H. Sutton* with him) for the appellant.—The summonses were for making unlawful deductions from the sums payable to these women without putting up the requisite notices; and the question is whether these women were persons who came within the definition of "workmen" in sect. 10 of the Employers and Workmen Act 1875. By sect. 12 of the Truck Act 1896, that Act is to be construed as one with the Truck Acts 1831 and 1887. By sect. 2 of the Truck Act 1887, the provisions of the principal Act of 1831 are made to apply to and include any "workman" as defined in the Employers and Workmen Act 1875, s. 10, so that the definition of "workman" applicable is that in sect. 10 of the Employers and Workmen Act 1875. These persons were essentially "workmen," and not contractors. They come within the words in sect. 10, "otherwise engaged in manual labour," and they had entered into or were working under a contract of service with their employers. The work done by these persons was part of the work and business of the factory, and was part of the work they were doing for their employers; and nobody was responsible for the clipped lace coming back except these persons. Sect. 10 of the Act of 1887 shows that the provisions of the Truck Acts are made to apply to many kinds of work done at the persons' homes, and, although that does not include this case, it does include a class much more unlikely to be workmen than these persons are, so that this is an *à fortiori* case. For some purposes at any rate the Truck Acts apply where the employers have given out the work (sect. 10 of the Act of 1896). With regard to Mrs. Lamb, the case finds that she was employed in the factory and occasionally took the work home, and she at any rate comes within the definition in sect. 10. In *Grainger* v. *Aynsley* (43 L. T. Rep. 608; 6 Q. B. Div. 182) it was held that where a person was employed in manual labour the mere fact that by the custom of the trade he employs others to do the work for him does not prevent him from being a "workman" within the meaning of sect. 10. Applying to the facts of this case the language used by Lindley, J. in that case, these persons were "engaged in manual labour," and they had entered into and were working under "a contract of service, or a contract personally to execute work or labour," and, as he points out, the fact that they employ others to do work which they could do themselves does not prevent them from being "workmen." So, in *Stuart* v. *Evans* (49 L. T. Rep. 138), a slater who provided his own tools and was paid by the piece was held to be a "workman" within sect. 8 of the Employers' Liability Act 1880; and *Brown* v. *Butterley Coal Company* (53 L. T. Rep. 964) carries the matter a step further. *Fitzpatrick* v. *Evans* (86 L. T. Rep. 141; (1902) 1 K. B. 505), in which it was held that the person then in question was not a "workman" in the service of the master sought to be made liable, is distinguishable on the ground that there was no contract of service between them, and that was the ground on which the case was decided. He also referred to *Bowers* v. *Lovekin* (27 L. T. Rep. O. S. 168; 6 E. & B. 584) and *Sharman* v. *Sanders* (20 L. T. Rep. O. S. 247; 13 C. B. 166) as to the meaning of the word "artificer," in the repealed sect. 19 of the Truck Act 1831, and to sects. 107, 111, and 116 of the Factory and Workshop Act 1901.

Stanger, K.C. (*Tinsley Lindley* with him) for the respondents.—The question is what is the nature of the contract, and whether the justices had any evidence on which they could find that these women were not within the definition of "workman" in sect. 10. The test as to whether a person is a "workman" or not is in the nature of the contract of service. If the contract is a contract to do the work personally, then the person is a workman, but if the contract is one by which a person is to procure certain work to be done,

then that person is not a "workman" within the Act. On the other hand, if the person contracts to do the work himself, then he is a workman, and he does not cease to be a workman merely because he procures that work to be done by someone else. According to the findings as set out in the case, these women were not bound to do the work themselves. If they were bound by their contracts to do this work themselves, then they would be within the Truck Acts; but, as in the present case, where the persons who make the contract are at liberty to get the work done by someone else, then they are not within the Acts. This distinction as to being bound to do the work personally is very clearly put by Parke, B. in *Riley* v. *Warden* (2 Ex. 59, at p. 68), and by Maule, J. in *Sharman* v. *Sanders* (*ubi sup.*), where he says: "There must be a contract by which he binds himself to do it"; and again: "The whole context shows that it was only intended to apply to those who are actually and personally engaged or employed to do the work." That was in reference to the meaning of "artificer" in sect. 19 of the Act of 1831. The test is, were these people bound to do the work themselves, or were they merely bound to bring the work back done? The justices have found that they belonged to a class who were not bound to do the work themselves, but who were merely bound to bring the work back done, and the sole question is whether there was any evidence to justify the finding. Other cases which show that to make a person an "artificer" within the meaning of that section he must be bound to give his personal labour in the performance of the work are *Weaver* v. *Floyd* (21 L. J. 151, Q. B.; 16 Jur. 289) and *Ingram* v. *Barnes* (28 L. T. Rep. O. S. 246; 7 E. & B. 115, 132). [Lord ALVERSTONE, C.J. — The judgment of Lord Campbell in *Ingram* v. *Barnes* (*ubi sup.*) is very strongly in the respondents' favour.] Yes; in that case the only contract was that the work should be done. That is so here, and the contract is entirely satisfied by the work being done by someone else. He referred to

Ex parte Gordon, 25 L. J. 12, M. C.; 1 Jur. N. S. 683.

Grainger v. *Aynsley* (*ubi sup.*) is not against the respondents. It is stated (6 Q. B. Div., at the bottom of p. 183): "Seeing that the appellant had engaged personally to work for the respondents, the magistrate was of opinion that the appellant was a workman," &c., so that there was a contract to do the work personally. The cases cited on the Employers' Liability Act do not carry the argument any further.

Robertson was called upon to reply as to the effect of the case of *Ingram* v. *Barnes* (*ubi sup.*). That case was decided on different words. The key note for determining the question is not personal service, but manual labour, and the words we have to look at in sect. 10 of the Employers and Workmen Act 1875 are "engaged in manual labour." These two women were engaged in manual labour, and they were entirely paid by personal wages; and they were therefore "workmen" within sect. 10. He referred to

Pillar v. *Llynvi Coal and Iron Company*, 20 L. T. Rep. 923; L. Rep. 4 C. P. 752; 38 L. J. 294, C. P.

Cur. adv. vult.

April 18.—The judgment of the court (Lord Alverstone, C.J., Kennedy and Ridley, JJ.) was read by

KENNEDY, J.—This is an appeal on a case stated by two of the justices of Nottingham against the dismissal of a summons against the respondents for an alleged unlawful deduction from the sum contracted to be paid by the respondents to a workwoman, Mrs. Annie Lizzie Flinders, contrary to the provisions of the Truck Act 1896, s. 2 sub-s. 1, and against their dismissal of a like summons in the case of another workwoman, Mrs. Amy Lamb. The justices were of opinion that neither Mrs. Annie Lizzie Flinders, in the one case, nor Mrs. Amy Lamb, in the other case, was a workwoman within the meaning of the Truck Acts, and on that ground dismissed both summonses. After carefully considering the findings of fact stated in the case by which we are bound, we find ourselves unable, in view of the language of the Acts of Parliament which apply to these cases and of judicial decisions which were given upon a practically identical statute, and which are binding upon this court, to hold that the determination of the justices was erroneous in point of law. The definition of workman (which includes a workwoman) is contained in sect. 10 of the Employers and Workmen Act 1875 (38 & 39 Vict. c. 90). We may summarise it for the purposes of this case as including any person, not being a domestic or a menial servant, who being engaged in manual labour, has entered into, or works under, a contract with an employer, the contract being a contract of service or a contract personally to execute any work or labour. The material facts in relation to the employment of "clippers" in the lace trade at Nottingham, generally, are set forth in the paragraphs (*c*) to (*h*) of the case. [His Lordship read these paragraphs and continued.] The further particular facts in regard to the two "clippers" whose cases form the subject of the present appeal are these. Mrs. Flinders never worked in the respondents' factory. She applied for and obtained work as a "clipper," and did the clipping herself at home. Mrs. Lamb was regularly employed in the respondents' factory during the day, and occasionally took home clipping work, which she knew was not considered part of the work at the factory. Her daughter helped her with the clipping work at home. In neither case were the respondents aware of the person or persons who actually did the work. It was further stated by counsel that the clipping work was entered in the wages-book and the women were paid weekly, subject to deductions from their pay for damaged work. We feel ourselves precluded by authority from considering, upon this state of facts, whether we might not give sect. 10 of the Act of 1875 an interpretation sufficiently liberal to include these two persons as workwomen entitled to the protection of the Truck Acts. The basis of the decision of the Exchequer Chamber in the leading case of *Ingram* v. *Barnes* (7 E. & B. 132), affirming the judgment of the majority of the Court of Queen's Bench (*ibid.*, p. 115), unquestionably is that to be a "workman" or "artificer" within the protection of the Truck Acts, the person who contracts to do work for an employer must be a person absolutely bound by the terms of the contract to work with his own hands in the

performance of it. The fact that he may work, or will probably work, with his own hands, in the performance of the contract is insufficient. The principle of *Ingram* v. *Barnes* (*ubi sup.*) was distinctly recognised in the judgment of the Court of Common Pleas in the later case of *Pillar* v. *Llynvi Coal and Iron Company* (38 L. J. 294, C. P.). Montague Smith, J., delivering the judgment of the court, said (p. 297):—"The result of that decision [*Ingram* v. *Barnes*] is that a man is not an artificer within the Act unless the employer has, by the contract of hiring, a right to require his personal work and labour in return for 'wages'—of course as wages are defined by the Act." In the present case the justices have found the employment of these women clippers to be the employment of persons who may execute the work or give it to other persons to execute. In fact Mrs. Flinders herself executed at home the work she got; so did Mrs. Lamb, with the assistance of her daughter. But neither of them was bound by the terms of the contract with the employer to do any part of the work personally; and this, as we have already said, appears to be established by the judgments of the judges in the Exchequer Chamber in *Ingram* v. *Barnes* (*ubi sup.*) to be essential in order to constitute a workman under the Truck Act. It is true that *Ingram* v. *Barnes* (*ubi sup.*) was decided not in regard to the Employers and Workmen Act 1875, s. 10, but upon the interpretation of an earlier Act—1 & 2 Will. 4, c. 37; but the learned counsel for the appellant was unable to point out to us, and we have been unable to discover any real or material distinction in the somewhat different wording of the two Acts in regard to the definition of "workman." We must, therefore, dismiss the appeal. We do so with some reluctance, having regard to the facts disclosed in this case as to the nature of the employment and the position of the women clippers, who, though they do sometimes employ assistants, are evidently, as a class, wage-earning manual labourers, and not "contractors" in the ordinary and popular sense, or persons who "speculate on the state of the labour market"; and we venture to express the hope that some amendment of the law may be made, so as to extend the protection of the Truck Act to a class of workpeople practically undistinguishable from those already within its provisions.

Appeal dismissed.

Solicitor for the appellant, *Treasury Solicitor.*

Solicitors for the respondents, *Hind* and *Robinson* for *Wells* and *Hind*, Nottingham.

Thursday, April 6, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

REX v. HANKEY AND ANOTHER, Justices. (*a*)

Motor-car—Owner — Refusal by owner to give name and address of driver — Conviction of owner — Omission in conviction of allegation that driver had committed an offence—Validity of conviction—Motor Car Act 1903 (3 *Edw.* 7, *c.* 36), *s.* 1, *sub-s.* 3—*Motor Cars* (*Use and Construction*) *Order* 1904, *art.* 4, *r.* 6.

The conviction of the owner of a motor-car under sub-sect. 3 *of sect.* 1 *of the Motor Car Act* 1903, *for refusing to give the name and address of the driver of his motor-car, must allege that an offence had been committed by the driver, and if the conviction does not contain an allegation to that effect, it is bad and may be quashed; but it is not a condition precedent to such conviction that the driver should first have been asked to give his name and address, or have given a false name and address.*

A conviction of the owner of a motor-car under sub-sect. 3, "*for that he, being the owner of a certain motor-car which was then being driven on the highway, did unlawfully . . . after due notice had been given to him, refuse to give the name and address of the driver who was then and there driving the same, such name and address being required in order that proceedings might be taken against him under sect.* 1 *of the Motor Car Act* 1903 *and rule* 6, *art.* 4, *of Statutory Rules and Orders* 1904," *is bad for not sufficiently alleging that an offence had been committed by the driver.*

RULE calling on two justices of the peace for the county of Berks to show cause why a writ of *certiorari* should not issue to remove into the High Court a certain record of a conviction by the justices, of the 9th Aug. 1904, whereby the Earl of Craven was convicted for that he, being on the 2nd July 1904 the owner of a certain motor-car, No. A C 143, which was then being driven upon the highway at Twyford, Berks, did unlawfully on the 4th Aug. 1904, after due notice had been given to him, refuse to give the name and address of the person who was then and there driving the same, such name and address being required in order that proceedings might be taken against him under sect. 1 of the Motor Car Act 1903 and rule 6 of art. 4 of the Statutory Rules and Orders 1904.

The rule was obtained at the instance of the Earl of Craven, and upon the following grounds: (1) That the conviction was bad on the face of it, because it did not allege that the driver had committed an offence under sect. 1 of the Motor Car Act 1903, and did not allege that the driver had refused to give his name or address or had given a false name or address; and (2) that the justices had no jurisdiction to convict in the absence of evidence to the above effect.

The information against the Earl of Craven was laid by a superintendent of police, and the summons, dated the 5th Aug. and received on the 6th Aug., was "for that you on the 2nd July 1904, being then the owner of a certain motor-car, No. A C 143, which was then being driven upon the highway at Twyford, Berks, did unlawfully on the 4th Aug. 1904, after due notice had been given to you, refuse to give the name and address of the person who was then and there driving the same in order that proceedings might be taken against him under sect. 1 of the Motor Car Act 1903 and rule 6 of art. 4 of the Statutory Rules and Orders 1904, No. 315, contrary to the form of the statute in such case made and provided"; and the summons required the defendant to attend before the court at Wokingham on the 9th Aug.

The information was laid upon the following depositions: Mr. Remnant, M.P., said that on the 2nd July 1904 he signalled to the defendant's motor-car just outside Twyford, on the Bath

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

road; he held up his hand, but no notice was taken, and the motor-car did not stop; he was driving a new horse, and the horse shied on one side; the chauffeur was riding between the driver's legs [An impossible position because the steering and pedal controls are there. He was probably seated on the footboard on the near side, as is usual when the seats are occupied.—ED.] on the car; and two other deponents corroborated this statement.

The superintendent of police deposed that he received a complaint respecting this car, No. A C 143, and made application for the name and address of the driver; he produced a certificate of registration and also notice with declaration of service taken before a commissioner for oaths served on the defendant; and said that he had not received the name and address of the driver, and that the defendant absolutely refused to give it.

Upon the hearing, the justices convicted the defendant, the conviction—which it was now sought to quash—being drawn up in the following form:

The Honourable the Earl of Craven, of Coombe Abbey, Coventry, Warwickshire (hereinafter called the defendant), is this day convicted before this court for that he being on the 2nd day of July 1904 the owner of a certain motor-car, No. A C 143, which was then being driven upon the highway in Twyford, Berks, did unlawfully on the 4th day of August 1904, after due notice had been given to him, refuse to give the name and address of the person who was then and there driving the same, such name and address being required in order that proceedings might be taken against him under sect. 1 of the Motor Car Act 1903 and rule 6, article 4, of Statutory Rules and Orders 1904. And it is adjudged that the defendant do for his said offence forfeit and pay to the clerk of this court at Wokingham, Berks, the sum of 10*l.*, and do also pay to Charles Goddard, the informant, the sum of 1*l.* 4*s.* 6*d.* for costs. And it is ordered that the said sums be paid forthwith. And if default is made in payment according to this adjudication and order, it is ordered that the sum due thereunder be levied by distress and sale of defendant's goods, and in default of sufficient distress it is adjudged that the defendant be imprisoned in His Majesty's prison at Reading, Berks, for the space of two months unless the said sums and all costs and charges of the said distress and of his commitment and conveyance to the said prison be sooner paid.

The affidavit of the Earl of Craven upon which the rule was granted set out that he was the registered owner of the motor-car registered No. A C 143; that on the 1st Aug. 1904 he received a letter, dated the 31st July 1904, which purported to be signed by the superintendent of police of Wokingham, Berks, in the following terms:

County Police Station, Wokingham.—To the Right Hon. the Earl of Craven.—I hereby give you notice that the name and address of the person who was driving your motor-car, No. A C 143, at Twyford, Berks, on the 2nd July 1904 is required for the purpose of taking proceedings against him under section 1 of the Motor Car Act 1903, and also under rule 6, article 4, of the Statutory Rules and Orders 1904, No. 315. I therefore make application under section 1, sub-section 3, to you as registered owner of the car to give the driver's name and address to the bearer of this notice or to me.—(Signed) CHARLES GODDARD, Superintendent of Police.

Thereupon he made inquiries, and he stated that he verily believed that the demand made upon him by the superintendent was not justified in fact or in law for (*inter alia*) the following reasons:

The driver of my motor-car referred to in the said notice or letter of the 31st July had not committed any offence at the date and place alleged in the said letter under sect. 1 of the Motor Car Act 1903, nor had the said driver committed any other offence at the date and place alleged in the said letter under rule 6, article 4, of the said regulations mentioned in the said letter or at all. The said driver had not refused to give his name and address. The said driver had not given a false name or address. The said driver had not been guilty of any offence under the Motor Car Act 1903. When the bearer of the said notice or letter came to me, he did not produce any evidence or make any statement which disproved any of the above-mentioned facts and reasons. No sort of communication was made by him to me to show that the said driver had committed an offence under sect. 1 aforesaid or under rule 6, article 4, or at all, or that he had refused to give his name or address or that he had given a false name or address. The bearer of the said notice or letter did not make any statement or communication to prove that proceedings were not going to be taken under rule 6, article 4, aforesaid against the said driver. On the contrary, I then verily believed and still believe that proceedings under rule 6, article 4, were intended to be taken against the driver, and therefore that I was not bound to comply with the application made to me as aforesaid. Thereupon I handed the matter over to my solicitors with instructions to act.

The applicant's solicitors then wrote the following letter on the 5th Aug. to the superintendent of police:

Dear Sir,—Earl Craven has forwarded us your letter to him with instructions to do what is necessary in the matter, and we shall be glad if you will inform us for what offence you desire to take proceedings against the driver of the car the registered owner of which you allege is the Earl of Craven.

To this letter the following reply was received from the superintendent, dated the 6th Aug.:

I beg to inform you that a summons has been sent to Coombe for service on Earl Craven for refusing to give driver's name.

The summons having been issued on the 5th Aug., served on the 6th, and made returnable on the 9th Aug., application was made by the defendant's solicitors for an adjournment upon the ground that it was impossible properly to prepare the defence in so short a time, but the application was refused, and the summons was heard and disposed of on the 9th Aug., the defendant not being in any way represented at the hearing of the case.

The affidavit then proceeded:

At the hearing of the said information I verily believe that no evidence was adduced that the driver had committed any offence as alleged in the said notice or order of the 31st July, or at all, or that he had refused to give his name and address, or that he had given a false name and address. If any evidence was adduced on any of these matters it was wholly insufficient, and could not reasonably support the conviction. Further, I submit that the conviction is on the face of it bad, having regard to the Motor Car Act 1903, and the regulations thereunder, because the application is made for alternative reasons, is bad for duplicity, and purports to be made for a purpose which is not within sub-sect. 3 of sect. 1 of the said Act; because the conviction is bad for

duplicity; because the conviction does not allege that the driver of the car had committed an offence under sect. 1 of the Motor Car Act 1903; and because the conviction does not allege that the said motor-car was unlawfully driven. Further, I submit, having regard to the special circumstances of the case, that the court acted oppressively to me in refusing to grant an adjournment and in hearing the case *ex parte*, and they improperly exercised their judicial power in declining to give me a reasonable opportunity to prepare and put forward my defence both in law and on the facts; and I ask that the conviction may be removed into this court by a writ of *certiorari* for the purpose of being quashed.

Two of the justices (Mr. Hankey and Mr. Watson) who convicted the applicant made an affidavit, in which they stated that the application for adjournment made to the court was not supported by any evidence except that the correspondence set out in the applicant's affidavit was read or referred to, while, on the other hand, it appeared that the principal witness for the prosecution, Mr. Remnant, was not able to attend the next sitting of the court, and that it would be most inconvenient for him to attend the court for some time, and, being of opinion that sufficient notice had been given, they refused the application.

Evidence on oath was then given by the said Mr. J. R. Remnant, M.P., that on the 2nd July last he was driving a new horse near Twyford, Berks, on the Bath road, and that he saw a motor-car (No. A C 143) coming towards him; that he held up his hand as a signal to the driver of the car to stop; that no notice was taken of his signal by the driver, although the speed at which the car was travelling caused his horse to shy, and that the car did not stop, and that the chauffeur was riding between the driver's legs [Evidently a mistake. See note above.—ED.] on the car. Sworn testimony was also given by James Beckford, a gardener, of Twyford, who stated that he saw Mr. Remnant driving on the occasion referred to; that he saw a motor-car coming along the Bath road at a furious pace; that he saw Mr. Remnant signal to the driver of the car to stop; that the car did not stop, and that he thought the pace at which the car was travelling was about forty miles an hour; and also by Charles Rickson, who stated that he saw Mr. Remnant signal to the driver of the motor-car to stop, and that the car was travelling between thirty and forty miles an hour.

Formal evidence was also given on oath that the Earl of Craven was the registered owner of the car; that the letter or formal notice was served personally upon him, when he refused to give the information, and that Superintendent Goddard had previously to the 31st July applied to Earl Craven for the name and address of the driver of the car, and that such information had been refused.

We were satisfied by the evidence before us that the driver of the car No. A C 143 had committed an offence under sect. 1, sub-sect. 1, of the Motor Car Act 1903 by driving a motor-car on a public highway at a speed dangerous to the public, having regard to all the circumstances of the case, and that it was clear that he might also have been convicted under art. 4, rule 6, of the Motor Cars (Use and Construction) Order 1904 for refusing to stop when signalled so to do by Mr. Remnant, who was driving a horse. We were also of opinion that if it was necessary for the prosecution to prove a refusal by the driver to give his name and address, which appeared to us on the construction of the statute not to be necessary, such refusal was proved to our satisfaction by the refusal to stop when requested so to do under the circumstances detailed by Mr. Remnant and the other witnesses at the hearing.

The Motor Car Act 1903 (3 Edw. 7, c. 36) provides:

Sect. 1 (1). If any person drives a motor-car on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway, that person shall be guilty of an offence under this Act. (2) Any police constable may apprehend without warrant the driver of any car who commits an offence under this section within his view if he refuses to give his name and address or produce his licence on demand, or if the motor-car does not bear the mark or marks of identification. (3) If the driver of any car who commits an offence under this section refuses to give his name or address, or gives a false name or address, he shall be guilty of an offence under this Act, and it shall be the duty of the owner of the car, if required, to give any information which it is within his power to give, and which may lead to the identification and apprehension of the driver, and if the owner fails to do so he also shall be guilty of an offence under this Act.

Sect. 11 (1). A person guilty of an offence under this Act, for which no special penalty is provided, shall be liable on summary conviction in respect of each offence to a fine not exceeding twenty pounds, or in the case of a second or subsequent conviction to a fine not exceeding fifty pounds, or in the discretion of the court to imprisonment for a period not exceeding three months. (2) Any person adjudged to pay a fine exceeding twenty shillings under this Act may appeal against the conviction in the same manner as he may appeal if ordered to be imprisoned without the option of a fine.

The Motor Cars (Use and Construction) Order 1904 (Statutory Rules and Orders 1904, No. 315), dated the 9th March 1904, provides:

Art. 4. Every person driving or in charge of a motor-car when used on any highway shall comply with the regulations hereinafter set forth—namely, . . . (6) He shall, on the request of any police constable in uniform, or of any person having charge of a horse, or if any such constable or person shall put up his hand as a signal for that purpose, cause the motor-car to stop and to remain stationary so long as may be reasonably necessary.

Cecil Walsh showed cause against the rule.—There is no ground for quashing the conviction in this case. The conviction was a conviction of the owner of the motor-car under sect. 1, sub-sect. 3, of the Motor Car Act 1903 for refusing, when required, to give information which it was in his power to give, and which might lead to the identification of the driver, and it is submitted that in so refusing he committed an offence under the Act. The contention put forward on behalf of the applicant is that under sub-sect. 3 the owner of the motor-car cannot be called upon to give the name or address of the driver until the driver has himself refused to give his name or address, or has given a false name or address. That cannot have been the intention of the Legislature in passing this sub-section. The offences specified in sub-sect. 1 are the driving recklessly or at a dangerous speed, and if the construction sought to be placed on sub-sect. 3 is correct—namely, that the owner of the car is not bound to give the information until the driver has refused to give his name and address—then the faster the driver goes and the greater the offence under sub-sect. 1, the less

chance there would be of getting the name and address of the driver from the driver himself, and, consequently, if the construction contended for is correct, the owner would not be bound in that case to give the name or address of the driver. Art. 4, rule 6, of the Motor Cars Order 1904 expressly provides that if a person in charge of a horse puts up his hand as a signal for the driver of the car to stop, the driver shall stop; in the present case there was a breach of that regulation by the driver. It cannot be said that the section meant that you must first speak to the driver and give him an opportunity of giving a false name and address before you can apply to the owner. When an accident happens and the driver drives very quickly away it would be impossible to speak to the driver, and that was the very difficulty the sub-section was intended to meet. Again, the writ of *certiorari* is discretionary, and in this case it ought to be refused upon the ground that the Act itself—in sect. 11, sub-sect. 2—provides the remedy, namely, an appeal against the conviction to quarter sessions, so that the owner has adopted the wrong remedy. Upon both grounds the rule ought to be discharged.

Avory, K.C. (*Moresby White* with him) in support of the rule.—The conviction is bad on the face of it, and ought to be quashed. The writ of *certiorari* is a writ *ex debito justitiæ*, when the party applying for it is a party aggrieved and when the conviction is bad. Quite apart from the question whether the driver has refused to give his name and address or has given a false name and address, it is clear on the construction of sub-sect. 3 of sect. 1 that it is only when the driver of a car has committed an offence under the Act that the owner can be called upon to give the name and address of the driver. The conviction under this sub-section ought to allege that the driver has committed an offence, which this conviction does not do. It does not even state that it was alleged that the driver had committed an offence. Unless the conviction contains with certainty all the allegations of facts which are necessary to constitute the offence, then it is bad, and it is not sufficient to constitute this offence merely to state, as this conviction does, that the name and address of the driver were required "in order that proceedings might be taken against him" under the Act, which was not an allegation that he had committed an offence. It at least ought to have said that the driver was alleged to have committed an offence, and before the justices can convict the owner under sub-sect. 3 they must have evidence before them that the driver had committed an offence. That is a condition precedent to conviction of the owner—not that the driver has been convicted of an offence, but that he has committed an offence; and this conviction does not allege that condition precedent. Again, under art. 4, rule 6, of the order the owner cannot be convicted; under that rule the owner cannot be called on to give the name and address of the driver, and, whether the driver committed an offence under that rule or not, the owner cannot be called upon under the rule to give the name and address of the driver, so that in refusing to give the name he committed no breach of that rule. [Lord ALVERSTONE, C.J. referred to the case of *Smith* v. *Moody* (87 L. T. Rep. 682; (1903) 1 K. B. 56).] In that case it was held that a conviction for an offence of injuring property under sect. 7 of the Conspiracy and Protection of Property Act 1875 was bad on the face of it in that it did not specify what property of the respondent had been injured. The present case goes much further, because there is insufficiency in the description of the offence itself. In that case Channell, J. said: "The principle, however, seems to be that . . . the conviction must be as precise as the summons. . . . Therefore, following the rule that the conviction must be as precise as an indictment, I think that this conviction is wrong," and so on. In the present case sub-sect. 1 of sect. 1 contains at least four offences, and, to make this conviction a good conviction on the face of it, it ought to have alleged an offence of doing some one or other of those concrete offences. See *Cotterill* v. *Lempriere* (62 L. T. Rep. 695; 24 Q. B. Div. 634), referred to in Paley on Summary Convictions, 8th edit., pp. 223 4, where, under a by-law providing that no smoke should be emitted from the engines so as to constitute a reasonable ground of complaint to the passengers or the public, it was held that in an information and conviction which stated that the defendant had permitted smoke to escape contrary to the by-law, without stating in terms any reasonable ground of complaint to the passengers or to the public, the statement was insufficient, and the conviction bad. The only way in which this conviction would be good would be by its containing a recital or statement that the driver had committed an offence.

Lord ALVERSTONE, C.J.—I have with great reluctance come to the conclusion that this conviction cannot be supported; I say with great reluctance, because throughout the argument I could not help feeling that there were no merits at all in the matter. But it has been an established rule for a great many years, upon which the judges have felt themselves constrained to act, that where a conviction contained matters of uncertainty it was bad. In this case the offence with which the Earl of Craven was charged was in not giving information which it was in his power to give, and which might lead to the identification of the driver of his motor-car. The first and perhaps the main point argued was that the obligation of the owner of the motor-car under this sub-section did not arise until the driver of the motor-car had refused to give his name and address; in other words, that it was only a remedy supplementary to the power of the prosecutor to get the name and address from the driver himself. I wish to say most distinctly that I do not construe the sub-section in that way. As was pointed out during the argument, if that had been the purpose of the section, then the language of the section ought to have been quite different; we should not have expected to find the word "and" where it is in the sub-section; and any such construction as has been contended for by counsel in support of the rule would render this enactment of no effect. The words of the sub-section are: "If the driver of any car who commits an offence under this section refuses to give his name or address, or gives a false name or address, he shall be guilty of an offence under this Act." That is complete in itself, and that constitutes the offence by the driver of refusing to give his name or address,

or of giving a false name or address. Then the sub-section goes on to say: "And it shall be the duty of the owner of the car, if required, to give any information which it is within his power to give, and which may lead to the identification and apprehension of the driver, and if the owner fails to do so he also shall be guilty of an offence under this Act." These words seem to me to create a fresh offence, and an offence on the part of a different person; and to say that the obligation of the owner is only to arise in cases where there has been a refusal by the driver would leave out of sight altogether cases most likely to arise of the driver going off as quickly as possible and giving no opportunity of asking for his name and address, which would really reduce this enactment to nothing so far as getting information is concerned. Therefore if the only point had been that the driver had not been asked to give his name and address, and that consequently no offence was committed by the owner of the car, I should have been against the contention of counsel in support of this rule. The difficulty, however, arises from the allegation in the conviction (which follows the information) that the owner of the car "did unlawfully on the 4th Aug. 1904, after due notice had been given to him, refuse to give the name and address of the person who was then and there driving the same, such name and address being required in order that proceedings might be taken against him under sect. 1 of the Motor Car Act 1903 and rule 6, art. 4, of Statutory Rules and Orders 1904." I am not sure that there is not some objection to that upon the ground of two offences being coupled together. It will be observed that the word coupling these two offences is not "or," but "and"—"and" "under rule 6, art. 4," and so on; and the words immediately preceding are "in order that proceedings might be taken against him." At present it does not seem to me to be clear that the owner of the car could be compelled to give the information necessary for a prosecution under rule 6 of art. 4, and that rather supports the argument of counsel in support of the rule. If that stood alone, I do not know that the conviction would be bad. It does, however, point to the main objection arising upon the words "in order that proceedings might be taken against him under sect. 1." Looking at this sub-section—sub-sect. 3—and bearing in mind that the information which the owner is required to give is to lead to the identification and apprehension of the driver, and that such identification and apprehension are only wanted for the purpose of taking proceedings, the allegation is very nearly sufficient. At the same time, however, it is open to the view, which was pressed upon us, that it does not allege in terms that an offence has been committed by the driver, and it is also open to the ambiguity that the driver might be wanted merely to consider whether proceedings might be taken against him or not. It might be said that the more natural view might well be that the information was wanted in order to enable proceedings to be taken, but, as proceedings ought not to be taken unless an offence is alleged to have been committed, it is possible to take the other view, and to hold that the allegation that the information is wanted in order that proceedings might be taken does not amount to an allegation in terms that an offence had been committed. Still, at the same time, bearing in mind that a conviction must be certain in its allegations and have the same amount of certainty as an indictment, I think upon the whole it is safer to hold that this conviction does not sufficiently allege that an offence had been committed by the driver, whose name was required. For these reasons I come to the conclusion that this rule must be made absolute and this conviction quashed, though I come to that conclusion with regret.

KENNEDY, J.—I agree.

RIDLEY, J.—I agree. *Conviction quashed.*

Solicitors in support of the rule, *Firth* and *Co.*
Solicitors against the rule, *Snow*, *Fox*, and *Higginson*, for *Cave* and *Wilson*, Bracknell.

Jan. 30, *Feb.* 3, *and May* 15, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

KIRBY (app.) *v.* ASSESSMENT COMMITTEE OF THE HUNSLET UNION (resps.) (*a*)

Rating — Poor rate — Valuation—Machinery—Tenant's machinery not forming part of freehold—Basis of valuation—Taking machinery into account as enhancing value of premises.

In valuing for purposes of poor rate manufacturing works which contain machines not forming part of the freehold, but which have been placed on the premises by the tenant or his predecessor for the purpose of making and which do make the premises fit for the purpose for which they are used, and which are tenant's machinery, the proper basis of valuation is to ascertain what is the rent which a hypothetical tenant would give for the manufacturing works as a combination of land, buildings, and machines upon the assumption that the tenant would get for his rent the right to use such machines during his tenancy; and such machines ought properly to be taken into account as enhancing the rental and rateable value of the premises, though the value of such user is not necessarily to be arrived at by putting a percentage upon the cost or value of the machinery.

CASE stated by the Recorder for the city of Leeds, upon an appeal against a poor rate for the township of Hunslet, in the Hunslet Union, in the city of Leeds, heard and determined at the quarter sessions for the city, held by adjournment on the 29th, 30th, and 31st March 1904, when the appeal was allowed and the rate was amended in manner hereinafter appearing, subject to the following special case:—

1. The appellant was the occupier of certain premises known as the Standard Works, where he carried on the business of a general jobbing engineer. The following are the items of so much of the rate appealed against (which was made and allowed on the 3rd Oct. 1903) as related to the premises:

No.—2579.
Occupier.—Thomas Kirby.
Owner.—B. Greaves and Sons and Thomas Kirby.

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

Description. — Engineering works, and the land, buildings, machinery, and fixed plant connected therewith.
Situation.—Saynor-road.
Estimated extent.—9p.
Gross estimated rental.—67*l.*
Rateable value of buildings, &c.—45*l.*

Before the making of the rate the appellant was assessed in respect of the premises at 29*l.* as the gross estimated rental, and 22*l.* as the rateable value.

2. The premises consisted of an office, a model room, a fitting shop, a machine shop, a store, an engine room, a shed and a yard; all of which, except the office, model room, and store, contained machinery. Some of the machinery, such as a horizontal steam-engine, shafting pulleys, steam piping, &c., admittedly formed part of the freehold In addition to the above there were a number of machines which formed no part of the freehold, and which had been placed thereon by the tenant or his predecessors in title for the purpose of making, and which did make, the premises fit as premises for the particular purpose for which they were used. The general character of these machines was shown in the schedule attached to this case, and it was admitted or proved to the satisfaction of the recorder that, with one or two trifling exceptions, these machines were not affixed to the freehold, but were merely secured to the fixed shafting by belting in order to enable the machines to be worked by the tenant, whose property they were. It was for the purposes of the argument admitted by counsel on both sides that the machinery set out in the schedule was tenant's machinery within the meaning of the *Tyne Boiler Works* case.

3. On the 31st Dec. 1891 the appellant, who had been in occupation of the premises since the year 1878, entered into an agreement with Benjamin Greaves and Sons, the owners of the premises, to take the premises on lease for a term of five years, from the 1st Oct. 1891, at a rent of 26*l.* per annum, payable quarterly. By this agreement, which was annexed to and formed part of the case, Benjamin Greaves and Sons (the lessors) agreed to let and Thomas Kirby (the lessee) agreed to take the whole of the premises then occupied by him and known as the Standard Works, situate in Saynor-lane, Hunslet. The appellant (the lessee) covenanted to pay all rates and taxes, except the landlord's property tax, and the lessors covenanted to keep the premises in good tenantable repair. The lessee was to have the right to renew the tenancy for a further period of five years if he so wished at any time during the lease; and all foundations, walls, roofs, &c., of whatsoever kind, whether of stone, brick, wood, or any other material which the lessee might during the term of this lease erect for the convenience of his trade or for the bearing of engines or machinery, were to belong to the lessee, and at the expiration of his tenancy under this lease or at any time during his tenancy the lessee was to have the right of taking down the structures erected by him, leaving the premises in the same structural condition as they were in at the commencement of the lease. Since the expiration of the term the appellant had continued to occupy, and now occupied, the premises as a tenant from year to year upon terms similar to those contained in the above agreement.

4. The appellant contended: (1) That in valuing the premises the value of the user of the machinery other than that which formed part of the freehold ought not to be considered. (2) That the machinery ought only to be taken into account in so far as its presence—(*a*) afforded proof that the premises were fit for the purpose of the business carried on therein, and (*b*) would be likely to induce a tenant to give a higher rent for the premises than he would give if the machinery were not upon the premises. (3) That to rate the premises upon the principle contended for by the respondents would be to put an assessment on machinery other than that which formed part of the freehold, which is wrong, because the said machinery is not part of the rateable hereditament. (4) That machinery of the class to which the machines belonged, if it were not upon the premises when a letting took place would be brought and put upon the premises by the tenant to whom the premises were let, and not by the landlord who let the premises, and that therefore it is wrong to include the value of the machinery in the annual rent which such tenant would pay to such landlord.

5. The respondents contended that in inquiring what was the gross estimated rental and the rateable value, the basis of the problem was to ascertain what was the rent which a hypothetical tenant would give for the premises equipped with the scheduled machines, and including the right to the use of such machines, and that in ascertaining such rent the value of the user of the said machines must be taken into account as enhancing the rental value of the freehold. It was upon this principle that the rateable value appealed against had been assessed.

6. The recorder held that in inquiring what was the gross estimated rental and the rateable value, the basis of the problem was to ascertain what was the rent which a hypothetical tenant would give for the engineering works as a combination of land, buildings, and scheduled machines, on a demise which included the right to use the scheduled machines—that is say, on the assumption that the hypothetical tenant would get as part of the consideration for the hypothetical rent the right to use such machines upon the premises during his tenancy. And that in this way the scheduled machines were properly being taken into account as enhancing the rental and rateable value of the freehold. He also held that the value of the user of the machinery was not necessarily to be arrived at by taking the cost or value of the machinery and putting a percentage on such value, as had been done by the respondents' valuers. [This paragraph was substituted for par. 6 of the case as it originally stood, the case having been remitted during the argument to the recorder for a fuller finding upon the point.]

7. A copy of the recorder's judgment was annexed to and was taken as forming part of the case.

8. The question for the opinion of the court was whether the recorder was right in law in his decision as stated in par. 6.

9. On the question of amount, the recorder reduced the assessment of the premises to 46*l.* as the gross estimated rental, and 31*l.* as the rateable value. If the answer to the question of law should be in the affirmative, that assessment was to stand. If the answer should be in the negative,

and the principle contended for by the appellant as stated in par. 4, (1) and (2) of this case, is correct, the assessment was to be reduced to 39*l.* as the gross estimated rental, and 26*l.* as the rateable value.

If the court should hold that neither the principle of the recorder's decisions as stated in par. 6, nor the principles contended for by the appellant as stated in par. 4 (1) and (2) of this case, is correct, the court was to make such other order herein as it should deem fit.

In the schedule containing the description of the machines, there were in the fitting shop, first floor, some seven machines (such as vertical drilling machines, shaping machine, milling machine, wood turning lathe, and so on); in the machine shop, ground floor, there were eight machines (screw cutting gap lathes, boring lathe, boring machine, grindstone, &c.); in the engine room, ground floor, there was one blast fan; and in the shed there was one vertical drilling machine.

The judgment of the learned recorder, which formed part of the case, was as follows:—

The appellant in this case is an occupier from year to year, under an expired tenancy, of some engineering works at Hunslet, at a rental of 26*l.* per annum, and he is appealing against an assessment of 67*l.* gross and 45*l.* rateable, the previous assessment being 29*l.* gross and 22½*l.* rateable. The importance of the case is certainly not in the amount involved, but it has been fought at considerable length for the purpose of settling an important principle upon which the assessment of a large number of very important works in the Hunslet Union will depend. The question involved is the settlement of the mode in which machinery, such as this is admitted to be, can be made available for the purposes of poor law assessment. Machinery by itself is not the subject of rating. If fixed to the freehold, either as the landlord's or as the tenant's fixture, it is, for the purpose of being rated, a part of the freehold, and no difficulty arises. Where the plant and machinery are not affixed to the freehold, but have been placed on the premises to be rated for the purpose of making, and do make, the premises fit for the particular purpose for which they are used (to use Lord Esher's words in the *Tyne Boiler Works* case), they then are capable of being "taken into account in ascertaining the rateable value of such premises." In this case the machinery belonging to the tenant, which is at present on the premises in question, is admitted to come within the above category, and it is common ground between the parties to this appeal that this machinery has, in some way, to be taken into account in arriving at the rateable value. The point that has been so strenuously fought in this case is, in what way is it to be made available. The appellant contends that the value of the user of this machinery in connection with the occupation of the premises ought not to be considered, but that the question of the benefit must be limited to the advantage derived from the fact that the machinery affords proof of the convenience of the building for the purpose of the business, and a possible value from the tenant being able to take it *in situ*. The respondents, on the other hand, say that the only way in which you can properly take machinery into account is by taking the hereditament as you find it, furnished and equipped with the necessary machinery, and ascertaining what is the rent which a tenant from year to year will give for such premises as they stand, including, of course, the right to use what he finds there. It is extraordinary how little decisive authority there is on the point. The earlier authorities, which have been quoted, are of little or no assistance in this regard, although exceedingly valuable on the point as to what sort of machinery may be treated as adding to the rateable value; and in the leading authority on the above point, the Court of Appeal, in the case of the *Tyne Boiler Works Company* v. *Tynemouth Union* (55 L. T. Rep. 825; 18 Q. B. Div. 81), carefully and deliberately refrained from expressing any opinion on the method by which value was to be ascertained. In the case of *Reg.* v. *Haslam* (17 L. T. Rep. O. S. 182; 17 Q. B. 220), in dealing with the case of the large chambers placed upon the premises used as chemical works, Patteson, J. said: "We do not think it necessary in this case to determine whether the chambers erected on the appellants' premises are or are not annexed to the freehold . . . because we are of opinion that, according to the principle laid down in the various cases on this subject, the rateable value of the premises is undoubtedly increased by the use of those chambers," showing that the learned judge was of opinion that the additional value of the hereditament was in respect of the user of the plant in question, and not merely in consequence of its existence. The only case which can be called a direct authority on this point is the case of *Gifford* v. *Chard Union* (6 Times L. Rep. 431), in the Court of Appeal. I have, however, been furnished with a print setting out the case as stated by the quarter sessions, the proceedings in the Divisional Court and in the Court of Appeal. It is most important to see what was the contention adopted by the sessions, and what were the questions submitted to the court. In paragraph 19 of the case there are set out the findings of the sessions. They found, first, "that the machinery had been rightly taken into consideration in arriving at the rateable value," and, secondly, "that the premises were accordingly assessable to the poor rate at the amount at which they would let to a tenant from year to year as a going concern of a lace factory equipped with such machinery as was essential to its user as such factory." There were two questions submitted to the court—first, whether the machinery was to be taken into account at all; secondly, whether, assuming that it was, it was taken into consideration upon the proper principle. Now, it is clear that not one but both of these questions would have to be answered if the first question was answered in the affirmative. The only point argued was the first one. The Divisional Court and the Court of Appeal answered that question in the affirmative, and as they affirmed the order of the sessions it must be taken that they answered the second question in the affirmative also: that the sessions had taken into account the machinery on the proper principle—namely, of a rent which would be paid for a factory equipped with such machinery. The observations in the judgment of Lord Esher in this case in the Court of Appeal, as reported in the Times Law Reports (*ubi sup.*), namely, "That machines, whether fixed to the floor, or not, if necessary to the use of the premises as such, and going to make up the value for which the rent was paid, might be taken into account in estimating the rateable value," show clearly, to my mind, that he was referring to the user of both premises and machinery as the factor in production of the rent. Two main objections which have been urged by Mr. Boyle to the principle adopted by the respondents are, first, that in adopting it, you will be rating machinery; secondly, that the tenant buys the machinery and yet has to pay the landlord rent for it. As to the first objection, I think the answer is that to take the value which machinery may add to the letting value of the premises, is not to take the value of the machinery; the added rent has no fixed relation to the value of the machinery. It is quite true you may have cases where the added value to the rent may very closely approximate to the hiring value of the machinery; where, for instance, the machinery is new, and the building is such that every advantage is gained from the machines by the construction and character of the building itself—in such case you might arrive at the added value by taking the hiring value of

the machinery on a percentage basis. But in most cases it would not at all be the fact that the two things would be the same. If new machinery is put into old and inconvenient buildings where the full benefit of the machinery could not be gained, no tenant would give, as an addition, a 5 per cent. rental on the value of the machinery, or calculate the rent he offered on any such basis. Indeed, the premises in this case afford an illustration of what I mean. Evidence has been given that, owing to the lowness of the rooms, full power cannot be obtained to drive the machinery, which has the effect of detracting from the value of the machinery as applied to this building. The vice of the way in which the recorder dealt with the valuation in the case of *Crockett and another* v. *Northampton Union* (72 L. J. 320, K. B.), was that he had not considered what was the rental value of the premises with the addition of the machinery, but had arrived at the value of the latter independently of any connection with the premises themselves. The second point urged by Mr. Boyle was that the tenant buys the machinery and yet has to pay the landlord rent for it. I think this involves the consideration of the facts of the particular tenancy in question, which, I think, is fallacious. The question is, not what this tenant has done in the purchase, or whose property, in this case, the machinery is. For rating purposes you must take the premises as you find them, permanently equipped as engineering works, with all the necessary appliances and machines: as it stands, what is the rent? and the answer to this question shows you what is the rateable value. I am of opinion therefore that the principle by which the rateable value is to be ascertained in this case is that contended for by the respondents—namely, that in ascertaining the rent you must take into account the value of the user of the machinery as contributing to the rental value of the freehold; but in saying this I am far from saying that such value is to be arrived at by taking the cost or value of the machinery, putting a percentage on such value, and adding it to the rent. The increase and value due to the machinery may and will vary in each case owing to a number of causes, such as I have indicated. I have now to apply these principles to the case before me. I find the net rental value of the land, buildings, and landlord's fixtures, without the rest of the machinery, at 21*l*. To this has to be added what the tenant would give by way of additional rent for these premises, equipped, as they are, with the machinery in them, including the right of user. This I estimate roughly at 10*l*. a year, making the net rateable value 31*l*. For the purpose of an appeal, I may say that if the appellant's contention should be found to be correct, the rateable value should stand at 26*l*. I think, subject to anything I may hear, with regard to the question of costs, as this case was fought on a matter of principle, and the figures are comparatively immaterial, the respondents are entitled to their costs.

The learned recorder gave judgment for the respondents, and on the application of the appellant consented to state this case.

During the argument of the case, Lord Alverstone, C.J. said that he wished to have a further explanation of what was meant by the following passage in the recorder's judgment: "I am of opinion therefore that the principle by which the rateable value is to be ascertained in this case is that contended for by the respondents—namely, that in ascertaining the rent you must take into account the value of the user of the machinery as contributing to the rental value of the freehold." He said that if "taken into account" merely means "taking into consideration what more a man would give for this factory because it is equipped with this machinery," I think it is perfectly right. If it means, "I am going to consider that there are two things, the machinery and the house, and I am going to give to the landlord the full price which would be paid to the owner of that machinery, because it happens to be there, and the man does not want to take it away," it would be a different thing.

In answer to the questions asked by Lord Alverstone, C.J. the learned recorder, on the case being sent back to him for restatement, said:

I meant by the words "taken into account," taking into consideration what more a man would give for this factory because it was equipped with this machinery; and I did not mean what is suggested in the second of the two questions. I desire to add that what I meant and what I thought I had expressed was that the proper basis of assessment is the rent which a hypothetical tenant would give for the premises already equipped with the necessary machinery as included in the demise, a rent which would be something more than the rent which would be given for the bare premises without the machinery. The value of the machinery was only taken by me into account as enhancing to some degree the rent of the premises, and I have put no separate rent or value on the machinery as such.

Upon further argument, the case was again sent back, when the recorder substituted par. 6 of the case for the previous paragraph.

W. C. Ryde for the appellant.—The recorder has proceeded upon a wrong basis. He has really adopted the basis of taking the rent which covers both land, buildings, and machinery; in other words, that the tenant, on striking the bargain between him and the landlord, pays nothing more than the rent in order to get the machines. He has taken the view that it is a letting by the possessor to a succeeding tenant of land, building, and machinery, and that the rateable value is the rent which would be given for the combination of those three things. It is submitted that the rateable value is the rent which would be given by an incoming tenant for land and buildings if he has the opportunity of buying or hiring from the landlord or anybody else the machinery in question. These cases are not tried by a jury, but if they were there are two hypotheses in which the judge would have to direct the jury, one being right, the other wrong. The wrong way of putting the question would be this: What is the rent which a tenant would give for these premises with the machines there if, when he has given his rent, he has nothing further to pay to the outgoing tenant or to the landlord or to anybody else for the use of the machines, assuming that the machines are there. The right question would be this: What is the rent which a tenant would give for the buildings with the machines there if on going in, over and above his rent, he has to pay either to the landlord or to the outgoing tenant, or to somebody else, some price for the machinery itself. We asked the recorder to say that the landlord does not demise the machines to the tenant by the hypothetical demise to the hypothetical tenant; that the hypothetical tenant over and above his rent, which represents the rateable value, has to pay something for the machines to somebody; but the recorder ruled that the rent which represents the rateable value is the rent which a tenant will pay who has to pay nothing further for his machines. That is the ruling which the appellant challenges. The real question is who is to pay for the machines, and

whether, as the respondents contend, the value of the machines is to be included in the hypothetical rent to be paid by the hypothetical tenant, so that that hypothetical rent would be the rent which would be paid by a tenant who had not to pay anything for the machines to the outgoing tenant or anybody else; or whether, as the appellant contends, the hypothetical rent is to be fixed on the basis that the tenant has over and above his rent to pay to the outgoing tenant or to somebody else something for the machines. The recorder, in fact, adopted the respondents' argument, and included the rental value of the machines; in other words, he has rated the machines, and when he used the words "the right to use" he meant "the right without further payment to use," which is contrary to the cases. This was chattel machinery, and what has been done is really to rate chattels. He referred to

Reg. v. *Haslam*, 17 Q. B. 220; 17 L. T. Rep. O. S. 182;
Reg. v. *Inhabitants of Lee*, 13 L. T. Rep. 704; L. Rep. 1 Q. B. 241;
Chidley v. *West Ham Churchwardens*, 32 L. T. Rep. 486;
Tyne Boiler Works Company v. *Tynemouth Union*, 55 L. T. Rep. 825; 18 Q. B. Div. 81;
Gifford, Fox, and Co. v. *Chard Union*, 63 L. T. Rep. 249; affirmed 6 Times L. Rep. 431;
Staley v. *Castleton Overseers*, 10 L. T. Rep. 606; 5 B. & S. 505.

Scott Fox, K.C. (*Jeeves* with him) for the respondents.—The real question is, What is the rateable subject, and our contention is that it is the land and buildings, equipped with the scheduled machines, including the right to use the machines, even "without further payment" to anybody. The rateable subject was, in the *Tyne Boiler Works* case, the equipped boiler works, and in this case it is the equipped engineering works; and, as to the meaning of the word "enhancing," Lord Esher said in that case that he regarded the machinery, with which he was dealing in that case, and which by agreement is equivalent to the machinery in this case, as included in the hypothetical demise. The rating was only a rating of the hereditament, combined with what may be legitimately combined with it. We do not contend that a rental value ought to be added for the machinery; we do not rate the machinery at all, what we contend is that we merely rate "the premises." Such matters as are not covered by Lord Esher's judgment in the *Tyne Boiler* case, as, for instance, furniture and the like, would not be included, because they are not so permanently devoted to the premises as to be intended for the improvement of the premises; but if it is machinery which is within the class as designated by Lord Esher, then it is to be considered in combination with the hereditament and as part of the hypothetical demise. That in terms is what Lord Esher said. The recorder has not given the rent of this machinery, but he has given a rent for the combination, and he was right in doing so. There is a distinction between that which is part of the freehold hereditament and that which is part of the rateable hereditament; and, although these machines may not have been part of the freehold hereditament, they were part of the rateable hereditament—that is, the engineering works as they stood. It is admitted that they were the necessary equipment of an engineering works, without which they would not be engineering works at all; and if a person were asked what rent he would give for these works, that would mean what rent he would give, not for the bare buildings, but for the whole combination, including these machines. The rule is clearly laid down by Lord Esher in the *Tyne Boiler* case (55 L. T. Rep., at p. 829; 18 Q. B. Div. at p. 92): "I believe the rule really to be that things which are on the premises to be rated, and which are there for the purpose of making, and which make the premises fit as premises for the particular purpose for which they are used, are to be taken into account in ascertaining the rateable value of such premises"; and in the same judgment he deals with the meaning of the word "attached," and he distinctly states that, applying that test to the articles in question—and the machinery in this case is in the same category—it is immaterial to inquire whether they are or are not physically annexed to the freehold, and that they all came within the rule. He enlarges the scope of "fixture," and he includes certain things as being in point of fact fixtures for these purposes, although not physically attached. That follows the judgment of Lord Denman, C.J. in *Reg.* v. *Guest* (7 A. & E. 951), one of the earliest cases on the point. Having regard to these authorities, the judgment of the recorder was right. He also referred to

Crockett and another v. *Northampton Union*, 72 L. J. 320, K. B.

Ryde in reply, after the final restatement of the case.—There is no possible distinction between rating the chattels pure and simple, and taking them into account, as the recorder has done. You are to take all that forms part of the freehold, the land, the building, and any plant which is so built into the building as to form part of it; then you are to ask, will the tenant give for that land, building, and fixed plant any higher rent because the machines are there? If he will, and he finds that he will get them cheaper by reason of their being there, then the rateable value is to be increased in proportion, but they are not to be taken into account further than that.

Scott Fox, K.C. was not called upon for further reply.

Lord ALVERSTONE, C.J.—The ultimate boiling down of this case has come to a point which I ventured to suggest it would come to when the case was originally argued before us, and we were urged by counsel for the appellant to have the case restated on the ground that the recorder may have meant something else. Now that we have got the final decision of the recorder, counsel for the appellant, not asking the case to be again restated, says still that the recorder meant something else. I wish to bring back to mind what the recorder said on the first restatement, and I need not go further back than that. [His Lordship read the statement as already set out.] To my mind that was abundantly clear, but counsel for the appellant persuaded me at any rate, and perhaps more than one member of the court, that it was open to ambiguity. Accordingly the case went back again, and now this is the answer: "I hold that in inquiring what was the gross esti-

mated rental and the rateable value the basis of the problem was to ascertain what was the rent which a hypothetical tenant would give for the engineering works as a combination of land, buildings, and scheduled machines on a demise which included the right to use the scheduled machines." I stop there because counsel for the appellant has said that that shows there is no difference between machinery and buildings, that there is no difference from the point of view of rateability. There is a very great difference from the point of view of how you are to estimate the machinery, and it does not quite do justice to the learned recorder's statement to stop at those words and to assume that that is all he has said. He goes on: "That is to say, on the assumption that the hypothetical tenant would get as part of the consideration for the hypothetical rent the right to use such machines upon the premises during his tenancy, and that in this way the scheduled machines were properly being taken into account as enhancing the rental and rateable value of the freehold. I also held that the value of the user of the machinery was not necessarily to be arrived at by taking the cost or value of the machinery and putting a percentage on such value as has been done by the respondents' valuers." I understand that to be an enunciation, not of what counsel for the appellant says that he has rated the machinery, but that he has taken the machinery into account, its presence there, as enhancing the rateable value. Is that right or is that wrong? I cannot give judgment upon the matter without repeating as briefly as I can what I believe the true view on this matter to be. It must be remembered that this question has always arisen with regard to machinery which was not intended to be removed from the premises, and when this case was first argued before us counsel for the respondents told us that it was agreed that the machinery in question all came within the same category as the machinery which was the subject matter in the cases of *Tyne Boiler Works Company* v. *Tynemouth Union* (55 L. T. Rep. 825; 18 Q. B. Div. 81) and *Laing* v. *Bishopwearmouth Overseers* (37 L. T. Rep. 781; 3 Q. B. Div. 299). Therefore, no question arises here, as counsel for the appellant has tried to make out, of the rating of mere chattels. Now, is it right to take into account the presence of that machinery as enhancing the value, where that machinery is going to remain during the whole term of the demise? I will not go back to the case of *Reg.* v. *Inhabitants of Lee* (13 L. T. Rep. 704; L. Rep. 1 Q. B. 241) for a reason which will be obvious; but Blackburn, J., a most learned judge in this respect, who was a party to that decision, when he came to *Chidley* v. *West Ham Churchwardens* (32 L. T. Rep. 486) said distinctly (at pp. 488-9): "I am not prepared to say that the various articles described in the present case may not be taken into account as enhancing the value of the premises, but that question is not asked, and we are only to say whether the things are rateable." Counsel for the appellant says that he cannot comprehend how anybody can understand the difference or know what the difference is. It may be difficult to apply it in any given case, but Blackburn, J. thought he saw the difference. The next important landmark—if I may use the expression—in these cases is *Laing* v. *Bishopwearmouth Overseers* (*ubi sup.*), which was a deliberate attempt by the parish valuers on the one hand to include all machinery, and the representatives of the owners on the other hand to prevent any machinery from being included at all, and to maintain the position that if the machinery was not affixed to the freehold and merely rested on the ground by its own weight it was a chattel. The point of that case is to be found in par. 29 of the statement of the special case (37 L. T. Rep., at p. 783; 3 Q. B. Div., at p. 303), where it was found that "the whole of the buildings, foundations, engines, shafting, and other machinery included in the appendix, were intended to be used in the shipbuilding and repairing yard, the subject of the assessment," for the purpose of building and repairing ships and vessels, and so forth. I need not read the whole of that paragraph. Therefore that case pointed out that, for the purpose of enhancing the value, it was not the mere fact that the machinery was to be there, but that that machinery, or machinery like it, was to be machinery which would be, if I may use the expression, a permanent equipment. That case, if I remember rightly, did not go to the Court of Appeal; but upon that case being decided another very vigorous attempt was made to try and get a reversal of that decision, and the case of *Tyne Boiler Works Company* v. *Tynemouth Union* (*ubi sup.*) was stated for that purpose. Now, in consequence of what has been said during the argument of this case, that the *Tyne Boiler Works* case only meant to rate things which were affixed to the freehold, I must call attention to a paragraph of that case. It is said (18 Q. B. Div., at p. 82): "It will be seen on referring to the report below that some of the machines were not attached either to the soil or building, but rested by their own weight on the ground"—there was therefore no question about those being attached to the freehold—"or on cement or stone foundations specially prepared for them; while some of the machines were fixed as described in the case. The object of the attachment of the machines was to steady them, and it did steady them in working, and the method of attachment was convenient when occasion arose for their removal." Then further on it is said: "The respondents contended that the machinery and plant were necessary to the beneficial occupation of the premises as boiler works, that being the business to which they were appropriated, and that they ought to be taken into consideration as enhancing the rateable value of the premises to which they were attached." If I may be allowed to say so, those words were taken from the judgment of Blackburn, J. in the case of *Chidley* v. *West Ham Churchwardens* (*ubi sup.*). I was one of the counsel for the respondents in that case, and we put the fastening down which we thought through that expression of Blackburn, J. would, at any rate, fasten our legal proposition, and, as it turned out, we were successful. Then when that case of the Tyne Boiler Works Company came before the Court of Appeal, it was strenuously argued, as it has been in this case now before us, that the machinery must be attached to the freehold, but Lord Esher, M.R., in the passage which I have read during the argument from his judgment, would not have anything to do with the attachment argument, but said (55 L. T. Rep., at p. 829;

18 Q. B. Div., at p. 92) that the rule was, "that things which are on the premises to be rated, and which are there for the purpose of making, and which make the premises fit as premises for the particular purpose for which they are used, are to be taken into account in ascertaining the rateable value of such premises," and he calls attention to *Chidley* v. *West Ham Churchwardens* (*ubi sup.*), as being the case which had recognised the doctrine which he was then enunciating in the Court of Appeal. I will not refer again to my own judgment given in the year 1902 in the case of *Crockett and another* v. *Northampton Union* (72 L. J. 320, K. B.; Ryde's Rating Appeals 1894-1904, p. 269), which was an attempt, however imperfect, to express the same view in my own way. When we find a skilled recorder saying distinctly: "I have not rated this machinery as such," and that is what he says distinctly in terms in the finding which he has last sent up to us, because he there says: "The value of the machinery was only taken into account as in some way enhancing the rent, and I put no separate value on the machinery as such"; when we find him further stating that he has only considered the value of the machinery as enhancing the rent, it, at any rate, is a statement that he has attempted to solve the proposition, which Lord Esher said was the proper proposition. I cannot accede to the argument for the appellant, because, however experienced the appellant's counsel may be, he has told us that no man could solve the problem: but, notwithstanding that, someone has to solve it. I come to the conclusion that the learned recorder in his restatement has made it perfectly clear, as I thought it was when the case was first opened, that he has merely regarded the presence of the machinery there and its value as an element which would lead a tenant to pay more for the combined rateable value—that is to say, the land and buildings and the right of using the scheduled machines as enhancing the value of these premises, which would not have been enhanced had the machinery not been in the place at all. I therefore come to the conclusion that the learned recorder was quite right, and that the objection taken to his finding fails, and that the respondents are entitled to succeed.

KENNEDY, J.—I am of opinion that the case is covered by the decision of the Court of Appeal in the case of *Tyne Boiler Works Company* v. *Tynemouth Union* (*ubi sup.*).

RIDLEY, J.—I also am of the same opinion. I think that the case is covered by the decision in the *Tyne Boiler Works* case (*ubi sup.*). I do not therefore see any means of coming to any other conclusion than that the judgment ought to be for the respondents.

Appeal dismissed. Leave to appeal.

Solicitors for the appellant, *Vincent* and *Vincent*, for *Day* and *Yewdall*, Leeds.

Solicitors for the respondents, *Pitman* and *Sons*, for *Emsley*, *Son*, and *Smith*, Leeds.

May 16 *and* 22, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

REX *v.* TOLHURST AND OTHERS (Licensing Justices of Penge); *Ex parte* FARRELL.

REX *v.* COX AND OTHERS (Licensing Justices of Gore Division); *Ex parte* WEST. (*a*)

Licensing—Renewal of licence—House not needed in neighbourhood—Report by justices to quarter sessions—Notice to licence-holder—Evidence on oath—Licensing Act 1872 (35 *&* 36 *Vict. c.* 94), *s.* 42—*Licensing Act* 1904 (4 *Edw.* 7, *c.* 23), *s.* 1, *sub-s.* 2.

Licensing justices, in forming their opinion under sub-sect. 2 *of sect.* 1 *of the Licensing Act* 1904 *"that the question of the renewal of any particular existing on-licences requires consideration on grounds other than those on which the renewal of an existing on-licence can be refused by them," cannot act merely on their own motion or their own knowledge and report a house to quarter sessions without notice being given to the licence-holder, though they are not necessarily to exclude their own knowledge of the locality and of the needs of the neighbourhood.*

It is therefore a condition precedent to the right of the justices to refer to quarter sessions the question of the renewal of an existing on-licence that written notice, as provided by sect. 42 *of the Licensing Act* 1872, *should be given to the licence-holder, so as to give him the opportunity of being present, and, if he so desires, of tendering evidence in favour of renewing the licence, instead of reporting it to quarter sessions. The evidence given before the justices must be given upon oath, though there need not be detailed evidence as to the differentiation between public-house and public-house, and the amount of evidence required for reporting the licence to quarter sessions may be less than that which would be required if the justices had finally to decide the question whether the licence should be renewed or not.*

RULES *nisi* for writs of prohibition and *mandamus* to the licensing justices of the Penge division of the county of Kent.

The first rule was for a writ of prohibition to prohibit the licensing justices from further proceeding in the matter of referring to quarter sessions the application of one Arthur J. Farrell for the renewal of his licence of the Duke of Edinburgh beerhouse.

The second rule was for a writ of *mandamus* to the same justices to hear and determine the application for the renewal of the licence of the Duke of Edinburgh beerhouse according to law.

The affidavit of the applicant Arthur James Farrell, upon which the rules were obtained, set out the following facts:—

The applicant was the holder of a justices' licence authorising the retail sale of beer for consumption on the premises known as the Duke of Edinburgh beerhouse, Arpley-road, in the Penge division of the county of Kent. The justices' licence in respect of the premises had been held by him for a period of about three years, and was in force after the date of the passing of the Licensing Act 1904, and was an "existing on-licence" within the meaning of that Act.

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

On the 11th Feb. 1905 the applicant was served with a notice, signed by the clerk of the licensing justices of the Penge division, as follows:

Sir,—Take notice that the justices of the above division require you to attend in person at the adjourned general annual licensing meeting for the above division to be held on Tuesday, the 21st day of February inst'ant, at the Court-house, Anerley, at ten o'clock in the forenoon, to apply for the renewal of your licence for the sale of intoxicating liquors in respect of the above-mentioned licensed premises, and that the special cause therefor personal to yourself is that such licence is not required for the needs of the neighbourhood and is therefore unnecessary.—Dated this eleventh day of February 1905.—C. GORDON LIDDLE, Clerk to the Licensing Justices.

On the 21st Feb. 1905, pursuant to the above notice, the applicant attended the adjourned general annual licensing meeting for the Penge division, held at Anerley, when six justices were present and constituted the meeting.

Before the consideration by the justices of the application for the renewal of the applicant's licence, the licences of all the licensed premises in the vicinity of the applicant's beerhouse had been renewed by the justices without any inquiry being held in open court in respect of any such licences.

The application of the applicant was the first heard at the adjourned meeting, and, when counsel applied on his behalf for the renewal of his licence, the justices intimated that evidence would be called in support of the above objection served on him. The clerk of the justices then called as a witness Inspector Sly, an inspector of police for the Penge division. The inspector was duly sworn, and gave the evidence set forth in the affidavit of Charles H. Field, a clerk to Messrs. Knapp-Fisher and Sons, solicitors, filed in support of this application.

The verified shorthand note of the evidence of Inspector Sly, as given in Mr. Field's affidavit, was as follows:

I have made certain inquiries at the request of the justices. The house is situate in the Arpley-road, Penge, at the corner of Evelina-road. In a circle within a radius of one-eighth of a mile, taking as a centre the house in question, there are 533 inhabited houses, twenty-two uninhabited houses, and a population estimated upon the average of five persons to each inhabited house of 2665. There are five houses with full on-licences, two houses with beer on-licences, and four houses with off-licences within that one-eighth of a mile circle. Within a radius of one-fourth of a mile taking the same centre, there are in addition four houses with full on-licences, two houses with beer on-licences, and five houses with off-licences. I know the locality, and with my knowledge I say that it is a fair average. I cannot say what the population is. The house is close to the police-station, and under frequent supervision. Cross-examined: In the Beckenham-road, the Waterman's Arms is in this district. It is a public-house. The Pawleyn Arms and the Goldsmiths' Arms, full on-licences, and the London Tavern are all in the one-eighth mile radius. These houses are all in the immediate vicinity. All these licences have been renewed. The dwelling-houses in the vicinity of the Duke of Edinburgh are principally one story. I know nothing of the trade of the house. The licence has been at the house about three years. I have received no complaint. If there had been any, I should have heard.

It was further stated in Mr. Field's affidavit that he was also present in the court-house at Brierley when the justices gave their decision on the 28th Feb., and that no further evidence was given before the justices on that occasion in the matter of the application for the renewal of the licence, and that the chairman merely stated that the justices had decided to refer the question of the renewal of the licence to quarter sessions.

The applicant's affidavit further stated that no other evidence was called before the justices in regard to the renewal of his licence, and counsel submitted on his behalf that the evidence was not sufficient in law to support the objection, and that upon the evidence given, and in the absence of any evidence showing that his house was less required by the needs of the neighbourhood than the other licensed houses in the same vicinity, the licences of which had all already been renewed without any inquiry in open court, the justices could not in law refer the question of the renewal of his licence to quarter sessions under sect. 1 of the Licensing Act 1904.

In support of the above submission his counsel referred particularly to sect. 42 of the Licensing Act 1872, and the case of *Raven* v. *Southampton Justices* (90 L. T. Rep. 94; (1904) 1 K. B. 430).

The justices, having reserved their decision in the matter of the licence until a later date, intimated at a further adjourned meeting, held on the 28th Feb. 1905, that they had decided to refer the applicant's licence to quarter sessions under sect. 1 of the Licensing Act 1904; and the applicant submitted that, in deciding to refer his licence to quarter sessions in the manner and upon the evidence above mentioned, the justices did not in law consider his application for the renewal of his licence in accordance with the Licensing Acts 1828 to 1902, as by sect. 1 of the Licensing Act 1904 they were required to do, and that his application had not been heard according to law.

The above rules were then obtained.

In the affidavit made by Mr. Tolhurst, chairman of the justices, on behalf of the justices he stated that he had for thirty-six years resided at Beckenham, and for sixteen years had been a justice of the peace for the Penge division, and one of the licensing justices; that he was familiar with the licensed houses in the division; that he knew the Duke of Edinburgh, and was fully acquainted with its accommodation and locality, as also with the accommodation of the licensed houses in its neighbourhood, and particularly those referred to in the evidence of Inspector Sly; and that the licensing justices were also provided with plans of the houses as required by the licensing laws. Besides the knowledge he thus possessed, the Duke of Edinburgh had been from time to time brought to his notice in connection with cases brought before him, when forming with others a court of summary jurisdiction, and he knew of no means by which he could exclude from his consideration the knowledge he possessed as to the Duke of Edinburgh, of the licensed houses in its neighbourhood, and the needs of the neighbourhood, when forming an opinion as to whether it ought to be reported to the Court of Quarter Sessions as not being required for the needs of the neighbourhood. The consideration of the licences in the division had for a considerable time been under the notice of the licensing justices, and, had it not been for the fact that legislation was proposed,

they should in the year 1903 have objected to the renewal of this and other licences in the division, as not being required for the needs of the neighbourhood, and at the licensing meeting on the 9th Feb. 1904 he, with the assent of the other justices, made an announcement to that effect, and stated that next year they would go into the whole question. Subsequently thereto the whole of the licensed houses in their district were personally inspected by certain of the justices, and, after the matter had been fully discussed by the licensing justices, they at the annual meeting in 1905 decided to adjourn the applications for renewal in the case of certain licensed houses (including the Duke of Edinburgh). At the adjourned meeting on the 21st Feb. 1905 the chairman, with the assent of the other justices, made a statement that in the case of the fourteen licences postponed they would renew nine for the time being, and that in the case of five others (including the Duke of Edinburgh) they had decided to serve, and had in fact served, notices of objection; that those cases would be further considered and a decision come to after hearing the evidence, and that they had asked the police to obtain certain information for them which they would then proceed to receive on oath. They then proceeded to hear the five remaining cases in respect of which notices of objection had been given, and they reported four of these (including the applicant's house) as in their opinion not being required for the needs of the neighbourhood. In the case of the applicant's house no evidence was called or tendered by the applicant, nor did he by evidence or argument suggest that there were not too many licensed houses for the needs of the neighbourhood around his house, or that any other house ought to be reported in preference to his own; in three of the cases the applicants called evidence. Having heard the evidence, the justices adjourned the further consideration of the five cases, and they gave their decision on the 28th Feb., and, after fully discussing the matter between themselves, they decided to renew the five licences (including the applicant's licence) provisionally, and "refer them to quarter sessions under the provisions of the Licensing Act 1904 on the ground that they are not required for the needs of the neighbourhood."

And I say that in forming my opinion as to the Duke of Edinburgh I was actuated solely by the evidence given by the police and the knowledge of the house I possessed and of the houses in the neighbourhood, both as to their character, situation, and structural suitability, and the manner in which, from my actual knowledge, the Duke of Edinburgh compared with the other houses in the neighbourhood whose licences were renewed. I respectfully say that I could not form any opinion in regard to the house other than that I have expressed. In my opinion the number of licensed houses is still in excess of the needs of the neighbourhood.

The Licensing Act 1904 (4 Edw. 7, c. 23) provides:

Sect. 1 (1). The power to refuse the renewal of an existing on-licence, on any ground other than the ground that the licensed premises have been ill-conducted or are structurally deficient or structurally unsuitable, or grounds connected with the character or fitness of the proposed holder of the licence, or the ground that the renewal would be void, shall be vested in quarter sessions instead of the justices of the licensing district, but shall only be exercised on a reference from those justices and on payment of compensation in accordance with this Act. In every case of the refusal of the renewal of an existing on-licence by the justices of a licensing district, they shall specify in writing to the applicant the grounds of their refusal. (2) Where the justices of a licensing district, on the consideration by them, in accordance with the Licensing Acts 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on-licences requires consideration on grounds other than those on which the renewal of an existing on-licence can be refused by them, they shall refer the matter to quarter sessions, together with their report thereon, and quarter sessions shall consider all reports so made to them and may, if they think it expedient, after giving the persons interested in the licensed premises and, unless it appears to quarter sessions unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the justices of the licensing district), an opportunity of being heard and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates.

The Licensing Act 1872 (35 & 36 Vict. c. 94) provides:

Sect. 42. Where a licensed person applies for a renewal of his licence the following provisions shall have effect: (1) He need not attend in person at the general annual licensing meeting unless he is required by the licensing justices [for some special cause personal to himself] so to attend. (2) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence [and stating in general terms the grounds of opposition] has been served on such holder not less than seven days before the commencement of the general annual licensing meeting. Provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given. (3) The justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath. Subject as aforesaid, licences shall be renewed and the powers and discretion of justices relative to such renewal shall be exercised as heretofore.

The words in brackets were inserted in this section by sect. 26 of the Licensing Act 1874.

Avory, K.C. (*Hohler* with him), for the justices, showed cause against the rules.—With regard to the writ of prohibition, there are two objections. In the first place, these licensing justices were not a tribunal to which a prohibition can lie, because prohibition only lies to a court or tribunal exercising judicial functions; and, in the second place, there was in this case nothing left for the justices to do—prohibition will not lie after an act has been done. The licensing justices had referred the matter to quarter sessions, and they are not—like the quarter sessions—a tribunal to which prohibition will lie: (Short and Mellor, p. 70). The proceedings to be prohibited must be of a judicial character, and it has been held not to apply to a preliminary investigation of the Local Government Board: (*Ib.*, p. 71). As the decisions now stand, *certiorari* will not lie to them, as they are not a court, and *à fortiori* prohibition will not lie. The only case in which the matter was discussed was *Reg.* v. *Local Government Board* (48 L. T. Rep. 173, at

p. 181; 10 Q. B. Div. 309, at pp. 320-1), but the point was not decided as to whether prohibition would go to the board. The utmost to which Brett, L.J. there says it ought to be extended is when the Legislature has intrusted to any body of persons the power of imposing an obligation upon individuals. Here the licensing justices are not seeking to impose an obligation on anyone, and therefore prohibition ought not to go to them. Then, with regard to the *mandamus*, the merits of the case can undoubtedly be raised by *mandamus*. In this case no question arises as to the non-compliance with the provisions of sect. 42 of the Licensing Act of 1872. Notice to attend was given to the licence-holder; evidence was given and taken on oath, so that no question of procedure can be raised here. But it is said that there was not a sufficient hearing of the case by the justices before they made their report. The duties of the justices in this respect are prescribed by sect. 1, sub-sect. 2, of the Licensing Act 1904, which provides that where, on applications for renewals of licences, the licensing justices "are of opinion"—not where they decide—"that the renewal of any particular existing on-licences requires consideration," and so on. The question, therefore, has quite a different aspect from that which they would have to deal with if they had to finally decide as to the renewal, as in *Raven* v. *Southampton Justices* (90 L. T. Rep. 94; (1904) 1 K. B. 430). The justices are not called upon to decide whether the licence ought to be renewed or not; that lies with the quarter sessions. They are merely called upon to say whether, in their opinion, that question as to the renewal requires consideration. [Lord ALVERSTONE, C.J. referred to *Rex* v. *Farnham Justices* (86 L. T. Rep. 839; s.c. *Rex* v. *Howard* (1902) 2 K. B. 363).] The chief feature of that case was that the justices could act upon their own knowledge, and the court held that the fact that the justices had acted upon their own knowledge was no objection to their giving a decision in the case. Even taking the words in sub-sect. 2, "in accordance with the Licensing Acts 1828 to 1902," those words have been satisfied in this case. The point in the *Southampton* case (*ubi sup.*) was that there was no evidence to distinguish the house in question from any other houses in the neighbourhood, but there was evidence that there were too many houses. Here the affidavit of the justices showed that in that respect all that was required by the *Southampton* case (*ubi sup*), or the *Farnham* case (*ubi sup.*), was complied with. They had the plans before them, and they could act on their own view or their own knowledge. They have not to make out that they have acted in accordance with the law as it was before the Act of 1904; but, even if they had, upon the affidavits they have complied with all the requirements of the previous law. They were therefore right.

Frederick Low, K.C. and *Bruce Williamson* in support of the rules.—The effect of the legislation is simply this, that the licensing justices have still to hear and determine in the same way as before the Act, as to matters within their jurisdiction. Before the Act of 1904, the question for them was, Shall the licence be renewed? Since the Act, the question is, Shall the licence be reported to quarter sessions? It leaves them in exactly the same position as before, except as to the form of their decision. The question is not the same, but the method in which the investigation is to be conducted is the same. By the sub-section the investigation is to be in accordance with the Licensing Acts 1828 to 1902, and that applies sect. 42 of the Act of 1872, which deals with the procedure the justices have to follow in granting renewals. There is no difference between the way in which they are to form their opinion as to what they are going to send to the quarter sessions and what they are going to decide themselves. The old procedure is still in force, and the only difference is in the result. The next and substantial question is, Was there any evidence upon which the justices were entitled to do what they did in reporting this house? It is submitted there was no sufficient evidence to support the objection. The evidence here was the same as in *Raven* v. *Southampton Justices* (*ubi sup.*), and nothing more, with the exception that, instead of having a map as in that case, a police officer was called. They can only send a case forward upon some evidence relating to the particular house. The only suggestion is that the houses in the neighbourhood were one-story houses, which applies to the other houses as well, and has nothing to do with the question. There was no evidence whatever to distinguish this house from any other house in the neighbourhood, or to show that it compared unfavourably in structure or otherwise, and the evidence would be equally applicable to any of the other houses referred to by the police officer. The words in sub-sect. 2, "in accordance with the Licensing Acts 1828 to 1902," incorporate the whole procedure of the Licensing Acts, and either the licence-holder is entitled to be summoned under sect. 42 with all the rights thereunder, or there need not be any investigation at all and the licence may be forfeited without the licence-holder knowing anything about it, and without either giving him notice or holding an inquiry. That could not be a consideration of the case in accordance with the Licensing Acts. The test as to whether sect. 42 applies or not is, Is the licence-holder entitled to be present? If he is, then he is entitled to notice and the other procedure of sect. 42 follows, the onus being upon the person objecting. The licensing justices are authorised to act in public and in public only. They are bound to give public notice of their meetings and to hold a public inquiry, and it must be a real inquiry in which they act judicially (*Sharpe* v. *Wakefield*, 64 L. T. Rep. 180; (1891) A. C. 173). With regard to the prohibition, if the applicant's contention is right, he is entitled to prohibition at any stage. It is a fallacy to contend that because it was held in *Boulter* v. *Kent Justices* (77 L. T. Rep. 288; (1897) A. C. 556) that the licensing justices were not a court of summary jurisdiction, therefore they are not a body subject to prohibition. From the affidavit of the justices it appears that they claimed to decide adversely to the applicant upon grounds (such as their private knowledge) not mentioned publicly in his presence at the meeting.

REX *v.* COX AND OTHERS (Justices of the Gore Division of Middlesex); *Ex parte* WEST.

The arguments in this case were then heard.

The applications were for a writ of prohibition to the licensing justices of the Gore division of

the county of Middlesex to prohibit them from further proceeding in the matter of referring to the quarter sessions the application of John West for the renewal to him of a licence for the sale of beer and cider to be consumed either on or off the premises known as the Pleasure Boat at Alperton; and for a *mandamus* to the justices to hear and determine according to law his application for the renewal of his licence of the Pleasure Boat.

The affidavit of the applicant, the holder of the licence since May 1901, stated that on the 3rd Feb. 1905—the date of the general annual licensing meeting for the Gore division—the applicant did not attend at the meeting as no objection was to his knowledge ever made to the renewal of his licence on that date, and that no written or other notice of an intention to oppose the renewal was ever served on him; that he was not required to attend by the justices, and that he received no notice at any time requiring his attendance at any adjourned meeting as provided by the Licensing Acts 1828 to 1904, and that he knew nothing of the intention of the justices until after the termination of the first meeting. Subsequently to the 3rd Feb. he heard indirectly that the justices would hear an application by him for the unconditional renewal of his licence on the 22nd Feb. 1905, and he attended on the 22nd Feb. for the purpose of making such application, but the justices refused to hear his application and announced their intention of referring the matter to quarter sessions. The justices also refused to state the ground of their refusal to unconditionally renew the licence, but they renewed it provisionally pursuant to the Licensing Act 1904; and the applicant alleged that the justices had under the circumstances no jurisdiction to refer his licence to quarter sessions.

The justices in their affidavit stated the following facts: On the 28th Dec. 1904 a committee of the justices of the Gore division was appointed to view all the licensed premises in that division and report to the justices as to the existing on-licences which required consideration on grounds other than those on which the renewal of an existing on-licence could be refused by them prior to the ensuing licensing meeting fixed for the 3rd Feb.

In accordance with such resolution the committee did view all the licensed premises in the division, and subsequently submitted to the justices a list of fourteen houses the licences of which they considered it would be desirable in the public interests on grounds other than the four statutory grounds not to renew, and amongst the houses so reported were the licensed premises known as the Pleasure Boat, Alperton.

At a private meeting of the justices, at which eleven justices were present, this report was considered, and it was resolved that three houses (of which the Pleasure Boat was one) should, pursuant to sects. 1 and 2 of the Licensing Act 1904, be reported to the quarter sessions of the county upon certain grounds, and it was arranged that in the court the clerk should read out the names of all the licensed houses in the division, and upon the names of the three houses being read out the chairman should state that the justices were of opinion that the question of the renewal of each house required consideration on grounds other than those on which the renewal of an existing on-licence could be refused by them, and that the matter would be referred to quarter sessions together with the report of the justices thereon, and this course was followed at the general annual meeting on the 3rd Feb. On the 9th Feb. the applicant's solicitor wrote to the clerk of the justices in reference to the matter, and received an answer on the 15th Feb.

At the adjourned licensing meeting on the 22nd Feb., counsel for the applicant stated that he wished to make an application with regard to the Pleasure Boat. He suggested that the course pursued by the justices in giving notice that they would refer the question of the renewal of the licence to quarter sessions without prior notice to the holder of the licence was wrong, and he cited several cases in support of his contention. During the argument counsel was told that the notice of reference to quarter sessions, with the report of the justices, had been already forwarded to quarter sessions, and counsel for the applicant was asked whether, if the justices after considering the matter were of opinion that the procedure was wrong, counsel would consent to the notice given to quarter sessions being withdrawn, and the whole matter dealt with *de novo* at the adjourned licensing day to be fixed. Counsel did not consent to that being done, and, after further observations from him, the justices retired to consider the matter. They came to the conclusion that, looking at the Act and the rules made thereunder, the course pursued by the justices at the general annual meeting was right; that their jurisdiction to consider the renewal of the licence on grounds other than statutory was taken away from them by the Licensing Act 1904, and that therefore they had no power themselves to hear and decide the question, and that it was not necessary for them to give notice to the licence-holder prior to the date of the general annual licensing meeting of their intention to refer the question of the renewal of his licence to quarter sessions.

On the 27th Feb. the applicant served notice of appeal to quarter sessions against the alleged refusal of the justices to grant a renewal of the licence. This appeal came on before the quarter sessions in April, but was respited pending the decision in this case.

It was stated in an affidavit made by the manager of the lessees of the beerhouse that the beerhouse was originally licensed before 1869, and had been continuously licensed ever since that date; that the chairman announced that the justices had decided to refer the question of the renewal to quarter sessions for compensation; that no objection was made to the renewal by the justices or any other person at the meeting, nor was any evidence taken in respect thereof, nor did the justices adjourn the granting of the licence to any future day as provided by the Licensing Acts 1828 to 1904; that the announcement by the chairman was the only reference made to the beerhouse, and that no complaint had ever been made with regard to the character of the licensee or with respect to the house.

Travers Humphreys, for the justices, showed cause against the rules.—The facts are somewhat different from those in the previous case, the important difference being that the applicant had had no notice of any opposition or objection to

the renewal, and there was no hearing of his application for renewal. [Lord ALVERSTONE, C.J.—Then the case raises the point whether the licensing justices can inquire into and report a licensed house to the quarter sessions without giving the licence-holder any notice.] Yes. That is the question raised. The applicant was offered a hearing, the justices suggesting that they should reopen the matter and recall their report if he would waive any right he might have to the uncontested renewal of his licence. He had appealed to quarter sessions against the refusal to renew, but the appeal has not been heard. First, as to prohibition. In any case prohibition would not lie, as the licensing justices had, before these rules were obtained, parted with all control over the matter and had referred it to quarter sessions, and the applicant knew that they had done so. That does not apply to the *mandamus*, but, as to *mandamus*, if an appeal lies to quarter sessions, then a *mandamus* will not lie. The words in sub-sect. 2 of sect. 1 of the Act of 1904, "on the consideration by them, in accordance with the Licensing Acts 1828 to 1902, of applications for the renewal of licences," have been satisfied. Those words mean and include not only a consideration at the meeting itself, but also a consideration before the meeting, and here there was a full and sufficient consideration by the justices before the meeting. [Lord ALVERSTONE, C.J.—It seems to be contrary to natural justice to refer a man's licence without giving him notice that you are going to do it.]

George Elliott, for the applicant, in support of the rules.—The applicant was right in giving notice of appeal to quarter sessions, and in moving for these rules. The notice of appeal to quarter sessions had to be served within five days after the order of the justices, and, in order to save his rights as to appeal, he had to give the notice within that time. This case does not depend on any question as to the sufficiency of the evidence. There had been no evidence at all, no hearing, and no notice had been given. Unless the words in sub-sect. 2, "in accordance with the Licensing Acts," are meaningless, the facts of this case absolutely entitle the applicant to have the rule for *mandamus* made absolute. Those words must mean that the licence-holder was put in the same position as he would have been in before the Act in applying for the renewal of his licence. He was entitled to notice under sect. 42 of the Act of 1872, and to all other rights conferred by that section; whereas all that he has got is a mere provisional renewal, which is not the same thing as a renewal.

Several other cases were argued at the same time, in some of which, such as *Reg.* v. *Britt and others, Justices of Maidstone*, no notice was given to the licence-holder; in others, notice had been given and a hearing had taken place before the justices.

Cur. adv. vult.

May 22.—The judgment of the court (Lord Alverstone, C.J., Kennedy and Ridley, JJ.) was read by Lord Alverstone, C.J.:—In these cases rules *nisi* have been granted calling upon the licensing justices in a number of instances to show cause why writs of prohibition should not issue to prevent them from taking any further proceedings in a matter of certain reports which they propose to make to quarter sessions in respect of applications for the renewal of certain licences. Rules *nisi* for *mandamus* were granted at the same time calling upon the same justices to hear and determine the applications for renewal. We think it doubtful whether prohibition is the right remedy; as, however, the same point is raised upon the applications for writs of *mandamus*, it is unnecessary to decide this point on the present occasion, and in the event of it being necessary to decide it on any future occasion it must be taken that we have expressed no opinion upon it now. The point raised on behalf of those for whom the rules were moved is that the justices had not before them any evidence sufficient to justify them in making reports to the quarter sessions in respect of the licensed houses in which the applicants for the rules were interested. This was the ground of the applications in Nos. 39, 40, 43, 51, 52, 53, and 54. In the cases numbered 47, 48, and 58-65 inclusive a further point was raised—viz., that no notice pursuant to sect. 42 of the Act of 1872 as amended by the Act of 1874 had been given to the applicants for renewal to attend before the licensing justices. The questions really depend upon the construction which should be placed on sub-sect. 2 of sect. 1 of the Licensing Act 1904; but in order to appreciate the point it will be convenient to consider the statutory enactments prior to that date. By sect. 42 of the Act of 1872 as amended by the Act of 1874 it was provided that where a licensed person applies for a renewal of his licence he need not attend in person unless he is required by the licensing justices so to do for some special cause personal to himself; that the justices shall not entertain any objection to the renewal of such licence or take any evidence in respect of the renewal thereof unless written notice of an intention to oppose the renewal of such licence, stating in general terms the grounds of opposition, has been served on such holder not less than seven days before the commencement of the general annual licensing meeting, with the proviso that the licensing justices may, notwithstanding that no notice has been given, upon an objection being made adjourn the granting of a licence to a future day, and require the attendance of the holder of the licence when the case is to be heard and the objection considered. Sub-sect. 3 provides that the justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath. The decisions in *Sharpe* v. *Wakefield* (64 L. T. Rep. 180; (1891) A. C. 173) and *Rex* v. *Howard* (86 L. T. Rep. 839; (1902) 2 K. B. 363) establish that a notice under the proviso to sub-sect. 2 of sect. 42 may be given by the direction of the justices themselves, and, further, that the question whether the licence should be renewed, having regard to the wants and requirements of the neighbourhood and the number of licensed houses therein, is one of the grounds which the justices were entitled to consider upon the question of renewing any particular licence. This, so far as it is necessary to refer to it for the purpose of the case before us, was the position of matters at the time of the passing of the Act of 1904. That Act by sub-sect. 1 of sect. 1 confined the power of the licensing justices to refuse renewal to certain specified grounds, which do not include the

question of the necessity for the houses, having regard to the requirements of the district, and sub-sect. 2 provided that where the justices of a licensing district on the consideration by them in accordance with the Licensing Acts 1828 to 1902 of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on-licence requires consideration on grounds other than those "on which the renewal of an existing on-licence can be refused by them they shall refer the matter to quarter sessions, together with their report thereon." It is upon these words that the question arises. It is contended by counsel on behalf of the justices showing cause against the rules that the justices may act on their own motion and rely solely on their own knowledge, that it is no longer necessary for them to require the attendance of any licence-holder in respect of whose house they propose to report or to direct any notice, under sub-sect. 2 of sect. 42 of the Act of 1872, to be given to the holders of such houses, and that the justices need not take evidence upon oath when the renewal of any existing on-licence requires consideration on grounds other than those on which the renewal can be refused by them. We summarise these contentions, not that they all arise in every case, but that they were urged in one or other of the cases as being the true position of the licensing justices under this section. On the other hand, it was contended in support of the rules that the justices must pursue the course which they would have followed under sect. 42 of the Act of 1872 as amended by sect. 26 of the Act of 1874, and give notice to all the applicants who are holders of the licences of the houses upon which they propose to report, and hear all the evidence as though they were themselves deciding under the old law the question whether the licence should be renewed. It will be convenient to deal first with the cases numbered 47, 48, and 58-65 inclusive, in which no notice had been given to the licensed holders. We are clearly of opinion that the justices ought not to make a report respecting any house without giving notice to the licensed holder and giving him an opportunity of attending and, if he desires, of tendering evidence. This seems to us to be clear, not only on principle, but from a consideration of the previous legislation. The report may certainly affect and alter the position of the licensed holder and in many cases his property. The objection that the house is not required may be raised by an opponent, independently of the justices themselves. In that case the Act of 1872 clearly provides that notice must be given to the licensed holder. Sub-sect. 2 of sect. 1 of the Act of 1904 directs the justices to report whether on the consideration by them in accordance with the Licensing Acts 1828 to 1902 on the applications for the renewal of licences they are of opinion that the question requires consideration. It seems to us that, inasmuch as the question relating to a particular house can be raised by an opponent, and that the occasion referred to would, but for the Act of 1904, only arise where notice had been given, the language of sub-sect. 2 is not sufficient to alter the existing law, which the new legislation nowhere repeals, which law requires that notice should be given. Further, the knowledge that the particular house is not required for the needs of the district may be brought to the notice of the justices for the first time by the evidence given on behalf of an objecting opponent. As the justices would certainly have to hear any evidence tendered by a person objecting, it seems plain on general principles that the person who or whose property is affected by such evidence must have the opportunity of tendering evidence in favour of renewing the licence, instead of referring the matter to quarter sessions. We do not see how the justices could properly consider the question of whether the renewal of any particular licence requires consideration on other grounds without at least giving the opportunity to the licensee of putting before them any evidence which he considers bears upon that question. In the cases, therefore, in which no notice was given to the licensed holders we are clearly of opinion that the proceedings were not regular, and that the rule for *mandamus* should be made absolute. In the cases numbered 39, 40, 43, and 51-54 inclusive, notice was given to the licensed holders pursuant to sub-sect. 2 of sect. 42, and the question in these cases is whether evidence must be taken before the licensing justices can make a report, and whether there was sufficient evidence in any of these cases to justify the justices in making such a report. In our opinion the true position of the justices differs somewhat from that which was urged before us on either side. It must be remembered that the condition precedent to their making a report is that they shall be of opinion that the renewal of an existing licence requires consideration on grounds other than those on which the licence can be refused by them. This is obviously a somewhat different question from that which the quarter sessions have to consider — namely, whether a particular house shall be selected as the house, or one of a number, in respect of which the renewal of the licence requires consideration; but we see nothing to alter the existing law that the justices' opinion upon this question is to be based upon evidence, and that such evidence must be taken upon oath, and liberty given to the applicant, the holder of the licence, to cross-examine the deponent, and to call evidence in favour of his application. The amount of evidence, however, which may be sufficient for the purpose of enabling the justices to form the opinion indicated in the section may, in our judgment, be properly treated as different from the amount which could be regarded as sufficient if they had to decide judicially whether or not the particular licence should be renewed or refused. It will not, we think, be necessary in all cases for them to have detailed evidence with regard to the differentiation between public-house and public-house, as the majority of the court thought was necessary in the case of *Raven* v. *Southampton Justices* (90 L. T. Rep. 94; (1904) 1 K. B. 430). There the quarter sessions had to consider the same question as will arise before the Committee of Quarter Sessions under the Act of 1904 — namely, whether they will decline to renew the licence of each particular house in respect of which a report is made. Evidence of the character of the district, the locality of the public-house and of the public-houses, and the number of public-houses in the district, might be quite sufficient to justify the justices in making a report to quarter sessions that the question of the renewal of any particular licences requires

consideration on grounds other than those on which the licensing justices can act. It was suggested in argument in opposition to the rules that in making a report the justices might act on their own knowledge and information only, and without any evidence given before them. In our opinion, it was not intended that in forming an opinion as to whether they shall make a report they should exclude their own knowledge of the locality upon such questions as the character of the neighbourhood, the amount of population, and the habits of the inhabitants. It seems to us, for the reasons expressed by Collins, M.R. in *Rex* v. *Howard* (1902) 2 K. B., at p. 376), that it cannot have been the intention of the Legislature that the justices should divest themselves of such knowledge, or determine the question solely on materials provided by the individual who happens to object. But this seems to us to be an entirely different matter from that which we have to consider, and, in our opinion, is consistent with the view that notice must be given to the licensed persons whose licences will be affected, and in so far as the opinion of the justices is formed upon facts with regard to a particular house, those facts should be proved before them by evidence upon oath, so as to give the licensed person an opportunity of testing them and of himself giving evidence if he so desires to do. It only remains to be considered whether, in the cases with which we are now dealing (Nos. 39, 40, 43, 51, 52, 53, and 54), there was sufficient evidence before the justices to enable them to make a report. In each case they had evidence as to the number of public-houses, the amount of population, and the character of the neighbourhood; in each case the applicants for the licences were present, and had the opportunity of cross-examining and calling further evidence, and, in our opinion, therefore, the justices in these cases acted in accordance with the view of the law which we have already expressed, and it was not necessary for them before reporting to go further and inquire into the matters which it may be necessary for quarter sessions to consider when they approach the question as to whether the licences of any particular houses should not be renewed. In those cases, therefore, the rules must be discharged. As has already been stated, the rule *nisi* for a writ of prohibition must be discharged in all the cases.

Rule for mandamus *discharged in* Rex *v.* Tolhurst and others; *made absolute in* Rex *v.* Cox and others.

Solicitors (in *Rex* v. *Tolhurst and others*) for the applicant, *Knapp-Fisher* and *Sons*; for the respondent justices, *Church, Adams*, and *Prior*, for *C. G. Liddle*, Anerley.

Solicitors (in *Rex* v. *Cox and others*) for the applicant, *Harry Wilson* and *Co.*; for the respondent justices, *Sharpe, Parker, Pritchards, Barham*, and *Lawford*.

Wednesday, April 12, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

SOUTHWARK UNION (apps.) *v.* CITY OF LONDON UNION (resps.). (*a*)

Poor law—"Desertion" of wife by husband—Misconduct of wife—Wife sent away for a time by husband—Promise by husband to take wife back on her reforming—Allowance to wife—Settlement by residence—Irremovability—Poor Removal Act 1861 (24 *&* 25 *Vict. c.* 55), *s.* 3.

A married woman living with her husband had given way to intemperance. She had frequently pawned her husband's goods to get drink, and had conducted herself in a manner which rendered it impossible for her husband to keep a respectable home for his children. In Oct. 1895 *her husband found that a distress was being levied in his house for the rent, and that his wife had again spent the money given her for paying the rent. The husband thereupon told her that he could not put up with that state of things any longer, that he and she must part for a time, and that she would have to find some other lodging, and that he would allow her* 8*s. a week so long as she kept straight; that she must do her best to get rid of her drunken habits, and that if she reformed they could live together again; and she could take with her enough furniture to furnish a room for herself. They accordingly separated, and he never took her back again. He continued to pay the weekly allowance for about a year, when he discovered that she had committed adultery with another man. He then stopped the allowance, and neither knew, nor took steps to find out, where she was, and he contributed nothing further to her maintenance. She cohabited with another man for several years in the S. Union until* 1903, *when she was found wandering in L. in a state of lunacy, and was removed to a lunatic asylum in the L. Union.*

Upon an application by the L. Union against the S. Union for the expenses incurred, the quarter sessions adjudged that the wife had been "deserted" by her husband within the meaning of sect. 3 *of the Poor Removal Act* 1861, *and that after her "desertion" she had resided for twelve months and upwards in the S. Union, and was exempt from removal therefrom, and they affirmed an order of justices whereby the S. Union were ordered to pay the L. Union the sum specified in the order.*

Held (*Ridley, J. dissenting*), *upon the authority of* Reg. *v.* Maidstone Union (41 *L. T. Rep.* 586; 5 *Q. B. Div.* 31), *that the wife had been "deserted" by her husband within the meaning of sect.* 3, *and was irremovable from the S. Union, and that the order of quarter sessions was therefore right.*

CASE stated by the quarter sessions of the city of London on the hearing of an appeal by the guardians of the poor of the Southwark Union against an order made on the 18th Dec. 1903 by two aldermen and justices of the city of London whereby it was adjudged that the place from which one Ellen Evans (properly Roff), a pauper lunatic (herein called Ellen Roff), was on the 29th July 1903 irremovable was in the Southwark

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

Union, in the county of London, and whereby the guardians of the poor of the Southwark Union were ordered to pay to the guardians of the poor of the City of London Union the sums specified in the order.

The facts as stated in the case were as follows: Ellen Roff was the lawful wife of Frederick Roff, to whom she was married in Aug. 1886. From the date of the marriage they resided and cohabited at Fitzallan-street, in the parish of Lambeth (which was not within the Southwark Union), until the 12th Oct. 1895.

Previously to that date (the 12th Oct. 1895) Ellen Roff had given way to habits of intemperance, and had been habitually drunk; she had frequently pawned her husband's goods in order to get drink, and had neglected the children of the marriage, of whom there were four. She had on several occasions spent, for purposes other than that for which it was intended, money given to her by her husband in order to pay the rent of the house, and had conducted herself in a manner which rendered it impossible for her husband to keep a respectable home for his children.

On the 12th Oct. 1895 the husband, upon his return home from work, found that a distress was being levied upon his goods at Fitzallan-street, for the nonpayment of rent; and that his wife had again spent in obtaining drink money given her for the purpose of paying his rent. The husband thereupon told his wife that he would not put up with this state of things any longer, and that he and she must part for a time, and that she would have to find some other lodging, and he would allow her the sum of 8s. a week as long as she kept straight; that she must do her utmost to get rid of her drinking habits, and that if she reformed he and she could live together again; and she could take enough furniture to furnish a room.

The distress was withdrawn by arrangement between the husband and his landlord, and the wife remained at Fitzallan-street until she found another lodging. She remained for ten days, during which period her husband occupied a separate bedroom with one of his children.

On the 22nd Oct. 1895 the wife left Fitzallan-street, taking with her sufficient furniture to furnish a bedroom. The husband also left Fitzallan-street on the same date (the 22nd Oct. 1895), taking with him his four children and the remainder of his furniture. He has since the 22nd Oct. 1895 resided separately from his wife, and has never cohabited with her since the 12th Oct. 1895.

From the 22nd Oct. 1895 the husband allowed his wife the weekly sum of 8s.; these payments were made through the medium of one H. D., a brother-in-law of the wife, who resided in the Southwark Union, near her residence.

A few weeks after the 22nd Oct. 1895 the husband met his wife by accident at the house of her aunt. At the wife's request the husband said that he would take her back if she would mend her ways; but her subsequent conduct showed no improvement, and he never did take her back.

For eleven months subsequently to the 22nd Oct. 1895 the husband continued to pay the allowance through her brother-in-law to his wife, at the end of which time the husband, upon being informed that his wife appeared to be in the family way (which information afterwards proved to be well founded), and was constantly associating with men in public-houses, and especially with one J. H., took steps to arrange a meeting with his wife at her brother-in-law's house.

In pursuance of such arrangement he went to her brother-in-law's house, but his wife did not come to meet him. He then informed her brother-in-law that he would no longer contribute to the support of his wife. Subsequently, on the same day, his wife followed him to a public-house in the neighbourhood of her brother-in-law's house, and he was asked by her why he had stopped her allowance. He then taxed her with her infidelity, and she did not deny the fact of such infidelity. She was at that time visibly pregnant with a bastard child, of which she was delivered about three months afterwards. He thereupon went away, and from that date made her no further allowance, and neither knew nor took any steps to ascertain her whereabouts. Except that he visited at the asylum since the commencement of these proceedings, the husband never saw his wife nor contributed to her maintenance or had anything to do with her from the time when he met her in the public-house aforesaid.

The husband was sincerely attached to his wife, and the quarter sessions accepted his evidence to the effect that if she reformed her drinking habits he would gladly have resumed cohabitation with her.

Shortly after the interview in the public-house and the stoppage of the weekly payment, the wife went to reside with J. H., at Stanhope-buildings, Redcross-street, also in St. Saviour's Union (that is, Southwark Union), and resided continously with J. H. as his wife at Stanhope-buildings, and afterwards at Mowbray-buildings, Redcross-street, in the Southwark Union, from the month of Sept. 1896 to the 19th July 1903.

On the 19th July 1903 the wife left her rooms in which she was residing with the said J. H. at Mowbray-buildings, in the Southwark Union, and was found on that day wandering in the city of London in a state of lunacy.

On the 29th July 1903 she was removed by order of an alderman and justice of the peace of the city of London as a lunatic to the City of London Lunatic Asylum, at Stone, in the county of Kent.

On the 18th Dec. 1903 the order of that date was made, against which notice of appeal dated the 18th March 1904 was given by the guardians of the poor of the Southwark Union to the guardians of the poor of the City of London Union.

On behalf of the appellants it was contended in support of the notice of appeal that the wife had never been deserted by her husband, and that she had not become irremovable under sect. 3 of the Poor Removal Act 1861 from the Southwark Union by reason of her residence in that union.

On behalf of the respondents it was contended that the wife had been deserted by her husband, and that during the residence at Redcross-street, in the Southwark Union, she was a married woman who had been deserted by her husband, and who had after his desertion resided in the Southwark Union as for a period of twelve months and upwards in such a manner as would, if she had been a widow, have rendered her exempt from

removal from that union at the time she was sent to the asylum.

The justices found as facts that the wife was deserted by her husband, and that after she had been deserted she had resided for the space of twelve months and upwards in the Southwark Union in such a manner as, had she been a widow, would have rendered her irremovable from the Southwark Union, and they accordingly affirmed the order of adjudication, and dismissed the appeal with costs.

The question for the opinion of the court was whether there was evidence upon which they could find as aforesaid.

Sect. 3 of the Poor Removal Act 1861 (24 & 25 Vict. c. 55) provides:

Where a married woman shall have been or shall be deserted by her husband, and shall after his desertion reside for three years in such a manner as would, if she were a widow, render her exempt from removal, she shall not be liable to be removed from the parish wherein she shall be resident unless her husband return to cohabit with her.

The order appealed against was made under sect. 294 of the Lunacy Act 1890 (53 & 54 Vict. c. 5).

J. B. Matthews for the appellants.—The order appealed against was wrong, and the quarter sessions had no evidence before them on which they could draw the inference that this man had deserted his wife. Under the circumstances of the case there was no "desertion" within the meaning of sect. 3 of the Poor Removal Act of 1861. The case finds that it was the wife who by her own gross misconduct caused the separation, and that she had conducted herself in such a manner as rendered it impossible for the husband to keep a respectable home for his children. At the time when he and she separated, he did all that he could possibly do for her; he allowed her 8*s.* a week out of his small wages, and he took and provided for the children. It is expressly found that he was sincerely attached to his wife, and the quarter sessions accepted his evidence to the effect that if she reformed he would gladly have resumed cohabitation with her. Those findings are important as showing that the husband had not intended the separation to be final, but that he intended to resume cohabitation with his wife upon her reforming her conduct. He recognised his duty to maintain her and he did maintain her, and his allowance to her only ceased on his discovering that she was misconducting herself with another man. His duty to maintain her ceased upon that. There was absolutely no blameworthy conduct on his part; and there must be blameworthy conduct on the part of the husband to constitute legal "desertion" for poor law purposes. The wife must in effect be turned out of his home by his wrongdoing, and here there was no reasonable evidence of desertion on his part, as it was she who put an end to the matrimonial tie. The mere ceasing to pay the allowance did not amount to desertion, as she was then cohabiting with another man. In *Reg.* v. *Cookham Union* (9 Q. B. Div. 522), in circumstances similar to the present, it was held that there was no "desertion" within the meaning of sect. 3. As it was there put by Field, J., the question is what act of the husband amounted in law to a desertion of his wife, and he pointed out that a desertion must be a leaving of somebody or something. Here there was no act of the husband which amounted to desertion and there was no leaving of the wife by the husband, and he did not absent himself from the conjugal home. Cave, J. there distinguishes the previous case of *Reg.* v. *Maidstone Union* (5 Q. B. Div. 31; s.c. *Maidstone Union* v. *Medway Union*, 41 L. T. Rep. 586), in which it had been held that there had been "desertion." *Reg.* v. *Maidstone Union* (*ubi sup.*) is distinguishable from the present case. There the husband on account of his wife's misconduct turned her out of his house and made no provision whatever for her, and the judgment of Cockburn, C.J. is chiefly based upon that, as he says (5 Q. B. Div., at p. 33): "He leaves her to provide for herself, and she has therefore necessarily to arrange for a separate residence." Manisty, J. in the same case says that the section must be taken to mean that "where a woman is, whether rightfully or wrongfully, sent away by her husband so as to be left as a free woman, she can so reside as to gain a settlement apart from him." A woman does not become a free woman where the separation is under such circumstances as these, as the husband adequately provides for her support. That case therefore does not govern the present case, nor does the case of *Reg.* v. *St. Mary, Islington Overseers* (22 L. T. Rep. 654; L. Rep. 5 Q. B. 445), where it was held that the conduct of the husband amounted to desertion, but where, it also appeared, that the husband had not made any allowance to the wife until he was compelled to do so, and then he only allowed her 2*s.* 6*d.* a week. "Desertion" in this section is strongly akin to desertion under sect. 3 of the Vagrancy Act (5 Geo. 4, c. 83); and in *Rex* v. *Flintan* (1 B. & Ad. 227) it was held that a man was not liable to a penalty under that section for neglecting and refusing to maintain his wife who had left him and had committed adultery, although he himself had been guilty of adultery since her departure.

R. Cunningham Glen for the respondents.—There was abundant evidence in this case upon which the quarter sessions could come to the conclusion that the husband had deserted his wife within the meaning of this section, and their decision that there was desertion is right. The object of these Poor Law statutes in early times was always considered as not punitive in any way, but as enacted in aid of the poor, and to prevent them from being moved from place to place if they became chargeable. Therefore it is that, in the case of *Reg.* v. *Maidstone Union* (*ubi sup.*), the court put the widest construction upon these provisions, and adopted a wide meaning for the word "desertion" in this section. It is immaterial, so far as the wife's separate residence is concerned, whether she was rightfully or wrongfully sent away by her husband (per Manisty, J. in *Reg.* v. *Maidstone Union*, *ubi sup.*); and therefore, in considering the question whether there has been "desertion" within the meaning of sect. 3, it is no answer to say that the wife may have been guilty of gross misconduct, and that, in consequence of such misconduct, the husband turned her out of his house. It is also immaterial whether the desertion may be considered as complete when the husband broke up the home or when he refused further to maintain her. If there were desertion in either case it would be

sufficient. The meaning of desertion is this, that wherever there is a disruption of the marital relation by either, that constitutes desertion. The desertion in this case commenced when the wife was turned out of the house, and was completed when the husband refused to support her or contribute any longer to her maintenance. In *Chudley* v. *Chudley* (69 L. T. Rep. 348, 617) it was held by the Court of Appeal, affirming the decision of the Divisional Court, that, on facts absolutely similar to the present, there was desertion by the husband within the meaning of sect. 1 of the Married Women (Maintenance in Case of Desertion) Act 1886; and there the case of *Reg.* v. *Leresche* (65 L. T. Rep. 602; (1891) 2 Q. B. 418) was distinguished, upon the ground that in that case there was in the first instance a separation by agreement between the parties, and that they were living apart under a separation deed. Here there was no agreement between the parties to live apart. It was for the quarter sessions, who had the witnesses before them, to arrive at and to construe what the intention of the husband was when he turned his wife out of his house, and, so far as the facts are concerned, this court ought to take the findings of the justices. The appeal was rightly dismissed by the quarter sessions, upon the authority of *Reg.* v. *Maidstone Union* (*ubi sup.*), which absolutely governs this case.

J. B. Matthews in reply.—In a case such as the present, where the husband has the honest intention of taking his wife back again when she reforms her conduct, it cannot be said that he "deserts" her within the meaning of sect. 3 of this Act. In *Frowd* v. *Frowd* (90 L. T. Rep. 175; (1904) P. 177) Barnes, J. said: "'Deserted' does not mean any and every separation, without considering how such separation has been brought about."

Ridley, J.—In this case the facts as found are these. The separation for the first period of time during which the husband and wife lived apart came about in this way: that she was a person of drunken habits; that upon one occasion, when she had as usual spent the money in drink instead of paying the rent, her husband told her that he would not put up with that state of things any longer, and that they must part for the time and she would have to find some other lodgings, and he would allow her 8*s.* a week so long as she kept herself straight; that she must do her utmost to get rid of her drunken habits; and she could take furniture enough to furnish a room for herself. After ten days she left and took the furniture, and received from her husband, actually for a period of about eleven months, 8*s.* a week. But after that period she was guilty of adultery, and went away and lived with the adulterer until July 1903. It is further stated in the case that her husband was sincerely attached to his wife, and the magistrates accepted his evidence to the effect that if she reformed her habits he would gladly resume cohabitation. The question arises whether, in the circumstances, the wife was "deserted" within the meaning of sect. 3 of the Poor Removal Act 1861. I think the answer to that question turns upon the consideration of two cases. The first is *Reg.* v. *Maidstone Union* (*ubi sub.*), where the facts were these: The wife committed adultery and left her husband's house for three months, but returned to him, and this occurred on three different occasions. After that she left again on several occasions, and her husband, being informed of her misconduct, accused her of it. She admitted it, and thereupon he told her to leave the house. It was the case of misconduct on the part of the wife, and of her husband showing her the door and telling her to go. In coming to his decision, Cockburn, C.J. said this: "The order of the sessions must be quashed, for I think there was such a desertion of the wife by her husband as brought the case within 24 & 25 Vict. c. 55, s. 3. This section enables a wife who has been deserted by her husband, and has resided for the prescribed period apart from him, to acquire a status of irremovability. In the present case, the husband, having discovered that his wife had repeatedly been guilty of adultery, ordered her to leave his house. She did so, and resided apart from him. Now, I cannot think that such a residence can be considered a constructive residence with her husband. Did she then reside apart from him under circumstances of desertion? I think that we must hold that she did. There was, perhaps, no desertion in the ordinary acceptation of the word; but the statute must be taken to mean that, where the husband permanently gives up the society of his wife and continues to live in a different place apart from her, she shall be looked upon as a different person from what she would otherwise be, for she resides where she does for her own, and not for any marital purpose." If the facts in this case were identical with those in *Reg.* v. *Maidstone Union* (*ubi sup.*), that case would bind us in this court; but it seems to me they are not identical. In that case the wife had been ordered to the door and told to leave the house for good. There was an end of it. In the sentence in the judgment of Cockburn, C.J., which I have just read, where he speaks of the case "where the husband permanently gives up the society of his wife and continues to live in a different place apart from her," I think "permanently" is the important word; and I think it means that the husband has said, "I will have no more to do with you at all; you and I part for ever." If that is the meaning of the judgment, it seems to me that the facts of this case are not the same as those in the *Maidstone* case (*ubi sup.*). It is not a case in which there has been a permanent arrangement that the two shall live apart, but a case in which the husband, desiring to avoid arriving at such a decision, has said: "You are suffering from this evil and drunken habit; get rid of it and we will live together again. I give you the opportunity." That is not the same case as that of a man who finds his wife guilty of immoral conduct, and says: "You and I part for ever." Ought we, therefore, to follow the case of *Reg.* v. *Maidstone Union* (*ubi sup.*)? I think the facts certainly are different. I think, perhaps, it is important also to remember in this matter, that, even in the case of *Reg.* v. *Maidstone Union* (*ubi sup.*), the court had some difficulty in arriving at the decision that there was desertion even then, for Cockburn, C.J. there said "there was, perhaps, no desertion in the ordinary acceptation of the term." If there were not, in the ordinary acceptation of the term, desertion in that case, how can there be in the present case? Instead of deserting her, what the husband wished to do was to give his wife a chance of

reforming the conduct I have mentioned, and to take the earliest opportunity, if it should ever happen, of taking her back again. I think if there was no desertion in the *Maidstone* case (*ubi sup.*) in the ordinary acceptation of the word, there certainly was none here; and if there were not, then I do not think we ought to give the word "desertion" an unnatural meaning, unless there be some previous authority which obliges us to do so. The other case is *Reg.* v. *Cookham Union* (*ubi sup.*), and there the facts are of a different character from those in the *Maidstone* case (*ubi sup.*), as well as from those in the present case. There the husband found reason to suspect his wife of intimacy with other men. She came home the worse for drink, found the door locked, forced her way in, and was threatened to be locked in by her husband in the morning. He went out, and when he returned he found his wife had gone, and she had taken part of the furniture. She went away with the adulterer, and lived with him until his death in 1879. In that case the court held there was no desertion, because it was not a case in which the husband had deserted the wife, but one in which the wife had deserted the husband, for it was she who had gone off with the man. It was not the husband who had turned her out of doors, but it was she who had deliberately gone away of her own accord with the adulterer; and therefore the case was to be regarded as one in which the wife had deserted her husband, and not as one in which the husband had deserted the wife. In his judgment Cave, J. in that case said: "Ordinarily speaking, a husband may be said to desert his wife when he absents himself from the conjugal home, and abandons his wife without any intention of returning to cohabitation. In *Reg.* v. *Maidstone Union* (*ubi sup.*) the husband did not absent himself from the conjugal home, but turned his wife out because she had committed adultery, and refused to receive her back; and the court held that there had been such a desertion of her by him as to bring the case within 24 & 25 Vict. c. 55, s. 3. Here we are asked to go further and to say that, where the wife departs from the conjugal home of her own free will, and remains absent for six years, living a life of profligacy in the meantime, the husband is guilty of deserting his wife. There was abundant evidence that the wife deserted her husband; but I am of opinion that there was no evidence at all that the husband deserted her." I think that applies to the second period, as it has been called, in this case. It was the act of the wife that she broke the agreement; that, instead of remaining faithful to her husband, she became unfaithful and went off with the other man. I think that falls within the words I have just read, and it is a case in which she deserted him, and he did not desert her. Now, it is true, if it be merely a question of inference from the facts, that we ought not to interfere with the decision of the justices upon such a matter as that; but it seems to me that there are certain things which can be gathered from the facts in the present case which make it clear to me that the justices in their decision have misapplied the rules. For these reasons I think that this order was wrong.

KENNEDY, J.—Though I quite appreciate the arguments the other way, I come to the conclusion that this decision was right. I cannot distinguish the case in principle from *Reg.* v. *Maidstone Union* (*ubi sup.*), but I think it right, since there is a difference of opinion in the court, not merely to say that I think it is undistinguishable without giving my reasons. In the first place, I think we ought to approach this case with the view expressed by Field, J. very clearly in *Reg.* v. *Cookham Union* (*ubi sup.*). He there says (9 Q. B. Div., at p. 527): "I quite agree with Mr. Lancaster that it is not for us to draw the inferences of fact which the sessions ought to have drawn, and that, if there is evidence on both sides, and the sessions have found in accordance with their view of the weight of the evidence, it is not for us to reverse their finding or to interfere in any way with it." Now, the question here is, Are the justices, who seem to have been naturally, with regard to the facts, desirous of finding all they could in favour of the man, so clearly wrong in the inferences which they have drawn, because they so clearly based their decision upon wrong principles, that we ought to reverse their decision? I think not. With regard to the meaning of desertion in the statute, Field, J. says in *Reg.* v. *Cookham Union* (*ubi sup.*): "The word 'desertion' is to be found in Acts of Parliament wholly unconnected with the poor law; for instance, in the Divorce Act (20 & 21 Vict. c. 85), s. 16; and there it has received a judicial interpretation, as in *Thompson* v. *Thompson* (31 L. T. Rep. O. S. 302; 27 L. J. 65, P. & M.): 'If the husband wilfully absents himself from the society of his wife in spite of her wish.' With that definition, as applied to the subject there under discussion, I cordially agree; but I by no means say it can be applied in its entirety to this Act, for I agree with Mr. Lancaster that 'desertion' in an Act of Parliament relating to separation and divorce is not necessarily applicable to 'desertion' in an Act relating to the management of the poor. The language of every statute must be read according to its subject-matter. Nevertheless, I feel some difficulty in giving the word 'desertion' here a better interpretation than that given to it by the Judge Ordinary in *Thompson* v. *Thompson* (*ubi sup.*)." Is there any doubt in this case? To my mind there is none. The definition applied by Field, J. is: "If the husband wilfully absents himself from the society of his wife in spite of her wish." Now, the facts are these: The woman was a drunkard. She made her husband's home miserable by her indulgence in drink, and the expenditure on drink of her husband's money, which should have been paid for rent to maintain the house. While marital law remains marital law, the fact remains that that constituted no ground, from any point of view as I understand the law, for the husband deserting her and leaving her to live the life of a *feme sole*, which he does if he remains in the house and sends her away. That he did that in this case there is no doubt. It is so stated in a paragraph of the case. I have no doubt he meant to do what was right for the sake of his children; and no question at all arises here as to motives. The question is, Did he, in fact, say "go"? There is no doubt he did. It has been said by my brother Ridley he did not say "go for ever." A man very rarely says that. He merely said in effect "go." But I do not think it makes any difference that he

says, "Go, and if you reform you can live with me again." It leaves the matter in the control of the man who sends the woman away to shift for herself, subject to an allowance he will give her. He says in effect, "If I ever consider you a fit person to live with me and my children you can come back." But it is remarkable in this case there is no fixed time, and no time ascertainable by reference to any date, on which he will consider her application to return. He says, "If I think you have reformed you can come back." For all practical purposes, he says, unless he can think her fit at some time to come back, she is not to come. Assuming it to be a perfectly honest thing, as the justices have found, that he was anxious to have her back again, is that not a desertion within the principle of *Reg.* v. *Cookham Union* (*ubi sup.*)? Field, J. there said: "The object of the Act is this, that where a husband has by his desertion of her reduced the wife to the condition of a *feme sole*, she shall not be deprived of the advantage of gaining a settlement as a *feme sole*, or be liable to be removed to the place of settlement of a husband who has treated her in that way." Taking that to be so, this woman left the husband's house to shift for herself, with a promise of 8*s.* a week so long as she remained chaste, and with the permission on the part of the husband to furnish a bedroom when she could find herself a roof. I think also this case comes within the judgment of Cockburn, C.J. in *Reg.* v. *Maidstone Union* (*ubi sup.*), where he says: "There was, perhaps, no desertion in the ordinary acceptation of the word, but the statute must be taken to mean that, where the husband permanently gives up the society of his wife, and continues to live in a different place apart from her, she shall be looked upon as a different person from what she would otherwise be, for she resides where she does for her own, and not for any marital purpose." I quite agree that the word "permanently" there, as the learned judge no doubt intended, is a word to which great importance ought to be attached. If in this case the husband had said to his wife, "I shall send you away to the seaside and allow you 8*s.* a week for a change of air to go and live with your father and mother, which will take you out of your drunken associations and you can come back at the end of a month or two months if you like; I will allow you 8*s.* a week, but you must not come here till then," then I think the facts would have been such as Cockburn, C.J. anticipated when he used the word "permanently." There would have been a temporary separation. Again, if he had said, "If you go into this inebriates' home for which I have got permission on your behalf, and when the doctor says you are quite right my doors are open to you again," and she had gone to this home, I think there it could not be held that there was a permanent separation. But here he says: "Go, you are not fit to live with me; but if at some time you should reform you may come back, and if in the meantime you live a decent and chaste life I will allow you through your brother-in-law 8*s.* a week." Such words seem to me to fall within the principle and spirit of the *Maidstone* case (*ubi sup.*), and it is very difficult to say that the justices on the question of fact were not entitled to find as they did. In the case of *Reg.* v. *Cookham Union* (*ubi sup.*) the facts were different, because there, instead of the husband leaving the wife, the wife left the husband. The husband never turned her out at all, but when he came home at night he found that his wife had gone and had taken furniture and clothes and she went and lived elsewhere; in fact she left him. I think Cave, J. was right when, after dealing with the *Maidstone* case, he said: "Here we are asked to go further and to say that, where the wife departs from the conjugal home of her own free will, and remains absent for six years, living a life of profligacy in the meantime, the husband is guilty of deserting his wife." In my view, we ought not to reverse the decision of the justices.

Lord ALVERSTONE, C.J.—Very able arguments have been given in this case which show that there is obviously room for argument on one side and on the other. There is certainly authority, in my opinion, that the husband in this case has not deserted the wife in the ordinary sense, but I think the principles we have to apply, already recognised in the two cases which have a bearing on this matter, will not allow us to decide the case from the point of view of public opinion as to what is desertion. We are, for the purposes of this Act, bound by the rule laid down in *Reg.* v. *Maidstone Union* (*ubi sup.*). Of course, it must not be forgotten that there is no question in this case as to any liability being put upon the husband in consequence of his act. The whole question is as to which of the two unions shall pay for the maintenance of this woman. Now, the justices have found as a fact that this woman was deserted by her husband. I think, however, that, notwithstanding that finding of fact, we are entitled, under Order LIX., r. 7, of the Rules of the Supreme Court, to draw inferences from the evidence which the justices ought to have drawn; but, at the same time, I agree entirely, as my brother Ridley said in the course of his judgment, that we ought not to come to a different conclusion from the justices unless we can really see that they have gone wrong on the point of law, and have not properly directed themselves. There are only three cases which have anything to do with this matter. The first case is *Reg.* v. *St. Mary, Islington, Overseers* (*ubi sup.*), which need not be referred to at any length, because that was obviously the case of the husband leaving the wife. In that case the allowance to the wife was made, not voluntarily, but by the order of some court. I mention it because it was contended by counsel for the appellants in this case that the fact of this allowance being made would enable the court to put a different construction on the act of the husband as to what took place when the wife left his home. I cannot agree with that. There is not the slightest evidence of a leaving by agreement. There is no evidence that he agreed to pay her 8*s.* a week. The whole statement of the case with regard to the 8*s.* a week is that he allowed his wife that sum through the medium of his brother-in-law, and, undoubtedly, when he found out that she was misconducting herself he stopped that allowance. I need not go through the facts again. They are very simple for the purposes of this case, and have been clearly stated by my brothers. But I wish to say why I think it is not possible for us to review this finding of fact. It is, of

course, important in this court, in all cases where there is an appeal, that we should follow the previous decisions in order to make them uniform, and if a decision has been laid down and we think the principle of it is right, we ought not to fritter that principle away or apply it differently unless there is a very clear case of being able to bring it within some principle or another which can be applied, and which is not inconsistent with the case. When we come to the cases of *Reg.* v. *Maidstone Union* (*ubi sup.*) and *Reg.* v. *Cookham Union* (*ubi sup.*), I think we can find the principle laid down which we should adopt. To make what I say on this particular point quite clear, I will read these words of Cockburn, C.J. in *Reg.* v. *Maidstone Union* (5 Q. B. Div., at p. 33): "There was, perhaps, no desertion in the ordinary acceptation of the word, but the statute must be taken to mean that, where the husband permanently gives up the society of his wife and continues to live in a different place apart from her, she shall be looked upon as a different person from what she would otherwise be, for she resides where she does for her own, and not for any marital purpose. In the construction of the section it is immaterial whether the husband is misconducting himself, or whether he leaves her in consequence of her misconduct. His residence is no longer connected with hers. He leaves her to provide for herself, and she has therefore necessarily to arrange for a separate residence." Manisty, J. says: "I am of the same opinion. I think we ought not to put too narrow a construction on 24 & 25 Vict. c. 55, s. 3, and that it must be taken to mean that where a woman is, rightfully or wrongfully, sent away by her husband so as to be left as a free woman, she can so reside as to gain a settlement apart from him, unless he returns to cohabit with her." On such matters as pauper questions, both these learned judges must be admitted to be judges of great authority, and, in my opinion, they laid down principles which must be applied in the construction of this particular statute. The same question came before Field and Cave, JJ. in *Reg.* v. *Cookham Union* (*ubi sup.*), upon which the appellants' counsel very naturally relies. All I desire to see is whether they laid down any principle on the statute. Field, J. says (9 Q. B. Div., at p. 527): "The object of this Act is this, that, where a husband has by his desertion of her reduced the wife to the condition of a *feme sole*, she shall not be deprived of the advantage of gaining a settlement as a *feme sole*, or be liable to be removed to the place of settlement of a husband who has treated her in that way." It is perfectly true that the learned judge in that exposition of the law used the expression "has by his desertion," but it seems to me that in that passage the expression must mean ignoring and leaving her, because he proceeds to say, "reduced the wife to the condition of a *feme sole*"; and he goes on to quote the definition of desertion which my brother Kennedy read: "If the husband wilfully absents himself from the society of his wife in spite of her wish." I agree with my brother Kennedy. I think that that is the real test, and that it was fulfilled in this case. Cave, J. in the same case said (9 Q. B. Div., at p. 529): "Ordinarily speaking, a husband may be said to desert his wife when he absents himself from the conjugal home, and abandons his wife without any intention of returning to cohabitation." That enunciation of the principle is covered in this case, and would show that the justices had legal ground in forming the conclusions which in fact they did, but for one particular point which counsel for the appellants relies on—namely, that the husband expressed great affection for his wife, and wished she should return some day, and that he had told her and said to the brother-in-law that if she would mend her ways he would take her back; but she never did. I think, for the purposes of this statute, that really could not make any difference. I agree with the way in which it has been put by my brother Kennedy. When we find the marital relations determined by the act of the husband, in my opinion the court can come to the conclusion that there was a desertion. I may say that I was very much struck with my brother Ridley's judgment, and I am by no means sure that I have come to the right conclusion in this case; but I think we are bound by the principle contained in *Reg.* v. *Maidstone Union* (*ubi sup.*), and I am unable to differentiate the present case in the ingenious and able way in which my brother Ridley did. That being so, I am driven to say that we are not bound to hold such a view on these findings, and I therefore think the appeal should be dismissed with costs, but with leave to appeal.

Appeal dismissed. Leave to appeal.

Solicitor for the appellants, *Howard Charles Jones.*

Solicitors for the respondents, *Rexworthys* and *Barnard.*

Wednesday, May 17, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

REX v. DRINKWATER AND OTHERS (Licensing Justices of Coventry); *Ex parte* WINCOTT. (*a*)

Licensing — Removal of licence to new site — Application for—Conditions—Money payment in respect of monopoly value—Jurisdiction of justices to impose conditions upon application for provisional removal of licence—Licensing Acts 1872 (35 *&* 36 *Vict. c.* 94), *s.* 50, *and* 1874 (37 *&* 38 *Vict. c.* 49), *s.* 22—*Licensing Act* 1904 (4 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 2.

An order of licensing justices sanctioning the removal of an existing on-licence to new premises is not a grant of a "new on-licence" within the meaning of sect. 4, *sub-sect.* 2, *of the Licensing Act* 1904, *and therefore, upon an application for the provisional removal of an existing on-licence to new premises about to be erected, the licensing justices have no power to impose the conditions, either as to requiring a money payment in respect of monopoly value or otherwise, which they have power under that sub-section to impose when granting a new licence.*

The justices, however, have still the same discretion as to allowing or refusing the removal, and they not only may, but ought to take into consideration the question whether the removal is one which would, by licensing the new premises, deprive the public of the monopoly value which would be preserved to them if, instead of the

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

removal, a new licence had been applied for and granted in respect of the premises; and they have a discretion to refuse the removal if they think that the new premises are such that there would be a monopoly value attaching to the grant of a new licence to them, and that they ought not to sanction the removal unless in some way that pecuniary gain was secured to the public.

RULE for a *mandamus* to the licensing justices of the city of Coventry, commanding them to hold an adjournment of the general annual licensing meeting, and to proceed to hear and determine, pursuant to the statutes in that behalf, the application of Arthur Wincott for the removal of the licence of the Hare and Hounds Inn to a certain house and premises intended to be erected and constructed upon a piece of land in another street.

In the affidavit of the applicant the following facts were set out.

At the general annual licensing meeting for the city of Coventry on the 8th Feb. 1905, the licensing committee heard and determined an application made by the applicant that the licence theretofore granted in respect of a house in Far Gosford-street, in the city of Coventry, known as the Hare and Hounds Inn, might be removed to a certain house, intended to be called by the same name, about to be erected and constructed upon a piece of land situate at Bramble-street.

The application was made under sect. 50 of the Licensing Act 1872 and sect. 22 of the Licensing Act 1874 for the provisional removal of the existing full publican's licence from the existing site, of which premises the applicant was one of the owners, to the house about to be erected on the new site, of which premises also the applicant was one of the owners.

Evidence was given in support of the application that the proposed removal of the licence would be to the interest and for the benefit of the inhabitants of the district in which the new premises were.

No objection was raised either by the licensing justices or by any other persons that the requirements of the Licensing Acts had not been duly complied with, or that the application was not legally and properly presented to the justices for their determination upon the merits. No objection or opposition was raised to the making of the order of provisional removal save upon the legal ground herein mentioned.

It was contended on behalf of the applicant that the order for provisional removal asked for was not an application for a new licence, and that no conditions in accordance with sect. 4, sub-sect. 2 (*a*) and (*b*), of the Licensing Act 1904, as to the monopoly value, should be attached to the order for provisional removal, or to the licence when removed.

The licensing justices, being advised that the application for removal was in effect an application for a new licence, and that they had no jurisdiction to make the order of removal except by way of granting a new licence, dismissed the application and rejected the applicant's contention.

The applicant submitted that the justices had jurisdiction to make an order for the provisional removal of the licence in accordance with his application, and that such application was not in effect an application for a new licence or subject to the conditions to be attached to a new licence under the provisions of sect. 4, sub-sect. 2 (*a*) and (*b*), of the Licensing Act 1904; and he asked that the justices might be ordered to hear and determine his application in accordance with the terms thereof and in pursuance of the provisions in the Licensing Acts 1872 and 1874 relating to the provisional removal of licences, and to hear and determine his application according to law as an application for an order for the provisional removal of an existing licence, and not as in effect an application for the grant of a new licence.

The affidavit made by Mr. Drinkwater, the chairman of the committee of licensing justices for the city, on behalf of himself and the other justices, stated as follows:—

Notices had been served on the clerk of the licensing justices in respect of two intended applications by Arthur Wincott (the applicant) for certain premises in Bramble-street not yet constructed, one being for a provisional grant of a licence pursuant to sect. 22 of the Licensing Act 1874, and the other being for an order to sanction the provisional removal of a licence under sect. 50 of the Licensing Act 1872 and sect. 22 of the Licensing Act 1874 of the Hare and Hounds Inn, situate in Far Gosford-street, to the premises in Bramble-street. The licence to the existing premises was an alehouse licence. The application for a provisional grant of a licence for the new premises was withdrawn and no evidence was offered in support of it, but evidence was tendered for the applicant in support of his application for an order sanctioning the removal of the licence.

Upon the evidence before them, the justices considered that a case had been made out for the provisional grant of a licence to premises to be constructed in Bramble-street, and that the removal or doing away with the licence to the premises in Far Gosford-street would be an advantage. Although they had no specific evidence on the point, they were satisfied from their own knowledge of the district that the removal of the licence to the new premises to be constructed would be a very great pecuniary gain to the applicant, and they were not disposed to make an order sanctioning the removal of the licence unless the pecuniary gain so acquired should be secured in the interests of the public.

It was contended on behalf of the applicant that they had no power to attach any conditions as to requiring payment of the monopoly value on the making of an order sanctioning the removal of a licence.

They were advised, however, that they had the same power to make an order sanctioning the removal of such licence as they had to grant a new licence, and, as licensing justices in the grant of a new on-licence have power to attach to the grant of the licence such conditions both as to payments to be made and as to any other matters as they think proper in the interests of the public, they considered that an order sanctioning the removal of such on-licence should not be made unless some such conditions should be attached to the order requiring (*inter alia*) a payment to be made by the applicant. They did not go into the question of amount, as they had no evidence before them to enable them to fix what the

amount should be. As the applicant wished an order sanctioning the removal free of all conditions as to payment, they refused the application, and at the same sessions the licence for the premises in Far Gosford-street was renewed.

The certified minute of the decision of the justices which was contained in the applicant's affidavit was as follows:

We are of opinion that, upon the facts proved, the removal of the Hare and Hounds to the proposed new site would be of public advantage, and should be permitted by the licensing justices. Acting, however, upon the opinion of their legal adviser, the licensing justices consider they cannot make the order asked for of provisional removal except as upon an application for a new licence. The law point raised by the applicant's counsel is important, and the justices will help the applicant in any way possible to obtain a decision of the High Court thereon by *mandamus* or otherwise.

Sect. 50 of the Licensing Act 1872 (35 & 36 Vict. c. 94) provides:

Licences may be removed from one part of a licensing district to another part of the same district, or from one licensing district to another licensing district within the same county, in manner following: The application for an order sanctioning removal shall be made by the person desiring to be the holder of the licence when removed, and shall be made at a general annual licensing meeting, or any adjournment thereof, to the justices authorised to grant new licences in the licensing district in which the premises are situated to which the licence is to be removed. Notice of the intended application shall be given in the same manner as notice is given of an application for the grant of a new licence. A copy of the notice shall be personally served upon or sent by registered letter to the owner of the premises from which the licence is to be removed and the holder of the licence, unless he is also the applicant. The justices to whom the application is made shall not make an order sanctioning such removal unless they are satisfied that no objection to such removal is made by the owner of the premises to which the licence is attached, or by the holder of the licence, or by any other person whom such justices shall determine to have a right to object to the removal. Subject as aforesaid, such justices shall have the same power to make an order sanctioning such removal as they have to grant new licences; but no such order shall be valid unless confirmed by the confirming authority of the licensing district.

Sect. 22 of the Licensing Act 1874 (37 & 38 Vict. c. 49) provides:

Any person interested in any premises about to be constructed or in course of construction for the purpose of being used as a house for the sale of intoxicating liquors to be consumed on the premises may apply to the licensing justices and to the confirming authority for the provisional grant and confirmation of a licence in respect of such premises; and the justices and confirming authority, if satisfied with the plans submitted to them of such house, and that if such premises had been actually constructed in accordance with such plans they would, on application, have granted and confirmed such a licence in respect thereof, may make such provisional grant and order of confirmation accordingly. . . .

The Licensing Act 1904 (4 Edw. 7, c. 23) provides:

Sect. 4 (1). The power of the county licensing committee to confirm new licences and any other power of that committee shall be transferred to quarter sessions. (2) The justices, on the grant of a new on-licence, may attach to the grant of the licence such conditions, both as to the payments to be made and the tenure of the licence and as to any other matters, as they think proper in the interests of the public; subject as follows: (*a*) Such conditions shall in any case be attached as, having regard to proper provision for suitable premises and good management, the justices think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed. Provided that, in estimating the value as licensed premises of hotels or other premises where the profits are not wholly derived from the sale of intoxicating liquor, no increased value arising from profits not so derived shall be taken into consideration. (*b*) The amount of any payments imposed under conditions attached in pursuance of this section shall not exceed the amount thus required to secure the monopoly value.

Avory, K.C. and *William Mackenzie*, on behalf of the justices, showed cause against the rule.—The sole question is whether upon an application for the removal of an existing on-licence from the old premises to a new site the justices have the same power under the Licensing Act 1904 to impose conditions as to payment in respect of monopoly value as they have under sect. 4, sub-sect. 2, in granting new on-licences. Sect. 50 of the Licensing Act 1872 gives the justices power to remove a licence to new premises, and sect. 22 of the Licensing Act 1874 gives them power to make a provisional grant of a licence in respect of premises about to be built. By sect. 4, sub-sect. 2, of the Licensing Act of 1904—which by sect. 10 is to be construed as one with the Licensing Acts 1828 to 1902—the justices, "on the grant of a new on-licence," may attach to the grant of the licence such conditions, both as to the payments to be made, and so on, as they think proper in the interests of the public; and the question is whether those words "on the grant of a new licence" cover the grant of a provisional removal of an existing on-licence. Although there were two applications before the justices, the parties are agreed that this application was for the provisional removal of the licence; and the justices say that on the evidence before them a case had been made out for the provisional removal, and that they were willing to grant it, but they state that, having evidence before them that the new premises would be of much more value to the applicant than the old, they thought that it was a proper case in which to require a payment in respect of the monopoly value, which the applicant refused to accept. It must be conceded that before the Act of 1904 the justices could not have imposed a money payment as a condition of removal (*Reg.* v. *Bowman*, 78 L. T. Rep. 230; (1898) 1 Q. B. 663); but it is submitted that they can now impose it under sect. 4, sub-sect. 2, as a condition of removal. It is in fact an application for a new licence. By sect. 50 of the Act of 1872, the application for the removal is to be made to the licensing justices at their annual meeting sitting to grant new licences; the same notice has to be given as upon an application for a new licence, and that section puts the removal exactly on the same footing as a new licence; the justices are to have the same power in granting it as in the case of new licences, and are to deal with it exactly as a new licence, including the confirmation of the order for removal, as in

the case of a new licence, which confirmation is not necessary in renewals. By sect. 74 of the Act of 1872, the definition of "new licence" (which has been slightly amended by sect. 32 of the Act of 1874) is a "licence granted at a general annual licensing meeting in respect of premises not theretofore licensed. . . ." The removal order comes within that definition. Here there was a licence to be granted to premises about to be constructed, and therefore not already licensed for the sale of intoxicating liquor, and the application for the removal was an application for a new licence. If an applicant came for a new licence and said he would surrender one or more existing licences for it, then undoubtedly the justices would have jurisdiction in granting the new licence to impose a money payment; but it is contended for the applicant that if, instead of surrendering the old licence, the applicant merely asks for its removal to the new premises, then they would have no power to impose a money payment. Asking for the removal from the old premises is in substance asking for the grant of a new licence to the new premises, with an offer to surrender the licence attached to the old premises. The justices have power to impose this payment on the grant of new licences, and there is no reason why they should not have the same power with regard to removals; and, although with regard to other conditions their power is discretionary, inasmuch as they "may" attach such conditions, yet as to the condition of imposing monopoly value they have no such discretion—the words being, such conditions "shall" in any case be attached. The justices were therefore right in holding that they had power to impose this condition as to payment of the monopoly value; and if it were otherwise the public would altogether lose that benefit.

Pickford, K.C. (*Bodkin*, *Bruce Williamson*, and *H. Maddocks* with him) for the applicant in support of the rule.—The account of the decision of the justices as given in their affidavit does not quite correspond with the certified copy of the minute which was read by the justices' clerk as their decision, and which was exhibited to the applicant's affidavit. The justices had no power to attach the conditions appropriate to the grant of a new licence to an order sanctioning the removal of an existing licence. The repealed Act of 1871 (the Intoxicating Liquors (Licences Suspension) Act 1871) contained the first statutory reference to removals, and in that Act we have the clear distinction between new licences and removals of existing licences. That Act was to restrict the issue of "new licences," and so on, and in sect. 1 it placed restriction on the grant of new licences. In sect. 2 it dealt with removals, and gave the justices power to remove existing licences. That removal of existing licences was treated as, and was in fact, an entirely distinct thing from the granting of new licences, and had ever since been so regarded. The effect of that Act of 1871 was that the justices could not grant new licences, but could order the removal of old licences, so that from that time down to 1904 there were two perfectly well-known and distinct things—namely, the grant of a new licence, and the removal of an old licence. The Act of 1872 gave the justices back the power of granting new licences and continued their power of sanctioning the removal of existing licences, the latter being by sect. 50 of that Act. That section began by saying "licences may be removed," and the part which the justices performed was simply described as making "an order sanctioning the removal"; but in no part of the Act is it spoken of as a licence, or as a grant or as the granting of a licence. It is in their discretion to make the order; they are not bound to do so. The concluding words of sect. 50, that "the justices shall have the same power to make an order sanctioning removal as they have to grant new licences," do not mean that they are to have the same powers in relation to the one as to the other. In that last clause the two things are contrasted; there is a difference in substance and a difference in the language used; one is spoken of as "an order sanctioning removal," and the other as the grant of a "new licence." The two things are kept distinct throughout the whole legislation down to and including 1904, and the applications are distinct. When it is said that the power of the justices is to be the same in ordering a removal as in granting a new licence, that only means, for instance, that if it were an old beerhouse the justices would have only the same power to refuse to remove as to refuse to renew; but the "same power" does not mean the same power to impose conditions. Taking the definition of a "new licence," this does not come within it. The distinction between the two things, a grant of a new licence and an order sanctioning the removal of an existing licence, is very clearly put in the case of *Laceby* v. *Lacon and Co.* (80 L. T. Rep. 473; (1899) A. C. 222). The decision of the House of Lords in that case is founded upon the distinction between the two things, which is pointed out by all the learned Lords, and the applicant's contention is put very clearly by Lord Morris where he says: "The Act of 1872 contemplates licences being obtained and granted under three sets of circumstances. By sect. 40 it contemplates the grant of new licences; by sect. 42 it contemplates the grant of renewals; and by sect. 50 it contemplates the grant of a 'removal' of a licence, which I would understand from the use of the words 'removal of the licence' to refer to a licence then *in esse*. . . . There are three different applications dealt with by the statute. There are three different sets of notices to be given by the statute; there are three different results to be arrived at by the statute. The first is renewal, the second is a grant of a new licence, and the third is an order for removal." This was not a creation of a new licence at all, but a dealing with an existing licence, and the great object of the Act of 1904 was to put existing licences on a different footing to new licences. [He was stopped.]

Lord ALVERSTONE, C.J.—In my opinion this rule must be made absolute. If the case had come before us solely upon the materials which were before my learned brothers when the rule was moved, I think the case would be almost too clear for argument, because the ground of the decision of the justices, as stated, which was the first thing read to us by Mr. Pickford, and which I did not happen to be acquainted with, because I had no knowledge of the case before it was argued to-day, is in these words, "We are of opinion that, upon the facts proved,

the removal of the licence of the Hare and Hounds to the proposed new site would be a public advantage and should be permitted by the justices, but, acting upon the opinion of our legal adviser, we are of opinion that we cannot make the order asked for of provisional removal, except as upon an application for a new licence." In other words, that was a distinct decision that the old law in regard to removal was altered, and that the application to remove from one house to a place which had not been previously licensed could only be dealt with as an application for a new licence. I think that obviously goes too far. I think there are clearly established two parallel lines, one removal and the other application for a new licence; and to say that in every case of removal no question of property value may arise, and no question of new and improved conditions may arise—in fact it may be a desirable thing to get a licence away from a place where there are a great many to a village even with less advantages where there are only one, or even none at all—to say that that can only be dealt with by way of application for a new licence as if the premises had not had a licence at all would be repealing the whole of the removal legislation, which I think goes much too far. The case is altered to a certain extent from that point of view by the affidavit of Mr. Drinkwater on behalf of the justices. I confess I have great difficulty in reconciling that affidavit with what was read out; but it may be as Mr. Avory says, what they meant to say was that they must deal with the question of removal upon the same basis and from the same point of view as in the case of granting a new licence. Therefore there is not the same amount of contradiction as Mr. Pickford suggested. When the affidavit was read they said they were advised they had the same power to make an order sanctioning the removal as of granting a new licence, and further, they had previously said that they were not disposed to make an order unless the pecuniary gain so acquired should be secured in the interests of the public. In any view, however, I think the state of the law at present with regard to this matter is this: There were two parallel lines of legislation—one with reference to removal, and the other with reference to the granting of a new licence. I agree that to a great extent the same considerations had to govern the one and the other—the public convenience, desirability that it should go, fitness of premises, fitness of the applicant, and other considerations. I am not going into those specifically, but I am only speaking of them generally, without consideration of what statutory limits there were, if there were any, to what the justices might do in one case or the other. Undoubtedly sect. 50 does say, "subject as aforesaid, such justices shall have the same power to make an order sanctioning such removal as they have to grant a new licence." I think there is something in the view presented by Mr. Pickford, that as that was the enabling section, words of that kind were required, and it falls short of the contention of Mr. Avory that the "same power" means that they are to order removal under all the circumstances exactly in the same way as they are to order a new licence. Similarly sect. 22 of the Act of 1874 which varied that section does not seem to me to destroy the argument that there were, in connection with provisional grants and in connection with the removal of a licence to new premises, parallel lines of powers which the justices exercised with an absolute discretion in the case of removal. Now, when you come to the Act of 1904, it involves difficulties of construction; but it must be construed largely with reference to the main object and intent of it, which was to give a value to existing licences, and secure them to the licence-holder, and to give the public the benefit of increased value due to a new licence. Subsect. 2 of sect 4 says: "The justices on the grant of a new on-licence may attach to the grant of the licence such conditions as to the payments to be made and the tenure of the licence and as to any other matters as they think proper in the interests of the public." Therefore the language does not point obviously to the question of removal. I think it is an argument fairly to be considered that if they had meant to bring both classes of jurisdiction into one section, and make them subject to one condition, you would have expected to have found some such words as "either on the granting of a new on-licence, or the removal of an existing on-licence," and although the interpretation clauses have not much bearing upon the main object, yet the interpretation clause in the Act of 1904 supports that view, because a distinction is drawn between existing on-licences and on-licences that were not existing at the time of the Act. Then, I think, the point to which we ventured to call attention in the course of the argument is not without weight in considering whether this section does relate to and include the case of removal. The matter to be considered under sub-sect. 2 (*a*) is the question of the monopoly value represented by the difference between the value the premises would bear when licensed and the value when not licensed. It is a little difficult to see how, if that is the problem to be solved and dealt with, the element of the removed licence having been surrendered could properly enter into the calculation. The public were not intended to get the benefit of the difference between the value of the premises as unlicensed and the value of the premises as licensed, on the granting of a new licence, and in addition the benefit of the value of the surrendered licence. Without suggesting that that is conclusive, it seems to me to point to the fact that removal of an existing licence involves considerations different from those which arise in the question of granting a new licence; and to support the argument that we ought not to construe those words "granting a new licence" as equivalent to, and including, removal simply because, by earlier legislation, the same powers were given to justices to grant removal as there were to grant new licences. I therefore think that upon the main question which has been argued before us, on application for removal the justices have not the power to impose the conditions which they have power to impose when granting a new licence. I wish, however, to say that I do not want anything I have said to suggest or to indicate that the justices have not, when the question of removal is before them, a discretion as to whether they will allow the removal, and, speaking for myself, I think they ought to take into consideration when they are asked to grant a removal whether or not it is a substantial removal under circumstances which would deprive

the public by licensing the new premises of that value which belongs to them, and which would be preserved to them if a new licence had been applied for in respect of the premises. That is one of the circumstances that they ought to take into their consideration. It must not be thought, therefore, that we in any way suggest that they have not a discretion to refuse the removal upon, among other grounds, the ground that the new premises are such that the removal of the licence to them will be, to use the justices' own language, conferring a very great pecuniary gain upon the applicant, and that they ought not to sanction removal unless the pecuniary gain is secured in some way to the public. That is a matter for them to take into their consideration. It seems to me it is taken into their consideration from the point of view of refusing the removal, or granting it, but does not empower them to impose conditions which they have not the power to impose. I think, therefore, the rule must be made absolute. The justices must deal with this question of refusing the removal, or granting it, on its merits when it comes before them.

KENNEDY, J.—I agree entirely with the views expressed by my Lord. The only thing I want to say for myself, and my Lord for himself has expressed his opinion upon it, is that we are not saying that the justices are bound to sanction the removal. I concur in those remarks made by my Lord so fully as well as with the rest of his judgment that I need add nothing more.

RIDLEY, J.—I agree. *Rule absolute.*

Solicitors for the applicant, *Godden, Son,* and *Holme,* for *Band* and *Hatton,* Coventry.

Solicitors for the justices, *Nicholson, Graham, Graham,* and *Beasley,* for *Montague S. Wilks,* Coventry.

April 18 *and May* 29, 1905.

(Before KENNEDY and RIDLEY, JJ.)

AUSTIN FRIARS STEAM SHIPPING COMPANY LIMITED (apps.) *v.* STRACK (resp.).

SAME (apps.) *v.* STRACK AND OTHERS (resps.). (*a*)

Shipping — Seaman — Wages — Agreement for ordinary voyage—Carriage of contraband of war —Termination of voyage by capture of ship— "Loss" of ship—Right of seaman to wages and damages—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 158.

A seaman entered into an agreement with the owners of a British ship, and signed articles to serve as a seaman on board the ship on a trading voyage to the East and to different ports in the East, the voyage not to exceed two years, and to end at a final port of discharge in the United Kingdom. During the course of the trading war broke out between Russia and Japan, and after the declaration of war the ship was employed in trading between ports in Japan and Korea, carrying railway material, which had been declared contraband of war by both the Russian and Japanese Governments. While on one of these voyages, with this contraband of war on board, the vessel was seized by a Russian gunboat and was taken as a prize of war, and the vessel and her cargo were confiscated by a prize court. The master knew, but the crew did not, that the ship was carrying contraband of war. The crew were sent back to London, viâ St. Petersburg, and suffered considerable hardships on the journey through insufficiency of food and sleeping accommodation. The seaman claimed wages up to the time of arrival in London, and also damages for breach of the agreement.

Held, that the capture of the ship was not a "loss" of the ship within the meaning of sect. 158 *of the Merchant Shipping Act* 1894; *that the termination of the voyage was not "by reason of the loss" of the ship within the meaning of that section, but was by reason of the act of the owners in carrying contraband of war, and that in consequence the character of the voyage and its risk and danger were altered, and that there was therefore a breach of the agreement by the owners which entitled the seaman to his wages up to the date of his arrival in London and to damages.*

Two cases stated by an alderman and justice of the peace for the city of London, sitting as a court of summary jurisdiction at the Guildhall Justice Room, the first being as to the wages of a seaman and the second as to damages.

1. On the 10th Sept. 1904 the respondent (Johannes Strack) took out a summons under sect. 164 of the Merchant Shipping Act 1894, against the appellants, claiming a sum of 35*l.* 2*s.* 2*d.*, balance of wages alleged to be due from them in respect of his services as a seaman on board the steamship *Cheltenham* from the 24th Nov. 1903 to the 30th Aug. 1904, and continuing wages up to the date of final settlement under sect. 134 of the Merchant Shipping Act 1894.

On the 16th Sept. 1904 the parties attended before the magistrate on the summons, when the appellants admitted the respondent's claim up to the 2nd July 1904 (which they had always been willing to do).

The claim was amended accordingly, and, after hearing the matter, the summons was adjourned till the 17th Sept., on which day, the appellants having in the meantime paid the respondent's wages up to the 2nd July 1904, the magistrate gave judgment for the respondent and adjudged the appellants to pay the balance of wages up to the 30th Aug. 1904—namely, 9*l.* 13*s.* 4*d.*—and the sum of 16*l.* 16*s.* for costs.

2. The following facts were either admitted or proved before the magistrate:—

(*a*) The respondent was a seaman who at the time of the matters hereinafter mentioned was serving as a seaman on board the British steamship *Cheltenham.* The appellants were the owners of the *Cheltenham.*

(*b*) The respondent on the 24th Nov. 1903 signed on the articles of the *Cheltenham,* then at Bremerhaven, to serve as boatswain on the vessel at the rate of 5*l.* per month. The articles of agreement, so far as is material, were as follows:

The several persons whose names are hereto subscribed and whose descriptions are contained herein, and of whom five are engaged as sailors, hereby agree to serve on board the said ship in the several capacities expressed against their respective names on a voyage from Bremerhaven *viâ* port in Bristol Channel to

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

amount should be. As the applicant wished an order sanctioning the removal free of all conditions as to payment, they refused the application, and at the same sessions the licence for the premises in Far Gosford-street was renewed.

The certified minute of the decision of the justices which was contained in the applicant's affidavit was as follows:

We are of opinion that, upon the facts proved, the removal of the Hare and Hounds to the proposed new site would be of public advantage, and should be permitted by the licensing justices. Acting, however, upon the opinion of their legal adviser, the licensing justices consider they cannot make the order asked for of provisional removal except as upon an application for a new licence. The law point raised by the applicant's counsel is important, and the justices will help the applicant in any way possible to obtain a decision of the High Court thereon by *mandamus* or otherwise.

Sect. 50 of the Licensing Act 1872 (35 & 36 Vict. c. 94) provides:

Licences may be removed from one part of a licensing district to another part of the same district, or from one licensing district to another licensing district within the same county, in manner following: The application for an order sanctioning removal shall be made by the person desiring to be the holder of the licence when removed, and shall be made at a general annual licensing meeting, or any adjournment thereof, to the justices authorised to grant new licences in the licensing district in which the premises are situated to which the licence is to be removed. Notice of the intended application shall be given in the same manner as notice is given of an application for the grant of a new licence. A copy of the notice shall be personally served upon or sent by registered letter to the owner of the premises from which the licence is to be removed and the holder of the licence, unless he is also the applicant. The justices to whom the application is made shall not make an order sanctioning such removal unless they are satisfied that no objection to such removal is made by the owner of the premises to which the licence is attached, or by the holder of the licence, or by any other person whom such justices shall determine to have a right to object to the removal. Subject as aforesaid, such justices shall have the same power to make an order sanctioning such removal as they have to grant new licences; but no such order shall be valid unless confirmed by the confirming authority of the licensing district.

Sect. 22 of the Licensing Act 1874 (37 & 38 Vict. c. 49) provides:

Any person interested in any premises about to be constructed or in course of construction for the purpose of being used as a house for the sale of intoxicating liquors to be consumed on the premises may apply to the licensing justices and to the confirming authority for the provisional grant and confirmation of a licence in respect of such premises; and the justices and confirming authority, if satisfied with the plans submitted to them of such house, and that if such premises had been actually constructed in accordance with such plans they would, on application, have granted and confirmed such a licence in respect thereof, may make such provisional grant and order of confirmation accordingly. . . .

The Licensing Act 1904 (4 Edw. 7, c. 23) provides:

Sect. 4 (1). The power of the county licensing committee to confirm new licences and any other power of that committee shall be transferred to quarter sessions. (2) The justices, on the grant of a new on-licence, may attach to the grant of the licence such conditions, both as to the payments to be made and the tenure of the licence and as to any other matters, as they think proper in the interests of the public; subject as follows: (*a*) Such conditions shall in any case be attached as, having regard to proper provision for suitable premises and good management, the justices think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed. Provided that, in estimating the value as licensed premises of hotels or other premises where the profits are not wholly derived from the sale of intoxicating liquor, no increased value arising from profits not so derived shall be taken into consideration. (*b*) The amount of any payments imposed under conditions attached in pursuance of this section shall not exceed the amount thus required to secure the monopoly value.

Avory, K.C. and *William Mackenzie*, on behalf of the justices, showed cause against the rule.—The sole question is whether upon an application for the removal of an existing on-licence from the old premises to a new site the justices have the same power under the Licensing Act 1904 to impose conditions as to payment in respect of monopoly value as they have under sect. 4, sub-sect. 2, in granting new on-licences. Sect. 50 of the Licensing Act 1872 gives the justices power to remove a licence to new premises, and sect. 22 of the Licensing Act 1874 gives them power to make a provisional grant of a licence in respect of premises about to be built. By sect. 4, sub-sect. 2, of the Licensing Act of 1904—which by sect. 10 is to be construed as one with the Licensing Acts 1828 to 1902—the justices, "on the grant of a new on-licence," may attach to the grant of the licence such conditions, both as to the payments to be made, and so on, as they think proper in the interests of the public; and the question is whether those words "on the grant of a new licence" cover the grant of a provisional removal of an existing on-licence. Although there were two applications before the justices, the parties are agreed that this application was for the provisional removal of the licence; and the justices say that on the evidence before them a case had been made out for the provisional removal, and that they were willing to grant it, but they state that, having evidence before them that the new premises would be of much more value to the applicant than the old, they thought that it was a proper case in which to require a payment in respect of the monopoly value, which the applicant refused to accept. It must be conceded that before the Act of 1904 the justices could not have imposed a money payment as a condition of removal (*Reg.* v. *Bowman*, 78 L. T. Rep. 230; (1898) 1 Q. B. 663); but it is submitted that they can now impose it under sect. 4, sub-sect. 2, as a condition of removal. It is in fact an application for a new licence. By sect. 50 of the Act of 1872, the application for the removal is to be made to the licensing justices at their annual meeting sitting to grant new licences; the same notice has to be given as upon an application for a new licence, and that section puts the removal exactly on the same footing as a new licence; the justices are to have the same power in granting it as in the case of new licences, and are to deal with it exactly as a new licence, including the confirmation of the order for removal, as in

the case of a new licence, which confirmation is not necessary in renewals. By sect. 74 of the Act of 1872, the definition of "new licence" (which has been slightly amended by sect. 32 of the Act of 1874) is a "licence granted at a general annual licensing meeting in respect of premises not theretofore licensed. . . ." The removal order comes within that definition. Here there was a licence to be granted to premises about to be constructed, and therefore not already licensed for the sale of intoxicating liquor, and the application for the removal was an application for a new licence. If an applicant came for a new licence and said he would surrender one or more existing licences for it, then undoubtedly the justices would have jurisdiction in granting the new licence to impose a money payment; but it is contended for the applicant that if, instead of surrendering the old licence, the applicant merely asks for its removal to the new premises, then they would have no power to impose a money payment. Asking for the removal from the old premises is in substance asking for the grant of a new licence to the new premises, with an offer to surrender the licence attached to the old premises. The justices have power to impose this payment on the grant of new licences, and there is no reason why they should not have the same power with regard to removals; and, although with regard to other conditions their power is discretionary, inasmuch as they "may" attach such conditions, yet as to the condition of imposing monopoly value they have no such discretion—the words being, such conditions "shall" in any case be attached. The justices were therefore right in holding that they had power to impose this condition as to payment of the monopoly value; and if it were otherwise the public would altogether lose that benefit.

Pickford, K.C. (*Bodkin*, *Bruce Williamson*, and *H. Maddocks* with him) for the applicant in support of the rule.—The account of the decision of the justices as given in their affidavit does not quite correspond with the certified copy of the minute which was read by the justices' clerk as their decision, and which was exhibited to the applicant's affidavit. The justices had no power to attach the conditions appropriate to the grant of a new licence to an order sanctioning the removal of an existing licence. The repealed Act of 1871 (the Intoxicating Liquors (Licences Suspension) Act 1871) contained the first statutory reference to removals, and in that Act we have the clear distinction between new licences and removals of existing licences. That Act was to restrict the issue of "new licences," and so on, and in sect. 1 it placed restriction on the grant of new licences. In sect. 2 it dealt with removals, and gave the justices power to remove existing licences. That removal of existing licences was treated as, and was in fact, an entirely distinct thing from the granting of new licences, and had ever since been so regarded. The effect of that Act of 1871 was that the justices could not grant new licences, but could order the removal of old licences, so that from that time down to 1904 there were two perfectly well-known and distinct things—namely, the grant of a new licence, and the removal of an old licence. The Act of 1872 gave the justices back the power of granting new licences and continued their power of sanctioning the removal of existing licences, the latter being by sect. 50 of that Act. That section began by saying "licences may be removed," and the part which the justices performed was simply described as making "an order sanctioning the removal"; but in no part of the Act is it spoken of as a licence, or as a grant or as the granting of a licence. It is in their discretion to make the order; they are not bound to do so. The concluding words of sect. 50, that "the justices shall have the same power to make an order sanctioning removal as they have to grant new licences," do not mean that they are to have the same powers in relation to the one as to the other. In that last clause the two things are contrasted; there is a difference in substance and a difference in the language used; one is spoken of as "an order sanctioning removal," and the other as the grant of a "new licence." The two things are kept distinct throughout the whole legislation down to and including 1904, and the applications are distinct. When it is said that the power of the justices is to be the same in ordering a removal as in granting a new licence, that only means, for instance, that if it were an old beerhouse the justices would have only the same power to refuse to remove as to refuse to renew; but the "same power" does not mean the same power to impose conditions. Taking the definition of a "new licence," this does not come within it. The distinction between the two things, a grant of a new licence and an order sanctioning the removal of an existing licence, is very clearly put in the case of *Laceby* v. *Lacon and Co.* (80 L. T. Rep. 473; (1899) A. C. 222). The decision of the House of Lords in that case is founded upon the distinction between the two things, which is pointed out by all the learned Lords, and the applicant's contention is put very clearly by Lord Morris where he says: "The Act of 1872 contemplates licences being obtained and granted under three sets of circumstances. By sect. 40 it contemplates the grant of new licences; by sect. 42 it contemplates the grant of renewals; and by sect. 50 it contemplates the grant of a 'removal' of a licence, which I would understand from the use of the words 'removal of the licence' to refer to a licence then *in esse*. . . . There are three different applications dealt with by the statute. There are three different sets of notices to be given by the statute; there are three different results to be arrived at by the statute. The first is renewal, the second is a grant of a new licence, and the third is an order for removal." This was not a creation of a new licence at all, but a dealing with an existing licence, and the great object of the Act of 1904 was to put existing licences on a different footing to new licences. [He was stopped.]

Lord ALVERSTONE, C.J.—In my opinion this rule must be made absolute. If the case had come before us solely upon the materials which were before my learned brothers when the rule was moved, I think the case would be almost too clear for argument, because the ground of the decision of the justices, as stated, which was the first thing read to us by Mr. Pickford, and which I did not happen to be acquainted with, because I had no knowledge of the case before it was argued to-day, is in these words, "We are of opinion that, upon the facts proved,

Scrutton, K.C. (*Dawson Miller* with him) for the appellants.—The first case is as to wages, and sect. 158 of the Merchant Shipping Act 1894 is the section upon which that question turns. Before the Merchant Shipping Act the seaman was not entitled to wages unless freight was earned. Sect. 157 of the Act provides that the right to wages shall not depend on the earning of freight. Sect. 158 gives the seaman a greater right, and gives him a right to wages up to the time of the termination of the service where such termination is caused by reason of the "wreck or loss" of the ship, although no freight has been earned. The capture of the ship was a "loss" of the ship within the meaning of that section. The time when the ship was captured was the time when the ship was "lost" to the owners, and by sect. 158 the wages are to cease on the wreck or loss of the ship. That is the whole point so far as the wages are concerned, and the contention for the respondent that there was no wreck or loss of the ship and that therefore the wages went on is not well founded. Then the second case is as to damages, and as to that, as there was no breach of the agreement, there was nothing in respect of which the respondent could claim damages. In the section "loss" is distinguished from "wreck," and it means anything which deprives the owner of the possession of the ship, which the capture in this case did. The act of capture defeated the rights of the seaman and put an end to his wages: (*The Friends*, 4 Ch. Rob. 143). The carrying of contraband of war is not an offence against the law of nations or the law of this country; it is not illegal by the law of this country: (*Ex parte Chavasse; Re Grasebrook*, 12 L. T. Rep. 249; 34 L. J. 17, Bk.). The decision of Lord Westbury, L.C. in that case shows that this was a perfectly lawful voyage. She was carrying railway material, and was engaged in a trade that could lawfully be carried on. The case of *The Justitia* (57 L. T. Rep. 816; 12 P. Div. 145) is an altogether different case from the present, and is quite distinguishable. In that case damages were awarded to the seamen, but it was entirely owing to the fact that they had incurred hardships through the vessel being employed for purposes other than those contemplated by the agreement. The seamen were, in fact, employed for quite a different service from that which the agreement contemplated, whereas, in the present case, the seaman was employed precisely as contemplated by the agreement, and, as the agreement entered into was for a lawful voyage and a lawful trade, the loss falls upon the seaman, the shipowners, and cargo alike. The decision of the magistrate was therefore wrong. *The Malta* (2 Haggard, 158) was also referred to.

Robson, K.C. (*Pilcher* with him) for the respondent.—The question is not whether it is lawful to carry contraband or not, but whether, when a shipowner enters into a contract with a seaman, he is entitled to put on the seaman risks never contemplated by the contract. The agreement in this case was for an ordinary commercial voyage, and the employers had no right to change that voyage into a voyage for the carrying of contraband of war, and the case finds that the cargo was contraband of war. It was the carrying of railway material for the construction of railways for the conveyance of Japanese troops. That change from the agreed voyage necessarily involved greater risks and dangers to the seamen than they had agreed to. The respondent was entitled to treat as a breach of the contract the appellants' employment of him on a voyage which would expose him to greater danger than he originally had reason to anticipate when he entered into the service—that is, to dangers other than the ordinary perils of the sea. By so doing, and by deliberately putting their ship in peril of capture, as they did, they became liable to the seamen in damages (*The Justitia, ubi sup.*), and also for the wages until their arrival in London: (*Burton* v. *Pinkerton*, 16 L. T. Rep. 419; 17 L. T. Rep. 15; L. Rep. 2 Ex. 340). Kelly, C.B. in that case said (16 L. T. Rep., at p. 424) that, as war had broken out between Peru and Spain, it was a breach of the contract with the seaman to place the vessel under the orders of a Peruvian who was causing her to act in concert with two Peruvian ships of war, "and so exposing the crew to the danger at any moment of the loss of their liberty or of their lives." That applies precisely in this case, as the master deliberately put his ship in peril of capture. In *O'Neil* v. *Armstrong, Mitchell, and Co.* (73 L. T. Rep. 178; (1895) 2 Q. B 70, 418) it was held by the Court of Appeal that, as the continuation of the voyage would, through the breaking out of war between Japan and China, have exposed the seaman to greater risks than those which he contracted to run, the seaman was justified in leaving the ship, and was entitled to recover the stipulated sum, notwithstanding that the voyage was not completed. Charles, J., in delivering the judgment of the Divisional Court in that case (72 L. T. Rep., at p. 778; (1895) 2 Q. B., at p. 77), said that the captain's action in going on with the voyage after war had broken out certainly increased the risk incidental to an ordinary voyage, and, "apart from any question of illegality," entitled the plaintiff to treat his conduct as a breach. That clearly shows that, apart altogether from the question of legality or illegality, the increased risk was a breach of the agreement. Under the proclamation of the Government the respondent's duty was not to go on if the vessel was carrying contraband of war. [KENNEDY, J. —How do you make the wages run up to the 30th Aug., the date of arrival in London?] Under sect. 134. The vessel was captured owing to the act of the owner himself, and therefore the owner himself, by putting the vessel and crew under a risk not contemplated by the parties, has brought about the state of things which terminated the contract, and, that act being "the wrongful act or default of the owner or master, the seaman's wages shall continue to run and be payable until the time of the final settlement thereof." The master was bound to send the respondent home; during all that time his wages were running, as he was not bound to treat the contract as determined, and under sect. 134 he was entitled to his wages until the 30th Aug. He is also entitled to damages. In both the cases referred to there was a claim for damages as well as a claim for wages. Under sect. 136 the seaman, on the settlement of his wages, is bound to sign a release, but in the present case the respondent was justified in refusing to sign on account of his claim for damages. Clearly there was not a "loss" or "wreck" of the vessel within

the meaning of sect. 158, as what is relied upon as the "loss" of the vessel—namely, the capture—was brought about by the appellants' own act in sending contraband of war to a port of a belligerent.

Dawson Miller in reply.—"Loss" or "wreck" within sect. 158 means loss or wreck however caused. As to the question of damages, the cases cited of *Burton* v. *Pinkerton* (*ubi sup.*), *O'Neil* v. *Armstrong, Mitchell,* and *Co.* (*ubi sup.*), and *The Justitia* (*ubi sup.*) were all cases where illegality under the Foreign Enlistment Acts came in, and where the seaman was asked to carry out a contract which was in fact illegal. In the present case the respondent must be taken to have entered for a voyage which was lawful.

Cur. adv. vult.

May 29.—The judgment of the court (Kennedy and Ridley, JJ.) was read by

RIDLEY, J.—These were two cases stated for the opinion of the court by a justice of the peace for the city of London, the first relating to a claim for wages made by a seaman under the Merchant Shipping Act 1894, and the latter to a claim for damages in respect of the same employment made by him under the Employers and Workmen Act 1875, as amended by 43 & 44 Vict. c. 16, s. 11. It appears that Strack, the seaman, on the 24th Nov. 1903, signed on the articles of the British steamship *Cheltenham*, belonging to the appellants, and then at Bremerhaven, as boatswain at the rate of 5*l.* per month, upon an agreement the material part of which was as follows: [His Lordship then read the terms of the agreement and the whole of the facts as set out in the case, and proceeded:] On the 1st Sept. 1904 Strack and other members of the crew issued a summons under 43 & 44 Vict. c. 16, s. 11, claiming damages against the appellants for breach of the agreement contained in the ship's articles; and upon this summons the magistrate awarded 10*l.* to Strack and to each of the crew. On the 10th Sept. 1904 Strack took out a summons under sect. 164 of the Merchant Shipping Act 1894, claiming the sum of 35*l.* 2*s.* 2*d.*, for balance of wages due up to the 30th Aug., and for continuing wages up to the date of final settlement under sect. 134 of that Act. At the hearing on the 16th Sept. the appellants admitted the claim up to the 2nd July, and the special case states that the summons was adjourned for the claim to be amended. The appellants then paid the wages due up to the 2nd July 1904; and on the further hearing on the 17th Sept. the magistrate gave judgment for the balance remaining due for wages between the two dates — namely, 9*l.* 13*s.* 4*d.*, and costs; but he declined to allow a claim for anything after the 30th Aug. on the ground that there was then a *bonâ fide* dispute within the meaning of sect. 134. It was argued for the appellants that the ship when she was taken was "lost" within the meaning of sect. 158 of the Merchant Shipping Act 1894 and that Strack was, therefore, entitled to wages only up to that date—that is to say, the 2nd July 1904. By that section: "Where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship . . . he shall be entitled to wages up to the time of such termination, but not for any longer period." It seems to us very doubtful whether the word "loss" would in any case include a capture such as this, which is not in the same category as wreck, fire, or stranding, or such terminations of a voyage as are brought about by the perils of the sea. But however that may be, it seems clear that the section was not intended to include cases where the service terminates not owing to capture by the King's enemies, but from the wilful action of the captain and owners, and not resulting either directly or indirectly from any peril or hurt affecting the ship itself or preventing the continuance of the voyage. The case of *O'Neil* v. *Armstrong, Mitchell, and Co.* (73 L. T. Rep. 178; (1895) 2 Q. B. 70, 418) was referred to on the argument, and appears to us to have a decided bearing upon the question before us. In that case the plaintiff shipped as fireman on a torpedo-ship constructed by the Japanese Government by the defendants for a voyage to Yokohama. The ship left the Tyne on the 31st July 1894, and war was declared between Japan and China on the 3rd Aug. The plaintiff became aware of this, and at Aden, after a proclamation had been read on board warning the crew against any breach of the Foreign Enlistment Act 1870, he and his fellow sailors left the ship and were sent home by the Board of Trade. The plaintiff sued for balance of wages, and for damages for non-fulfilment of the contract. The nominal defendants accepted responsibility for the satisfaction of the plaintiff's claim to the extent of the liability, if any, of the captain of the vessel. It was held in the Queen's Bench Division and in the Court of Appeal that the plaintiff was entitled to recover both wages and damages, inasmuch as the defendants admitted responsibility for the captain of a vessel whose owners (represented for the purpose of the action by the defendants) had by the declaration of war altered the character of the voyage during its continuance, and exposed the plaintiff and crew to dangers greater and other than those originally anticipated. It was not a case in which something had occurred beyond the control of either party, such as was *Appleby* v. *Myers* (16 L. T. Rep. 669; L. Rep. 2 C. P. 651), by which the voyage had been terminated, but a case in which its discontinuance resulted directly from the action of the owners. There the risk was altered because after the outbreak of hostilities the Japanese vessel of war became liable to capture by the enemy, and for that outbreak of hostilities the owners were responsible. In the present case the risk was altered because after the outbreak of hostilities between Japan and Russia the captain, acting for and as agent for the owners, and therefore the owners, undertook a venture materially different from the character of the voyage in regard to which the seaman's contract was made. They knew (although the crew did not) that railway material had been declared to be contraband when they chartered the vessel for the voyages, on one of which she was seized and captured: (see *Burton* v. *Pinkerton*, 16 L. T. Rep. 419; 17 L. T. Rep. 15; L. Rep. 2 Ex. 340). It is true that the carrying of contraband is not illegal (*Ex parte Chavasse; Re Grazebrook*, 12 L. T. Rep. 249; 34 L. J. 17, Bk.), but merely exposes the neutral who engages in such a venture to the risk of seizure and confiscation; but the question does not turn upon the legality or illegality of the

voyage and its object, but upon whether, after its inception, the risk and danger are materially varied by any alteration in its conditions for which the owners are responsible. It seems clear that, when the owners engaged in the business of carrying cargo which they knew to be contraband, they did so alter the conditions of the voyage. That was the cause of its termination, and not a "loss" of the ship within the meaning of sect. 158 of the Merchant Shipping Act. In *O'Neil* v. *Armstrong, Mitchell, and Co.* (*ubi sup.*) the plaintiff was entitled by the articles to the lump sum of 30*l.* on arriving at Yokohama, and having received a portion of that sum on account the court gave him judgment for the balance. Upon this contract Strack was entitled to be paid at the rate of 5*l.* a month till his arrival in the United Kingdom—that is to say, the 30th Aug. We are of opinion that the magistrate's decision in awarding the balance due up to that date was right. In regard to damages, there was jurisdiction, in the view which we have already expressed as to the breach of contract, to award damages (see *The Justitia*, 57 L. T. Rep. 816; 12 P. Div. 145), and we see no reason, considering the hardships involved in the homeward journey of the crew, in holding that the amount awarded in the present case is in point of amount unreasonable.

Appeals dismissed in both cases.

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REX v. TIDESWELL. (*a*)

Criminal law—Larceny—Sale of goods in bulk—Fraud — Conspiracy — Fraudulent conspiracy with servant of vendor—Delivery of quantity greater than quantity sold—False receipt.

A purchaser of goods sold out of bulk commits larceny if he, by a fraudulent arrangement with the servant of the vendor, obtains possession of a greater quantity than that which the vendor has agreed to sell.

The prosecutors, E. and Sons Limited, had from time to time quantities of residual products for sale. They had for many years, whenever they had an accumulation of such matters, agreed with T. that he should buy the products at a fixed price per ton.

On the occasions charged in the indictment, T. had agreed to buy casters' ashes at a price per ton.

It was the duty of K., a servant of E. and Sons Limited, to weigh the ashes, deliver them into trucks provided by T., to make an entry in a book showing the amount so delivered, and to make out a receipt to be signed by the purchaser stating the amount delivered.

In pursuance of a fraudulent arrangement between K. and T., K. delivered two quantities of ashes to T., but, with the knowledge of T. in each case, made out the receipts for a quantity less than the quantity delivered, the result being that T. obtained more ashes than the quantity for which he paid E. and Sons Limited.

Held, that T. was properly convicted of larceny of the quantity delivered in excess of the quantity stated in the receipts.

CASE stated by the chairman of the Staffordshire Quarter Sessions.

1. At the adjourned general quarter sessions of the peace for the county of Stafford holden at Stafford on the 1st Dec. 1904, Thomas Tideswell was tried before me on an indictment charging him: (*a*) With feloniously stealing, taking, and carrying away 1 ton 10cwt. of casters' ashes on the 23rd Jan. 1904, the property of Allen Everitt and Sons Limited; (*b*) with receiving the said goods on the date aforesaid well knowing them to have been stolen; (*c*) with feloniously stealing, taking, and carrying away 1 ton 6cwt. of casters' ashes on the 21st April 1904, the property of the said Allen Everitt and Sons Limited; and (*d*) with feloniously receiving the last-mentioned goods on the said date well knowing them to have been stolen.

2. It was proved that the prisoner had been a customer of Allen Everitt and Sons Limited for a number of years, purchasing waste and residual metal products from them. A man named Ephraim Kaye was employed by Allen Everitt and Sons Limited as general metal weigher, and it was his duty to weigh out waste and residuals to customers, and to enter in a book called the residual metal book a record of such weights, for the purpose of enabling the customers to be charged in the books of the company with the proper weights. It was also the duty of Ephraim Kaye to keep another book, called the receipt book, in which he took from the customers signed receipts for the weights of waste and residuals taken by them.

3. On the 23rd Jan. 1904 Ephraim Kaye weighed and delivered into trucks of the railway company a quantity of casters' ashes, a residual metal product, the property of Allen Everitt and Sons Limited, weighing in fact 32 tons 13cwt. Ephraim Kaye made out a receipt for these casters' ashes by the prisoner in his receipt book, describing them as weighing 31 tons 3cwt. only, and this receipt was on the 23rd Jan. signed by the prisoner, who was charged with that amount only in the books of the company. On the 20th and 23rd Jan. 1904 the prisoner made out two consignment notes to the railway company in his own handwriting for 19 tons 9cwt. and 13 tons 4cwt. respectively of casters' ashes, amounting together to 32 tons 13cwt.

4. On the 21st April 1904 Ephraim Kaye weighed and delivered into two trucks of the railway company a quantity of casters' ashes, the property of Allen Everitt and Sons Limited, weighing in fact 12 tons 16cwt. 2qrs. The prisoner on the 20th April signed a receipt made out by Ephraim Kaye in his receipt book for 11 tons 10cwt. 2qrs. only, and was charged with that weight in the books of the company. The prisoner on the 21st April made out a consignment note to the railway company in his own handwriting for 12 tons 16cwt. of casters' ashes.

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5. Ephraim Kaye (who, on being charged with the afore-mentioned felonies before magistrates at petty sessions, pleaded guilty and was sentenced to three months' imprisonment) was called on behalf of the prosecution, and stated that he entered the lesser weights in the residual metal book and receipt book intentionally, and that he kept a private book, to which he referred at the trial, in which he entered all the correct weights of goods weighed out to the prisoner, who obtained these said correct weights from him or through being present at the time they were entered. He said that he had no previous arrangement or understanding with the prisoner that he was to be charged for less casters' ashes than were to be sent, and that he could not say he had ever told the prisoner that he was being charged for less than the actual weights on any occasion, and that there was no understanding as to any particular deduction from weights, though (he added) deductions were as a matter of fact made, but the prisoner had previously and from time to time given him sums of money as a reward for these services generally, though not as a payment in respect of any particular transaction. All the casters' ashes that were put into the railway company's trucks were loaded in the ordinary course of business between Allen Everitt and Sons Limited and the prisoner.

6. On this evidence it was objected by counsel for the prisoner that the indictment was not supported by the evidence, on the ground that there was no proof of the larceny or receiving by the prisoner of any specific goods.

7. I overruled the objection, but consented to reserve the point for the consideration of the Court for Crown Cases Reserved. I told the jury that, if they believed the evidence for the prosecution, their duty was to find the prisoner guilty. The jury found the prisoner guilty, and he was sentenced to six months' imprisonment in the second division, and was released on bail pending the decision of the point reserved.

On the argument the court remitted the case to the quarter sessions for restatement on the following points: (*a*) Was there any previous or contemporary contract between the prisoner and Everitt and Sons Limited or any authorised agent or servant of Everitt and Sons Limited other than Kaye, either for the sale of these ashes or the sale of any quantities of ashes? (*b*) Was there any contract between the prisoner and Kaye for the sale of the ashes on either of the dates laid in the indictment?

The statement of the quarter sessions on these points was that the evidence did not disclose any such contract. And that the course of business between the prisoner and Everitt and Sons Limited had for many years been that when Everitt and Sons Limited had an accumulation of waste residuals or ashes they sent for the prisoner, who saw the managing director and arranged verbally with him to buy so much as he should require of the bulk at so much per ton. No specific quantities would be mentioned, the understanding being that the quantities purchased should be defined by the weighing. The ashes the subject of the indictment formed part of one of these accumulations.

Vachell for the prisoner.—The contention is that the prisoner in each case defrauded Everitt and Sons Limited of the price of one ton of casters' ashes. But the offence with which he is charged is stealing the actual ashes. The result of the transaction between the managing director of Everitt and Sons Limited and the prisoner was that the prisoner was entitled to receive so much casters' ashes as should be weighed and delivered to him. Kaye when he weighed 32 tons 13cwt. was acting properly, and at that moment the property in the ashes passed to the prisoner. The ashes then belonged to the prisoner by virtue of the Sale of Goods Act, s. 3. Subsequently the prisoner and Kaye conspired to defraud Everitt and Sons Limited, which is not the offence charged in the indictment. There cannot be larceny of undefined goods. The whole bulk of 32 tons 13 cwt. was weighed at one operation. A purchaser of part with knowledge of the fraudulent transaction could not be convicted of receiving stolen goods:

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a purpose beyond what the statute contemplated is nothing to the purpose. I think that the judgment of Joyce, J. should be restored. With respect to the costs of this litigation, I cannot overlook the fact that the local authority made a blunder, and interfered with the footway. That has now been put right, but in the first instance led to the litigation. Then, I think that the negotiation and correspondence was not as candid as it should have been, and I think, therefore, that neither side in this controversy should have any costs.

Lord MACNAGHTEN. — My Lords: At the southern or lower end of Parliament-street, just before you come to Bridge-street, where in consequence of recent improvements there is a distance of about 100ft. between the opposite buildings, the appellants, as the sanitary authority of the city of Westminster, have constructed public lavatories and other conveniences for the use of persons of both sexes. These conveniences are placed under the ground in the middle of the street, as far removed as possible from the buildings on either side. The plan of the construction is this: On each side of the roadway there is an entrance, 5ft. 9in. wide, protected by railings and leading by a staircase of the same width to a passage or subway, 10ft. wide and 8ft. high, which runs the whole way across on a level with the underground conveniences. Out of this subway there are openings—two for men and one for women—into spacious chambers, where the usual accommodation (politely described as lavatories and cloakrooms) is provided on a large and liberal scale. All the arrangements seem to have been designed and carried out with due regard to decency and with every possible consideration for the comfort of wayfarers in need of such accommodation. The London and North-Western Railway Company are the owners of a large and valuable block of buildings on the east side of Parliament-street, having a frontage to Parliament-street and a frontage to Bridge-street, with vaults under the pavement in Parliament-street, and a claim, for what it is worth, to the soil beneath the roadway up to the midline of the street. They took objection to the sanitary works constructed by the corporation and sought to have them removed. They put their case alternatively as a case of trespass or of obstruction to the highway causing special damage. The corporation relied on their statutory powers under the Public Health (London) Act 1891, which authorises them to construct such public sanitary conveniences, and vests in them for the purpose the subsoil of the road, exclusive of the footway. When the parties came to trial it was found that owing to some mistake or inadvertence the works of the corporation had encroached on the footway. Joyce, J., before whom the case was tried, ordered the corporation to remove the encroachment, but made no order as to costs. On appeal by the plaintiffs, the court ordered the corporation to "pull down and remove the whole of the staircase, railings, and other works placed by the defendants upon the lands of the plaintiffs other than the conveniences in the pleadings mentioned, and such further portion of the construction as the court" might, "upon application, sanction as a proper approach to the said conveniences." The order was to be suspended pending an appeal to this House, and the corporation were to pay the costs of the action and of the appeal. The corporation have acquiesced in the order of Joyce, J. Their only contention now is that the order of the Court of Appeal is wrong. There can be no question as to the law applicable to the case. It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first. But in the present case I think that it will be convenient to take it separately. Now, looking merely at what has been done—at the work as designed and actually constructed—it seems to me that, apart from the encroachment on the footway, it is impossible to contend that the work is in excess of what was authorised by the Act of 1891. The conveniences themselves, extensive as the accommodation is, have not been condemned by the Court of Appeal or even attacked in the evidence. Then the entrance from the roadway is only 5ft. 9in. wide; so is the staircase. It is in evidence that a width of 4ft. 6in. is "necessary" in order to enable two persons to pass on the staircase. The witness who gave that evidence was pressed to say that "under ordinary circumstances 4ft. 6in. to 5ft. would be a wide entrance for a thing of this sort." "No," he replied, "not ample. You want to give a *minimum* of 5ft., if you can, and more than that. You would give 6ft. if you had got plenty of space." So the entrance actually provided which has been condemned by the Court of Appeal, and, as I think, without evidence, is just 9in. wider than the minimum width which the only witness examined on the point says ought to be provided, and 3in. narrower than what he thinks should be allowed if space permits. It seems rather a strong measure to invoke the powers of the court in so trifling a matter, especially considering that the excess, if excess there be, cannot make the slightest practical difference to the respondents. Then I come to the subway, which has not been opened to the public as yet. Now, there is not a scrap of evidence tending to show that there is anything improper or suspicious about the subway. One witness was asked if he had "ever known an approach to a convenience which was 10ft. wide except this." He said he had not, and there the matter dropped. But then no instance could be given—at any rate, no instance was given—of a convenience so large placed in the centre of a street so wide and approached from either side. If it is permissible to construct a convenience approachable from either side of a wide street, you cannot prevent the public from using the subway as a thoroughfare. I should think it most unlikely that it would be largely used, if used at all, by persons not desirous of availing themselves of the convenience. But it is possible; Vaughan Williams, L.J. thinks it more than possible. He has "no doubt, apart from the conveniences, the subway at the present moment is a considerable convenience to pedestrians." There seems to be no experience to guide one on the point. And so the corporation were, I think, not to be blamed for making provision in order to obviate crushing and jostling in a place where crowding is (to say the least) not convenient. I have not forgotten that there are two passages in the

evidence which one of the learned Lords Justices quotes at length, and all the members of the court appear to rely on them. It seems that the chairman of the works committee admitted that this tunnel (as it has been called), 10ft. wide and 8ft. high, was "both an approach and a subway." That seems to have been thought a very damaging admission. Of course, it was a subway. It was a subway capable of being used as a thoroughfare It would have been a subway if there had been no thoroughfare. For my part, I do not quite understand all this play upon words. Then there was another passage in the evidence supposed to be more damaging still, in which a witness said that he did "not see any necessity for 10ft." It would, he admitted, be "a waste of space and a waste of money." But if you look at the context, it is perfectly clear that the learned Lord Justice was under a misapprehension. The witness was not referring to the subway, which was 10ft. wide. He was not thinking of the subway. The questions put to him both by the learned counsel and by the judge were addressed to the entrance and staircase, to which very different considerations apply. It was not suggested that there was any notice, or any intention of putting up a notice, directing the public to this subway as a means of crossing. The entrance, which was of the usual limited dimensions, did not of itself offer any invitation to the public to enter for the purpose of crossing the roadway. Then I come to the question of want of good faith. That is a very serious charge. It is not enough to show that the corporation contemplated that the public might use the subway as a means of crossing the street. That was an obvious possibility. It cannot be otherwise if you have an entrance on each side and the communication is not interrupted by a wall or a barrier of some sort. In order to make out a case of bad faith it must be shown that the corporation constructed this subway as a means of crossing the street under colour and pretence of providing public conveniences which were not really wanted at that particular place. That was the view of their conduct taken by the Court of Appeal. "In my judgment," says Vaughan Williams, L.J., "it is not true to say that the corporation have taken this land which they have taken with the object of using it for the purposes authorised by the Legislature. You are acting *mala fide*," he added, "if you are seeking to acquire and acquiring lands for a purpose not authorised by the Act of Parliament." So you are; there can be no doubt of that. The other learned Lords Justices seem to take the same view of the conduct of the corporation. Now this, as I said, is a very serious charge. A gross breach of public duty, and all for a mere fad! The learned judge who tried the case had before him the chairman of the works committee. That gentleman declared that his committee considered with very great care for a couple of years or more the question of these conveniences in Parliament-street. He asserted on oath that "the primary object of the committee was to provide these conveniences." Why is this gentleman not to be believed? The learned judge who saw and heard him believed his statement. The learned judges of the Court of Appeal have discredited his testimony, mainly, if not entirely, on the ground of two letters about which he was not asked a single question—one written by the surveyor of the parishes of St. Margaret's and St. John's under the city engineer of Westminster, the other by a person acting for the acting town clerk. The letter of the surveyor was a foolish letter, which the writer seems to have thought clever. The letter of the temporary representative of the acting town clerk, if you compare the two letters, seems to have derived its inspiration from the same source. I cannot conceive why the solemn statement of the chairman of the committee should be discredited on such a ground. I do not think that there is anything in the minutes tending to disprove his testimony. I agree with Joyce, J. that the primary object of the council was the construction of the conveniences with the requisite and proper means of approach thereto and exit therefrom. I have felt more difficulty with regard to the question whether the corporation have acted altogether reasonably, "with judgment and discretion," as Turner, L.J. puts it in a well-known case. It seems to me that, when a public body is exercising statutory powers conferred upon it for the benefit of the public, it is bound to have some regard to the interest of those who may suffer for the good of the community. I do not think it right—I am sure that it is not wise—for such a body to keep its plans secret and carry them into execution without fair and frank communication with those whose interests may possibly be prejudiced or affected. I cannot help thinking that, if the engineer of the corporation and the engineer of the railway company had been put into communication, some modification of plan might have been suggested which would have obviated all this litigation and expense, and all the litigation and expense yet to come if the Court of Appeal is to take upon itself, as it proposes to do, the functions of a sanitary authority and determine the precise dimensions of approaches to such a place as this. The surveyor thought it politic and not unworthy of his position as an officer of a great public body to try to throw dust in the eyes of his correspondent. I do not suppose that the officials of the railway company were put off their guard by the answer which he sent. I have no doubt that they knew perfectly well what the corporation proposed to do. But still, the mode in which they were met prevented anything like a free interchange of ideas between these two bodies for their mutual advantage. The result of these considerations to my mind is that, if at the trial the respondents had suggested any practical mode of altering or amending the plans that would have obviated the inconvenience which the works as executed must cause to them, I should, speaking for myself, have been disposed to think that an injunction ought to have been granted to secure that object. Unfortunately, the respondents chose to stand aloof, and have given no assistance to the court. Under these circumstances I think there is no alternative but to allow the appeal, and to restore the judgment of Joyce, J. But I think there ought to be no costs either here or in the Court of Appeal.

Lord JAMES OF HEREFORD.—My Lords: In this case the London and North-Western Railway Company seeks by injunction to restrain the defendants, the present appellants, from maintaining a certain tunnel, staircase, and railings, and other works upon land in Parliament-street, Westminster. The facts upon which the questions in issue depend may, I think, be

summarised as follows: [His Lordship went through the facts and evidence as set out above, and in greater detail in the reports in the courts below, and continued as follows:] Now upon these facts it seems to me to be clear that the intention of the local authority was to construct two distinct objects, a convenience with an approach and a subway. It is true that a portion of the subway would be used as the approach to the convenience, but the subway would also be used by those who did not intend to visit the convenience, but only desired to cross free of danger from one side of Parliament-street to the other. It is also clear that in consequence of this double user the subway was made of 4ft. greater breadth takn would have been necessary if only an approach to the convenience had been constructed. Such being a summary of the facts before your Lordships, it is necessary to consider with what legal powers the appellants and their predecessors were invested so as to authorise the construction of the works in question. Inasmuch as the soil of the respondents has been taken without their sanction for the purposes of the works, the appellants must show legal authority for such an act. By sect. 44 of the Public Health Act (London) 1891, power was conferred upon sanitary authorities to provide and maintain public conveniences, and in order to carry out the exercise of the power, the subsoil of any road (required for the purpose) was vested in the sanitary authority. This is the only legislative authority under which a justification for the act done is alleged. It will be noted that there is no legislative power given to local authorities to construct subways. Now, I agree in the view that has been taken that the powers to construct a convenience under the Act of 1891 of necessity include a power to construct an approach thereto. And so the question to be solved seems to be thus formulated. Was the so-called tunnel an approach to the convenience only, or was it something more? (1) Was it a subway distinct from the approach, or (2) was it a subway in combination with the approach used for two distinct purposes? In my judgment the construction in question comes within one or other of the two latter alternatives. Possibly within the first, certainly within the second. If this finding on the facts be correct, the works, so far as they constitute the subway, are constructed without legal authority. The Legislature has not thought it right to confer on local bodies the power to compulsorily take land or impose rates for the purpose of constructing subways. In this case some land has been taken which would not have been required if the approach had not been enlarged into a subway, and an unauthorised burden has been imposed upon the ratepayers in consequence of this enlargement. Thus it is, in my opinion, that the appellants have acted beyond their powers and without justification. I have only to add that the reasons for their judgment given by the Lords Justices in the Court of Appeal appear to me to be unanswerable, and I therefore think that those judgments ought to be affirmed and this appeal dismissed.

Lord LINDLEY.—My Lords: By the Public Health of London Act 1891, sect. 44, the appellants were authorised to provide, and make, and maintain public lavatories and sanitary conveniences in situations where they might deem the same to be required, and they were authorised to defray the expense of providing the same, and of any damage occasioned to any person by the erection and construction thereof, as if such an expense was an expense of sewerage. Further, for the purpose of such provision the subsoil of any road, exclusive of the footway adjoining any building, was vested in the appellants. I cannot doubt that under this authority they could lawfully construct lavatories and sanitary conveniences in, on, or under any road in their district, provided that they did not interfere with any footway adjoining any building, or with the soil under any such footway. No particular size or form of convenience, or mode of access to an underground convenience, is prescribed, and I see no reason why a convenience should not be made under a road, with an underground access to it on each side of the road. The size and position of the convenience and of the access are left to the discretion of the appellants, and in the exercise of that discretion the locality, the amount of traffic, and the class of people likely to use the conveniences, would naturally have to be considered. The cost is left to the good sense of the appellants, and I am not aware of any authority to show that the High Court can properly grant an injunction to restrain a public body, authorised to make a particular work for some public purpose, from exercising its authority, on the ground that in the opinion of the court the work being made is larger, or handsomer, and more costly than it need have been. Still less can a mandatory injunction be properly granted in such a case. Matters of detail, of taste, and of expense in executing works authorised by statute are left to the constructing authority, and their decision on such matters is not open to review in an action for an injunction, unless the court is of opinion that the statutory authority is a mere cloak to screen a really unauthorised work. The case before your Lordships is not of that description. Whether an expense unnecessarily incurred in constructing authorised work could be disallowed by an auditor, or be thrown in some other way on the person who incurred it, is a matter which your Lordships have not to consider on the present occasion, and I say no more about it. But the foregoing observations, favourable as they are to the appellants, do not exhaust the case. Other matters have also to be considered. Where a person is authorised by statute or by the common law to do what, apart from such authority, would be unlawful, *e.g.*, to commit a trespass, and the authority is conferred for some distinct and definite purpose, and is abused by being used for some other and different purpose, the person abusing it is treated as a wrongdoer from the beginning, and not only as a wrongdoer in respect of what can be proved to have been in excess of his authority. It is presumed against him that the abuse of his authority shows an intention from the first to commit an unlawful act under colour of a lawful authority. This general principle was established in the well-known case known as the *Six Carpenters'* case (8 Rep. 146 *a*), on which there is an instructive comment in the first volume of Smith's Leading Cases. Counsel for the respondents urged that this principle was applicable to the present case, and deprived the corporation of any defence which

they might have had if they had not exceeded their authority. In one respect the appellants did clearly exceed their authority, for they interfered with the foot pavement and the land under it, a thing which they had no right to do. This, however, was put right by the injunction granted by Joyce, J. The argument had the charm of novelty, but no authority was cited for applying the principle of the *Six Carpenters'* case to such a case as this. I never heard of, and I cannot find, any instance of an injunction being granted to restrain the completion of works authorised by statute simply because the authority which authorised them had been exceeded, if the excess was abandoned, and satisfaction for the injury caused by it had been made either by payment of money or by restoration in fact. In the absence of any such authority I cannot accede to the argument of the learned counsel. The consequences would be most unjust, and contrary to settled principles of equity. Still less would it, in my opinion, be in accordance with the principles on which mandatory injunctions are granted to compel the corporation to undo work done which, apart from the excess, can be shown to be within their statutory authority. The respondents naturally rely very strongly on the minutes of the proceedings of the constructing authority, and on the letters written by their officials, and on the evidence given by Mr. Weaver at the close of his cross-examination. They contended that the sanitary conveniences were constructed in order to make a subway, which without them could not lawfully be made. But I do not think that the minutes and letters are sufficient to prove that the subway as constructed was in fact unauthorised by statute. On this part of the case I do not think it necessary to say more than that I concur in the observations of Lord Macnaghten. Having regard to those minutes and letters, I also am of opinion that the costs should be dealt with as proposed by him. Although the appellants succeed in their appeal they have only themselves to thank for the litigation which they provoked.

Order appealed from reversed. Order of Joyce, J. restored without costs.

Solicitors for the appellants, *Allen* and *Son.*

Solicitor for the respondents, *C. De J. Andrewes.*

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 20 *and* 23, 1905.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.)

ATTORNEY-GENERAL (on Relation of Monmouthshire County Council) AND MONMOUTHSHIRE COUNTY COUNCIL *v.* SCOTT (No. 2). (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Highway—Locomotives—Traction engine—Injury to road—Public nuisance—Injunction—Default of local authority—Locomotive Act 1861 (24 *&* 25 *Vict. c.* 70), *s.* 13—*Locomotives Act* 1898 (61 *and* 62 *Vict. c.* 29), *s.* 6.

The Attorney-General, on the relation of a county council, brought an action for an injunction to restrain the defendant from using a traction engine upon a certain highway, which was repairable by the relators, in such a way as, by damaging or obstructing the highway, to cause a public nuisance.

At the trial the judge found as a fact that the condition of the road was not caused primarily by the defendant's traction traffic, but partly by the traction traffic, partly by the continued stone haulage by carts and horses, partly by the ordinary traffic, and partly by the weather, but primarily and chiefly by the failure of the county council to maintain the road in a fit state to bear the traffic—including the traction traffic—which was not more unusual or onerous than they ought to have expected to come upon it; and that when the reconstruction of the road, then nearly finished, was completed, if ordinary care was used by the county council to keep it in repair, there would be no appreciable risk of the traction engine cutting up the reconstructed road so as to render it so dangerous, or impassable, or incommodious as to constitute a public nuisance.

Held (*affirming the decision of Jelf, J.*), *that the injunction ought not to be granted.*

APPEAL from a decision of Jelf, J. in an action brought by the Attorney-General on the relation of the Monmouthshire County Council, for an injunction to restrain the defendant from using traction engines upon a certain highway, which was repairable by the relators, in such a way as, by damaging or obstructing the highway, to cause a public nuisance.

The facts are sufficiently stated in the judgment of Jelf, J. delivered on the 2nd July 1904.

A. T. Lawrence, K.C., *Macmorran*, K.C., and *J. R. Atkin* for the plaintiffs.

Arthur Powell, K.C., *R. Cunningham Glen*, and *A. A. Bethune* for the defendant.

JELF, J.—This action is brought by the Attorney-General on the relation of the Monmouthshire County Council, for a perpetual injunction "to restrain the defendant, his servants or agents, from using, or causing or procuring to be used, any locomotive, or otherwise conducting traffic, upon the highway leading from Caldicott to Magor, situate in the parish of Llanvihangel Roggiett, in the County of Monmouth, in such a way as by damage to or obstruction of the said highway to cause a public nuisance." In accordance with the requirement of the Attorney-General usual in such cases, the Monmouthshire County Council are added as co-plaintiffs solely in order to make them the responsible parties in the action. The writ was issued on the 7th Dec. 1903. By an order of Phillimore, J., dated the 19th Dec. 1903, an interim injunction was granted substantially in the terms of the claim. This order was affirmed by the Court of Appeal on the 12th Jan. 1904 (89 L. T. Rep. 727; (1904) 1 K. B. 404). How far, if at all, my judgment and discretion are fettered by the judgments of Collins, M.R. and Mathew and Cozens-Hardy, L.JJ. in that interlocutory proceeding, I will discuss later on. The *locus in quo* is a section (898 yards in length) of a main road repairable by the county council and leading from Caldicott to Magor. The defendant was a hauler, and the complaint of the county council was that he

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

hauled stone with a traction engine and trucks over the main road from a neighbouring quarry belonging to a Mrs. Hillier by contract with her, and also from a neighbouring quarry of his own, in such a way as to cut up that section of the main road, and render it dangerous and practically impassable both for vehicles and pedestrians. His hauling from those quarries was, as to his own quarry, by a public road belonging to the Chepstow District Council, and as to Mrs. Hillier's quarry by a private road, in each case on to the same section of the main road, and thence by another district council road to the Severn Tunnel Junction railway station for the purpose of carriage by railway to certain blast furnaces where there was a great demand for the stone in question. This traffic by the defendant's traction engine began on the 2nd May, and went on till it was stopped by the interim injunction of the 19th Dec. 1903. An attempt was made by the defendant after the injunction was granted to use the traction engine with less weights, without infringing the injunction; but this was immediately followed by threatened proceedings for attachment, and since the 18th Jan. 1904 the use of the traction engine over the *locus in quo* has been entirely abandoned. The traction engine and trucks used by the defendant, and the weights carried thereby, were in all respects strictly in conformity with the regulations of the Locomotives Acts. There was no evidence that the engine and trucks were improperly constructed or driven or handled, or that the traffic was conducted wantonly or recklessly, or otherwise than in the honest and *bonâ fide* exercise of the defendant's legitimate business. Nor was it the county council's case that this traffic constituted a public nuisance in regard to smoke or noise, or likelihood to frighten horses, or in any other way except cutting up and injuring the roadway. Nor was it contended that any single passage of the engine and loaded trucks over the road was unlawful or a nuisance; but it was alleged that the frequency of the journeys with heavy loads constituted or created a public nuisance. Quarrying of stone had been for many years a recognised industry of the district, and for several years the defendant had hauled stone with carts and horses from Mrs. Hillier's, and from another neighbouring quarry belonging to a Mr. Perry, over the section of the road in question to the Severn Tunnel Junction railway station, though he did not begin hauling from his own quarry (by carts as well as by traction engine) till May 1903. The only way for such traffic to go was by the section of road in question. Long before the year 1902 the haulage of stone by traction engines had become common throughout England and Wales, and, though the evidence was conflicting, I find as a fact that both for long and short distances such traction was more economical than carriage by horses and carts, and that the prohibition to use such traction over the *locus in quo* is, and will be if continued, a trade loss to the defendant, especially as his rivals in the trade are combining to obtain a private railway line instead of using this main road, from the use of which line he will be excluded. The trial lasted five days, and a number of witnesses were called before me on both sides. The evidence was of a conflicting character as to the nature and construction of the main road in question; as to the repairs done to it by the county council; as to the state of the road before May 1902, when the haulage of stone was by carts and horses, as compared with its state after the use of the traction engine and trucks began; as to the sort of traffic which the county council might have expected to come upon the road; as to the effect of the use of the traction engine, and as to the state of the road between May 1902 and the present time, and especially at the time when this action was commenced and the injunction against an alleged public nuisance asked for. The evidence, generally speaking, on the part of the county council was to the effect that the road had been a fairly good country road, fit for ordinary traffic, and that, though the stone haulage by carts and horses had made it rutty, it was not till the traction engine traffic began that it became very bad, and that especially through the wet year 1903 it got steadily worse, notwithstanding the efforts of the county council to keep it in repair, and that towards the end of 1903 it was almost impassable, and was dangerous to life and limb. For the defendant, on the other hand, the evidence was to the effect that the road before May 1902 was already in a bad condition; that there was no such substantial change for the worse when the traction engine began to be used, as alleged by the county council, but in some respects the traction traffic rendered it better by flattening the ruts; that the cause of the deterioration of the road was due partly to the weather and the ordinary traffic, but mainly to the neglect of the county council to repair it and, where necessary, to reconstruct it, and to the improper way in which they did at last begin to reconstruct it in Oct. 1902, and to the dilatoriness with which they carried out the reconstruction, not having even now finished it; that the road was not in Dec. 1903 impassable or dangerous, and that no public nuisance existed; and that, now that the reconstruction is nearly complete, or, at least, when the reconstruction is complete, the road will be fit, if ordinary care is taken of it by the county council, for the resumption of the defendant's traction traffic without causing any damage to the road. I think the evidence on the part of the relators was exaggerated, and that some of the witnesses, notably the rector of the parish, one of the chief movers in the matter, were actuated in a great measure by dislike of traction engines in general in regard to noise, smoke, and frightening of horses, incidents of the use of these engines, none of which in themselves (in the case of a properly constructed and driven engine), however distasteful to individuals, could probably at the present day be successfully made, nor were they in this case attempted to be made, the subject of an indictment or proceeding by the Attorney-General as for a public nuisance. The truth probably lies between the extreme views of the witnesses on either side. I am not satisfied that there was so great a change for the worse, dating from or from soon after the traction traffic began, as was alleged by the relators. But I think it is established that, on the 7th Dec. 1903 (the date of the writ), and for some time previously the road had become, by a combination of causes to be mentioned presently, in a very rough and muddy condition and very incommodious for traffic of all kinds, rendering necessary the use of great care by the public,

particularly at night, though, in view of the fact that no accident was shown to have occurred, notwithstanding that the traffic had continued over the road during the whole of the years 1902 and 1903, I am not satisfied that the road was at any time before action actually dangerous to life and limb. Nevertheless, I think the condition above described would, if primarily caused by the acts of the defendant, render him liable to be indicted for a public nuisance. In Hawkins' Pleas of the Crown (vol. 1, 8th edit., p. 700) I find in sect. 10 these words: "There is no doubt but that all injuries whatsoever to any highway, as by digging a ditch or making a hedge over-thwart it, or by laying logs of timber on it, or by doing any other act which will render it less commodious to the King's people, are public nuisances at common law." Also in Ventris' Reports (p. 4) I find this: "*Sir Thomas Gresly's* case (Mich. Anno. 20 Car. 2). Information against him for stopping of the highway, the word was *obstrupabat*. It was proved in evidence that he ploughed it up; and resolved, it did well maintain the information." The cases are also collected in Russell on Crimes (vol. 1, 6th edit., p. 785). As to lawful acts done so as to become a nuisance, see *Thorpe* v. *Brumfitt* (L. Rep. 8 Ch. App. 650), *Attorney-General* v. *Brighton and Hove Co-operative Supply Association* (81 L. T. Rep. 762; (1900) 1 Ch. 276), *St. Helens Chemical Company* v. *Corporation of St. Helens* (34 L. T. Rep. 397; 1 Ex. Div. 196), and *Lambton* v. *Mellish* (71 L. T. Rep. 385; (1894) 3 Ch. 163). See as to obstruction by traction engine in order to be indictable having to be substantially greater than that caused by carts, *Reg.* v. *Chittenden* (15 Cox C.C. 725). But it must be noted that in that case injury to the roadway was not established. The condition of this road was, however, as I find as a fact, not caused primarily by the defendant's traction traffic, but partly by the traction traffic, partly by the continued stone haulage by carts and horses, partly by the ordinary traffic, and partly by the weather, but primarily and chiefly by the failure of the county council to maintain the road in a fit state to bear the traffic, including the traction traffic, which was not more unusual or onerous than they ought to have expected to come upon it, and to the careless and dilatory way in which they proceeded with the reconstruction of the road decided upon by them in Oct. 1902, and as to part not yet finished. Also, I find that, though the difficulties of reconstructing the road by the county council were increased by the traction engine running on the partly completed road, they never asked the defendant to discontinue the use of the engine temporarily till they could complete the road; and, further, that now that the reconstruction is nearly completed, very little, if any, damage would in future be done by the resumption of the defendant's traction traffic; and that when the reconstruction is completed, which, according to the statement of the county council, will be in a month from the last day of the hearing—that is, the 20th June—there will be no appreciable risk of the traction engine cutting up the reconstructed road, at all events not to the extent of rendering it (if ordinary care is used by the county council to keep it in repair) so dangerous or impassable or incommodious as to constitute a public nuisance. Now, after the decision of the Court of Appeal, I think it is too late to argue (except in the House of Lords) that the 13th section of the Locomotives Act 1861 (24 & 25 Vict. c. 70), which provides: "Nothing in this Act contained shall authorise any person to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance; and every such person so using such engine shall, notwithstanding this Act, be liable to an indictment or action, as the case may be, for such use where, but for the passing of Act, such indictment or action could be maintained"—applies only to nuisances other than those caused by injury to the highway, as to which the Act prescribes a remedy by compensation for extraordinary traffic: (see Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), s. 23). Nor do I think that, even independently of the decision of the Court of Appeal, such an argument could succeed, because, before the Act a user in itself lawful might become a nuisance if exercised in such manner or with such frequency as to make the road dangerous: (*Thorpe* v. *Brumfitt* (*ubi sup.*). It was, however, urged by counsel for the plaintiffs that the Court of Appeal intended to prevent the defendant from setting up the failure of the county council to provide and maintain a sufficient road as being the real primary cause of the mischief instead of his traction engine. On this point I think the Court of Appeal and Phillimore, J. only intended to enforce the interim injunction in order to protect the public in a case of apparently imminent danger by prescribing the *status quo* pending the investigation of the facts and of the rights of the parties. I do not think, to take an extreme instance, in a case where the road authority is really wholly to blame for the road being unfit to bear the traffic which they ought to expect upon it, that the first person who brings any traffic upon it, however proper for the road as it ought to be, and, in fact, breaks it down because it is unfit, can be indicted for a nuisance as causing or creating it unless he does it deliberately, knowing that this will be or will probably be the result; still less that he can be in such a case perpetually enjoined in an action by the Attorney-General on the relation of the defaulting authority from ever bringing such traffic on the road again; nor do I think the Court of Appeal meant so to hold. See, as to the duty of the road authority to maintain the road according to an up-to-date standard, *Reg.* v. *Henley* (10 L. T. Rep. O. S. 110; 2 Cox C. C. 334), *Wallington* v. *Hoskins* (per Field, J., 43 L. T. Rep 597, 601; 6 Q. B. Div. 206, 215), *Hemsworth Rural District Council* v. *Micklethwaite* (cited to me from shorthand notes), *Reg.* v. *High Halden* (1 F. & F. 678); and as to an injunction not being granted unless it is just and equitable in such a case, see *Kirkheaton Local Board* v. *Ainley* (67 L. T. Rep. 209; (1892) 2 Q. B. 274). In that case Bowen, L.J. makes a distinction, which I do not wish to lose sight of, between an action brought by the Attorney-General representing the public, and an action brought by the local board by themselves alone. He says (1892) 2 Q. B. 285, 286): "Again, cases have been referred to in which the Attorney-General represented the Crown in asking for an injunction against nuisances. I do not think these cases have any bearing on the present.

The Attorney-General represents the Crown and the public, and the conduct of the relator has not necessarily any bearing on the matter; unless in some way the position of the Attorney-General is tainted by the conduct of the relator there is no reason why he should not succeed as representing the interests of the public, whatever the conduct of the relator may have been." Then later on he says: "It is, I think, matter for the consideration of the court whether the plaintiffs' conduct is such as to make it unjust that the order should be made at their instance, and if so on the general principles of justice, the court ought to say that whoever else may be aggrieved and entitled to complain, it does not lie in the mouth of the local board to do so." I have not lost sight, therefore, of the distinction between the case when the Attorney-General representing the public comes forward, and the case where the Attorney-General has not given his sanction to the action—that is to say, where it is not for the public; but I cannot help thinking that the court, in granting or withholding the injunction, which is more or less a discretionary power, must have regard to such considerations as those which appear in this case. It should not be forgotten that the county council might have placed restrictions upon the use of locomotives on the road by passing by-laws under sect. 6 of the Locomotives Act 1898 (61 & 62 Vict. c. 29). This they have not done. Even if the defendant could have been rightly indicted or temporarily enjoined in respect of an intentional user by him of the road as it existed towards the end of 1903 so as to create a nuisance, although that nuisance would not have been caused but for the default of the highway authority, it by no means follows that when that defaulting authority has put or is putting the road into a proper state presumably fit for this traffic, the defendant should at his peril be perpetually enjoined from bringing this traffic upon it, when it is or ought to be so fit, as to create a nuisance. He ought not, in my judgment, to be perpetually enjoined, unless he has shown an intention to continue to act unlawfully, which, as I find as a fact, he has not shown. Whether he has been or will be liable to contribute specially to the maintenance of the road, owing to extraordinary traffic, is a question as to which I express no opinion. There was a further point taken by the defendant to the effect that the county council had made no definite complaint of the use of the traction engine from May 1902 till Oct. 1903 (which is true), and that laches alone was an answer to this action. I incline to think, however, that the maxim *Nullum tempus occurrit Regi* prevents laches by itself being successfully set up against the Attorney-General, and the case of *Attorney-General* v. *Sheffield Gas Consumers' Company* (3 D. M. & G. 304) is not, when examined, an authority to the contrary. But for the reasons already given, and exercising my discretion in the matter, I think the perpetual injunction asked for should be refused. As regards the counter-claim for a declaration as to the duty of the county council to repair the road to the extent mentioned therein, that counter-claim is not brought under the ægis of the Attorney-General, and is, on the contrary, set up against him. It was sought to be supported under Order XXV., r. 5, which, while not countenancing applications for declarations "in the air," yet does seem to sanction the granting of a declaration as to the future in cases where it is definite and useful. But it is not the practice to grant it if it is embarrassing or useless for any good purpose, and I think that is the case here, especially as the extent of the obligation of the county council may vary very considerably at different dates and under different circumstances. The defendant's counsel felt the force of these considerations, and ultimately agreed to raise his contention as to the duty of the county council by way of argument in opposition to the claim, and to drop it as a counter-claim. The counter-claim was accordingly treated by both parties practically as struck out, and I order it to be struck out without costs. As to the claim, I give judgment for the defendant, with costs against the county council, refusing the perpetual injunction claimed, and so dissolving the interim injunction, subject only to the undertaking by the defendant given to me in open court that, if the injunction were dissolved, he would undertake not to use the road with his traction engine till the expiration of the month within which the county council say the reconstruction will be completed—namely, by the 20th July inst., and I give liberty to apply.

From this decision the plaintiffs appealed.

Asquith, K.C., *Macmorran*, K.C., and *J. R. Atkin* for the plaintiffs.

Arthur Powell, K.C., *R. Cunningham Glen*, and *A. A. Bethune*, for the defendant, were not called on.

VAUGHAN WILLIAMS, L.J.—I think we cannot interfere with the findings of fact by the learned judge. The findings of fact upon the affidavit evidence, which were sufficient to justify the granting of the interim injunction, do not of course in any way determine what the findings are to be at the trial. One need not, therefore, be surprised that the Court of Appeal dealt with the evidence merely as establishing *primâ facie* a nuisance; but they expressly said that that finding was not to forecast the result of the trial or to prejudice or prevent a full and untrammelled trial of the case when it should come to be heard at length on *vivâ voce* evidence. The question is whether the evidence establishes that the defendant by the use of a traction engine of great weight, drawing trucks with heavy loads in them, has turned the road into a condition in which it is unfit for public user, or in which public user has been rendered substantially less convenient. Now, I look to see what are the facts found by Jelf, J. The principal findings of fact are as follows: [His Lordship then read them from the judgment of Jelf, J., and continued:] It seems to me that unless those findings can be displaced the conclusion is inevitable, that it is not the fact that this traction engine has created a nuisance on the highway. It is not true that a public nuisance has been caused by the defendant, to quote the words of Collins, M.R. in this case when it was formerly before the Court of Appeal, "by the use of traction engines of great weight drawing trucks of considerable weight with heavy loads in them" upon the road. No doubt every user by the public of a road with heavy traffic more or less affects the surface of the road. On

the facts it must be taken that the traction engine more or less affected the surface of the road; but I can see nothing in the finding of Jelf, J., and nothing in the evidence, to lead me to suppose that the use of the traction engine caused the condition of the road. The fact of the matter is that there is an increased general traffic on this road, caused partly, no doubt, by the new line of the Great Western Railway through the Severn Tunnel to the Severn Tunnel Junction Station, and also, no doubt, it has been increased by the new use to which this limestone is put with such great advantage. But it seems to me there is nothing to lead us to the conclusion that this condition of the road was created especially by the traction engine. One knows, and there is the finding of the learned judge, that the principal cause here was this: that when the local authority thought fit to improve their road for the purpose of meeting this generally increased traffic, unfortunately the weather was very bad; there was an extraordinary amount of wet, and this, coupled with the fact that the stone which the local authority first used, having been a gift to them by some of the people in the neighbourhood, was of this limestone character and very soft, and therefore liable to be affected by the wet conditions. I think the conclusion of the learned judge cannot be disturbed. It is not the fact that the user of these traction engines has caused this condition of the road or any nuisance, and therefore this appeal must be dismissed with costs.

ROMER, L.J.—I also think we cannot differ from the finding of fact of the learned judge. The finding, to my mind, at any rate, amounts to this: that the plaintiffs have failed to establish to the satisfaction of the judge that the defendant, by his acts, committed a public nuisance on this highway.

STIRLING, L.J.—I am entirely of the same opinion, and for the reasons which have been given by my Lords.

Solicitors for the appellants, *Taylor, Rowley, Lewis*, and *Davis*, agents for *H. S. Gustard*, Newport, Monmouthshire.

Solicitors for the respondent, *Hicks, Davis*, and *Hunt*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

May 16, 17, 18, 23, 24, 25, 30, 31; *June* 1, *July* 11, 12, *and* 29, 1905.

(Before KEKEWICH, J.)

ATTORNEY-GENERAL v. DORCHESTER CORPORATION. (a)

Nuisance—Statutory powers—Liability of local authority—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 17, 27, 299—*Local Government Board's Provisional Orders Confirmation* (*No.* 9) *Act* 1900 (63 & 64 *Vict. c. clxxviii.*)—*Dorchester Order* 1900, *art.* 21.

A Local Government Order confirmed by statute enacted that it should be the duty of a corporation within a fixed time to proceed to carry out works for the disposal of sewage approved by the Local Government Board, and, in the event of the corporation not so proceeding, that they might be compelled to proceed in manner provided by sect. 299 *of the Public Health Act* 1875, *which section empowers the Local Government Board to enforce performance of duty by defaulting local authorities by writ of* mandamus.

Sect. 27 *of the Public Health Act* 1875 *empowers local authorities to construct works for the disposal of sewage, "provided that no nuisance be created."*

The corporation proceeded to construct sewage works approved by the Local Government Board.

Upon action brought for an injunction to restrain the corporation from creating a public and private nuisance by smell, and also from sending an effluent of improperly treated sewage from their works into a natural stream in breach of sect. 17 *of the Public Health Act* 1875:

Held, that the corporation had created both a public and a private nuisance by their works, and that as their local order was merely a direction to them to exercise their powers under sect. 27 *of the Public Health Act* 1875, *an injunction must be granted.*

The principle laid down in London, Brighton, and South Coast Railway *v.* Truman (54 *L. T. Rep.* 250; 11 *App. Cas.* 45) *and* East Fremantle Corporation *v.* Annois (85 *L. T. Rep.* 732; (1902) *A. C.* 213) *not, therefore, applicable.*

Held, also, that the effluent was a breach of sect. 17 *of the Public Health Act* 1875 *for which an action was maintainable by the Attorney-General, but, the breach having been remedied, no injunction was granted.*

Attorney-General *v.* Cockermouth Local Board (30 *L. T. Rep.* 590; *L. Rep.* 18 *Eq.* 172) *followed.*

ACTION by the Attorney-General, at the relation of R. R. Talbot and R. R. Talbot, against the corporation of Dorchester.

The writ was issued on the 29th Sept. 1904.

The plaintiff the Attorney-General claimed an injunction to restrain the corporation (1) from maintaining, working, and carrying on certain works and land for the treatment and disposal of the sewage of the borough of Dorchester, a town of 9500 inhabitants, so as to cause a public nuisance by smell affecting the inhabitants of the borough; and (2) from conveying or permitting to be conveyed untreated, or improperly treated, sewage from their works into a natural stream, the river Frome.

The plaintiff R. R. Talbot, who was the owner and occupier of a house and grounds of about seven acres, called Syward Lodge, which he purchased in 1888, also claimed an injunction to restrain the corporation from maintaining and carrying on their works so as to cause a nuisance to him, and damages for injury suffered.

In 1883 the Dorchester Corporation obtained a provisional order (the Dorchester Order 1883, duly confirmed by the Local Government Board's Provisional Orders Confirmation (No. 4) Act 1883, 46 & 47 Vict. c. 135) enabling them as urban sanitary authority for the borough to purchase compulsorily under the Lands Clauses Acts certain lands for the purpose of receiving, storing, disinfecting, and distributing or otherwise disposing of the sewage of the borough.

In 1884 the corporation accordingly acquired three acres of land for the purpose, but did not

(a) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

then proceed to execute any works pending inquiries as to the best method of disposing of the sewage of the borough.

In 1899 the corporation purchased by agreement another seven acres adjoining the three acres already acquired.

On the 30th Dec. 1899 the Local Government Board authorised the corporation to borrow 17,000*l.* for sewage works, and on the 7th Aug. 1900 approved plans and sections for a drainage scheme and sewage works on what is known as the International system.

On the 9th Nov. 1900 the Dorchester Order 1900 (duly confirmed by the Local Government Board's Provisional Orders Confirmation (No. 9) Act 1900, 63 & 64 Vict. c. clxxviii.) came into operation whereby the boundaries of the borough were extended, and it was also by art. 21 thereof enacted as follows:

It shall be the duty of the corporation within six months after the commencement of this order to proceed to carry out and execute works for the disposal of the sewage of the borough approved by the Local Government Board and, in the event of the corporation not proceeding with such works within such period as aforesaid or not proceeding with the same with due diligence, the requirements of this article may be enforced in manner provided by sect. 299 of the Public Health Act 1875 as if this article were an order of the Local Government Board limiting the time for the performance by the corporation of their duty in that behalf and the corporation had not performed the duty hereby imposed within the time limited in the order.

Sect. 299 of the Public Health Act 1875 provides:

Where complaint is made to the Local Government Board that a local authority has made default in providing their district with insufficient sewers or in the maintenance of existing sewers, or in providing their district with a supply of water . . . or that a local authority has made default in enforcing any provisions of this Act which it is their duty to enforce, the Local Government Board, if satisfied after due inquiry that the authority has been guilty of the alleged default, shall make an order limiting the time for the performance of their duty in the matter of such complaint. If such duty is not performed by the time limited in the order, such order may be enforced by writ of *mandamus*, or the Local Government Board may appoint some person to perform such duty, and shall by order direct that the expenses of performing the same . . . shall be paid by the authority in default. . . .

In 1901 work was accordingly commenced, but was stopped to await further inquiries into drainage systems, which led to a resolution to adopt the bacterial or septic system of treatment of sewage instead of the International, and, it appearing that more land and additional works would be required, on the 22nd July 1902 the corporation obtained an order (the Dorchester Order 1902, duly confirmed by the Local Government Board's Provisional Orders Confirmation (No. 2) Act 1902, 2 Edw. 7. c. lxxix.) empowering them to take compulsorily additional lands for the disposal of sewage.

On the 15th Sept. 1902 the Local Government Board sanctioned plans and sections for sewage works upon the bacterial system, and on the 14th Oct. 1902 authorised the corporation to borrow an additional 7500*l.* for sewage works.

In 1903 the corporation under their order of 1902 acquired an additional nine acres adjoining the lands already purchased.

The corporation now proceeded to carry out their works, in the course of doing which they made several alterations, partly owing to remonstrances from persons who alleged that they were creating a nuisance.

It appeared that these further alterations were approved by the Local Government Board, but in some cases after the alterations had been made.

The works were finally completed on the 17th March 1904, when the sewage of the borough was treated therein and then discharged by an outlet into the river Frome, a small non-navigable stream.

Before the construction of these works the borough of Dorchester was drained by sewers which led the sewage without any treatment or purification into the river Frome about 100 yards above the new outlet.

Under the Public Health Acts the corporation were obliged to take into their new system all sewage formerly sent into the old system, included in which was a certain amount of brewery waste.

The total area of the lands purchased by the corporation for their sewage works amounted to about nineteen acres, of which the three acres purchased in 1884 lay within the boundary of the borough and the remainder without it.

The lands lay to the east of the borough, being distant about one mile from the centre of it. Syward Lodge, the plaintiff Talbot's property, was situate about 150 yards west-south-west of the nearest part of the lands.

By their statement of claim the plaintiffs alleged that the defendant corporation were the urban sanitary authority for Dorchester and the owners of works and lands for the treatment of the sewage of the borough, which works and lands were situate partly within and partly without the boundary of the borough; that they had duly applied for and obtained in 1902 the sanction of the Local Government Board for the construction of the works and also for the acquisition of such of the land upon which the works were placed as was without the boundary of the borough and had constructed the works and were treating the sewage of the borough upon the works and land; that they had constructed and were maintaining the works and treating the sewage conveyed there and disposing of the effluent from the sewage after it had been so treated at the works so negligently and improperly that they had caused to issue from the works and lands offensive, poisonous, and unwholesome vapours so as to be a public nuisance to the inhabitants of Dorchester and also a private nuisance to the plaintiff Talbot. In this respect the plaintiffs alleged that the works had been constructed by virtue only of the powers given by sect. 27 of the Public Health Act 1875, which provides:

For the purpose of receiving, storing, disinfecting, distributing, or otherwise disposing of sewage, any local authority may (1) construct any works within their district, or (subject to the provisions of this Act as to sewage works without the district of the local authority) without their district; and (2) contract for the use of, purchase, or take on lease any land, buildings, engines, materials, or apparatus either within or without their district; and (3) contract to supply for any period not exceeding twenty-five years any person with sewage, and as to the execution and costs of works, either within or without their district, for the purposes of such

supply. Provided that no nuisance be created in the exercise of any of the powers given by this section.

And that the defendant corporation were therefore liable for the nuisance created, as such nuisance was plainly prohibited by the section.

The plaintiffs further alleged that the defendant corporation conveyed, and were conveying, sewage and filthy water from the outfall of their works into the natural stream or watercourse—the river Frome—in contravention of sect. 17 of the Public Health Act 1875, which provides:

Nothing in this Act shall authorise any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal, pond, or lake, until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in such stream or watercourse, or in such canal, pond, or lake.

The defendant corporation by their defence denied that they had constructed or were maintaining their works or disposing of the effluent therefrom negligently or improperly, or that they were causing either a public or a private nuisance, but that, if there were any nuisance, it was necessarily incidental to the construction and maintenance of such works, particularly during the early working, and was only temporary. They alleged that the sewage works complained of were the works for the disposal of the sewage of the borough, approved by the Local Government Board, which were prescribed by art. 21 of the Dorchester Order 1900, and had been executed and were maintained by them under the express directions of that order as confirmed by statute, and under the best engineering advice, and with all proper skill and caution. They further denied that they had committed a breach of sect. 17 of the Public Health Act 1875 in respect of the effluent from their sewage. They alleged that they were compelled under the Public Health Acts to take all the sewage previously sent into the old system, and that their present effluent was certainly an abatement of the nuisance caused by the old effluent.

There was no reply.

P. O. Lawrence, K.C. (with him *Macmorran*, K.C., *Clavell Salter*, K.C., and *Longstaffe*) for the plaintiffs.—The defendant corporation are enabled to carry out their works solely by virtue of the powers given them by sect. 27 of the Public Health Act 1875. They allege that they are compelled to carry them out under art. 21 of the Dorchester Order 1900, and are therefore protected from any action by that statutory authority; but really that article merely directs them to carry out their works under sect. 27 of the Public Health Act 1875, by which section they are expressly made liable for nuisance. Moreover, the works as carried out have not been approved by the Local Government Board. It is not therefore necessary to prove negligence if we prove nuisance. The Attorney-General is entitled, without the necessity of proving injury, to an injunction to restrain the breach of sect. 17 of the Public Health Act which we allege has been committed.

Evidence having been heard,

Danckwerts, K.C. (with him *Stewart-Smith*, K.C. and *Sargant*) for the defendant corporation.—No nuisance is proved, public or private. By their statement of claim the plaintiffs allege we are not liable unless we are guilty of negligence, and that they have failed to prove. The works as constructed have been approved by the Local Government Board. We were under the absolute statutory compulsion of art. 21 of the Dorchester Order 1900 to carry out these works, and we are therefore protected:

East Fremantle Corporation v. *Annois*, 85 L. T. Rep. 732; (1902) A. C. 213;
London, Brighton, and South Coast Railway v. *Truman*, 54 L. T. Rep. 250; 11 App. Cas. 45.

In *Metropolitan Asylums District Managers* v. *Hill* (44 L. T. Rep. 653; 6 App. Cas. 193) and *Canadian Pacific Railway* v. *Parke* (81 L. T. Rep. 127; (1899) A. C. 535) the statutory authority was permissive only, and not imperative as here. Lord Watson says in *Canadian Pacific Railway* v. *Parke*: "Wherever according to the sound construction of a statute the Legislature has authorised a proprietor to make a particular use of his land, and the authority given is in the strict sense of law permissive merely and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others." In *National Telephone Company* v. *Baker* (68 L. T. Rep. 283; (1893) 2 Ch. 186) a tramway a company, as it was acting under provisional order, was held not liable for nuisance occasioned by escape of electricity. [KEKEWICH, J. referred to *Eastern and South African Telegraph Company* v. *Cape Town Tramways* (86 L. T. Rep. 457; (1902) A. C. 381).] If there is a nuisance it is transitory, andno injunction will be granted:

Attorney-General v. *Preston Corporation*, 13 Times L. Rep. 14.

We have not committed a breach of sect. 17 of the Public Health Act 1875. That section empowers us to send drainage into a stream if purified, and it is certainly purified in comparision with the former effluent. We are obliged to take all the drainage formerly sent into the old system under sect. 21 of the Public Health Act 1875, and what really may cause some nuisance is this brewery waste. The river Frome itself became a sewer when the old outfall was made into it:

West Riding of Yorkshire River Board v. *Gaunt*, 1902, 1 L. G. R. 133.

Sect. 17 is merely a clog upon our power to make sewers under sect. 16; the only persons affected are riparian owners. No public right is affected, so the Attorney-General cannot interfere. No damage has been proved except a slight injury to the fish on the 20th Nov. 1894:

Harrington (Earl) v. *Derby Corporation*, 92 L. T Rep. 153; (1905) 1 Ch. 205;
Attorney-General v. *London and North-Western Railway Company*, 81 L. T. Rep. 649; (1900) 1 Q. B. 78.

Stewart-Smith, K.C.—There is a defined obligation upon us to do these works, and if we do not do them we are liable to a *mandamus*:

Attorney-General v. *Clerkenwell Vestry*, (1891) 3 Ch. 527;
Attorney-General v. *Acton Local Board*, 47 L. T. Rep. 510; 22 Ch. Div. 221;
Reg. v. *Staines Union*, 69 L. T. Rep. 714;
Canadian Pacific Railway Company v. *Parke* (*ubi sup.*).

Macmorran, K.C. in reply.—These works were carried out under sect. 27 of the Public Health Act 1875. Art. 21 of the private Act merely says, "Do your duty under sect. 27 within a fixed time and to our satisfaction." It is clear that there is a nuisance, although it may be not so bad as it was. As to the breach of sect. 17 of the Public Health Act 1875, it is no answer to say that the present effluent is better than the old effluent. The contravention of a statutory prohibition gives the Attorney-General a right to obtain an injunction without the necessity of proving injury to the public:

Attorney-General v. *Cockermouth Local Board*, 30 L. T. Rep. 590; L. Rep. 18 Eq. 172;
Attorney-General v. *Shrewsbury (Kingsland) Bridge Company*, 46 L. T. Rep. 687; 21 Ch Div. 752;
Attorney-General v. *London and North-Western Railway*, 81 L. T. Rep. 649; (1900) 1 Q. B. 78.

An injunction should be granted even if it be suspended:

Attorney-General v. *Willesden District Council*, 12 Times L. Rep. 528.

I admit, if there is an absolute statutory obligation under art. 21 to do these works, we cannot get an injunction, but that is not the right construction.

Cur. adv. vult.

KEKEWICH, J.—The first thing to be done is to decide whether the existence of a nuisance has been proved or not. There is a question whether, if proved, the nuisance is actionable in point of law, but the question of fact must first be determined. This was challenged on behalf of the defendants on the ground that the question is not raised by the pleadings, and it is necessary to see how the matter stands. It is alleged in the statement of claim that the defendants have constructed and are maintaining their works and are treating the sewage conveyed there and are disposing of the effluent from such sewage so negligently and improperly that they have caused a public and private nuisance, and it is said that the plaintiffs' case therefore depends on negligence in construction and maintenance, and that, unless it can be proved that there is a nuisance arising from this particular cause, no relief can be granted. It may be that the learned counsel who settled the statement of claim did not fully recognise the force of the rule of pleading attributed to Sir William Follett: "Always plead broadly, for you never know what you may have to argue"; but I think it would be doing him injustice to restrict the meaning of his language within the narrow limits contended for by the defendants. It is to be observed that he claims an injunction to restrain the defendants from maintaining, working, and carrying on their said works in such a manner as to cause a nuisance, without saying anything about negligence, and that the defendants in their defence, after traversing negligence, join issue on the question of nuisance in fact. The defendants' counsel, at any rate, fully understood that the question of nuisance or no nuisance in fact was intended to be raised. The writ was issued on the 29th Sept. 1904 and strictly the question is whether there was a nuisance at that date, but it would not be satisfactory to decide that only. It might have been, and indeed it was, seriously argued that the nuisance was of a temporary character, and if the court had found that there was sufficient nuisance to justify the issue of the writ, but that it had not been continued, the measure of relief would have been quite different from what I am prepared to hold it to be. It is common ground that there was a nuisance, both public and private, when the works were first started in the spring of 1904. It may be that this was inevitable in the sense that no skill in construction or management could have prevented it, but whether this be so or not it is unnecessary for me to determine. The fact remains that there was for some time a serious nuisance. Improvements were suggested by the defendants' advisers, and it is but fair to them to say that they endeavoured to obtain the best advice, and that the improvements advised were adopted. It is, I think, clear on the evidence that these improvements did much good, and that thereafter the nuisance was not so serious or so constant as before; but it is in my judgment equally clear that the nuisance was not got rid of, and continued up to the date of the issue of the writ. It is said that during all this time the works were passing through an experimental stage, and that if the plaintiffs had waited awhile they would have had no cause of complaint. But the evidence shows that the experimental stage has not yet been passed, or, at any rate, that complete efficiency has not yet been attained, and it is impossible to say that the plaintiffs ought to have waited three months or six months longer than they in fact did. The evidence certainly is that during the rest of the year 1904, and during that period of 1905 which it covers, there has been a large diminution both in the intensity and constancy of the nuisance; but it has not wholly disappeared, and I have cogent and trustworthy evidence of its continuance until the spring of the present year. Something must be said about the cause of it, but for the moment I am not concerned with that. I am merely dealing with the question of fact, nuisance or no nuisance public and private, and on that I am compelled by the evidence to give my verdict for the plaintiffs. To what is this nuisance attributable? I do not deem myself bound to express a definite opinion on this question beyond saying that it is undoubtedly due to the sewage brought by the defendants to their works, in which I for this purpose include the land, and there treated by them. And I should say no more on the subject but that it was urged on behalf of the defendants that the nuisance is inherent in the system and is therefore inevitable. In my judgment that is no defence if true, but I am not satisfied that it is true. Some witnesses certainly expressed an opinion to that effect, but, taking the evidence as a whole, that is not the proper conclusion. I am by no means satisfied that, assuming the system to be theoretically perfect, it has worked to perfection. I am not convinced that the works at present constructed, including the land, are sufficient properly to treat the entire amount of sewage with which the defendants have to deal, or that the nuisance is not in great measure due to the inability of the works to cope with the demands made upon them. The capacity of the works to deal with more than an estimated average which must be and is frequently exceeded seems to me a blot, not on the system, but in the way in which that system is carried out, and the necessity

of diverting on to the storm-water beds and so on to the land sewage which has never been purified in the works properly so-called is to my mind conclusive proof that those works are not sufficient for the purpose for which they were designed. Probably the best method of disposing of the sewage so as to avoid nuisance has yet to be determined, but the evidence points to the conclusion that works constructed on a larger scale ought to be sufficient for the purpose, and probably would be so even without the addition of land, except perhaps for the purpose of meeting extraordinary emergencies. It seems unnecessary for me to say more on this subject. It would answer no useful purpose for me to attempt an analysis of the evidence; to criticise that of different witnesses, or to compare the statements made by them, and to attribute to such statements their proper weight and value. Throughout the prolonged trial I gave the witnesses my best attention, and, the shorthand writer relieving me from the necessity of taking notes myself, I was able to follow them in their frequent reference to the cartoon hanging on the wall of the court, which has been of incalculable advantage to me as well as to all others concerned, and since the trial I have leisurely read through the notes of evidence and endeavoured thoroughly to digest them. My conclusions are the result of that process, and they would not be improved by detailed reasoning. It is argued on behalf of the defendants that the plaintiffs' witnesses fell into gross exaggeration, and there is at least some truth in that. I never knew a case of this character in which the plaintiff's evidence could not justly be accused of exaggeration. But the exaggeration is not wholly on one side, and, if one has to make considerable allowance for exaggeration when weighing the evidence of those who deposed to an overpowering smell, one is obliged also to make some allowance in weighing the evidence of those to whom no smell at all was perceptible under circumstances that rendered it difficult to believe that such was really the case. I shall follow the same course in dealing with another question of fact, to which I now turn. The plaintiffs allege that the defendants convey through their sewers into the river Frome sewage or filthy water, such as is prohibited by the Public Health Act 1875, s. 17, to be conveyed into any such natural stream or watercourse, and again I have to determine the question of fact whether this allegation is proved or not. Before the construction of the new works, sewage was conveyed into the river Frome at the point known as the old outfall. With that, and the evils attributable to it, I am not dealing. The old outfall is no longer used by the defendants for the purpose of conveying sewage, and I take it to be distinctly proved that no offence against the Act is now committed there, or has been committed there for some time past. In connection with their works, including the land operations, the defendants have constructed a new outfall, and there they discharge into the river Frome the effluent from their works. Part of this effluent has gone through the works properly so called and also through the land, but part has gone through the land only, and has had no further purification than the land itself affords. There can be no doubt that during the early stages of the defendants' works the effluent was by no means good, and I take it to be proved that at the date of the issue of the writ of the 29th Sept. 1904 it had not sufficiently improved to be devoid of offence against the statutory prohibition to which I have referred. I hold the plaintiffs to have been right in point of fact at that date. But the evidence shows that the improvement in the effluent which was noticeable after the works had been in operation a few months increased as time went on, probably in great measure by reason of increased means of purification, and that in the spring of the present year it had become unobjectionable. I am not forgetting the accident to the fish of the 20th Nov. 1904, but, putting that aside, I think that there has been no cause of complaint under this head for many months past. As regards this, the evidence of the fishermen, which otherwise renders no assistance, is useful, but the more valuable evidence is afforded by analysts. There are two questions of fact which, according to my view, do not fall for decision, but which, having regard to all the circumstances of the case, cannot properly be passed unnoticed. In the first place it is alleged by the defendants that, if they have in fact created a nuisance, that is not due to any negligence on their part either in the construction or in the maintenance of their works. The plaintiffs at an early stage of the trial said that they attached no importance to this, and it may be that they have not exerted themselves to prove negligence; but the point is distinctly raised by the statement of claim, and with equal distinctness met by the defence. Taking the evidence as it stands (and of course I must do that), there is no proof of negligence, and, indeed, so far as that is possible, negligence has been disproved. I pay no attention to what may be termed preventible accidents, by which I mean such accidents as are sure from time to time to occur in works of this character, especially when they are new themselves, and the operators are not familiar with them—accidents, that is, which could only be prevented by care in excess of that which can reasonably be demanded. That the works have proved inefficient is not in itself evidence of negligence, and I am satisfied that the defendants and their agents have done their best to construct the works according to competent advice, and, having constructed them, to make them operate efficiently so far as circumstances permitted. Their employment of new advisers when they found that there was cause for complaint, and their promptitude in adopting the measures then recommended, strongly support this conclusion. Secondly, there is a question whether as a matter of fact the works as constructed and maintained have been sanctioned by the Local Government Board. It is reasonably clear that, at any rate until recently, all the alterations had not received that sanction, and I can pay no attention to the fact (if fact it be) that orders made at a time when the action was in course of trial have sanctioned alterations which had before that been made without sanction. The fact that from time to time additional powers of borrowing money have been given is, I think, wholly unimportant. The defendants say that all these alterations are improvements —that is, have enabled them to deal with the sewage more efficiently, and make further progress towards avoiding a nuisance, than would

have been possible if they had adhered to the original plans. This is probable enough, and, to some extent at least, must, I think, be true. Nevertheless, the alterations are not trifling, and I should entertain some difficulty in allowing the defendants to succeed on the ground that their alterations are improvements if I thought there was any real question in the case whether the works had received the sanction of the Local Government Board. It will be seen in the sequel that in my judgment there is no such question. But, inasmuch as another court might take a different view, or, at any rate, arguments elsewhere might be directed to the question whether the defendants' works have been sanctioned or not, I deem it worth while to mention that in my opinion that question is not open on the pleadings as they stand. The statement of claim—whether inadvertently or not I cannot say—seems to me to treat the defendants' works as sanctioned; and the defendants, having in their defence pleaded that the sewage works complained of in this action have been executed and are being maintained under the express direction of the order there mentioned as confirmed by the statute, the statement of claim remains unamended and there has been no reply. Having regard to all that passed at the trial, I should, as at present advised, give, without hesitation, leave to amend the pleadings, in order directly to raise this question, if in my opinion it were necessary to decide it. In all cases of this class one meets with a plea to the effect that the nuisance alleged, if it exists at all, is due to some cause other than that of which the plaintiffs complain. The blame is here thrown on brewery waste. It is proved that large quantities of brewery waste are discharged into the sewers at irregular times and in irregular quantities, and that is done under a prescriptive right, so that the defendants are incompetent to prevent it. It is further proved that the brewery waste thus discharged adds much to the difficulties which the defendants encounter in disposing of the sewage. The admixture of this waste with sewage seems to produce a smell more offensive than sewage alone, and the process of purification seems to be slower and more uncertain. On the other hand, the smell of brewery waste alone is not so strong as that of sewage, and does not carry so far. It is unfortunate for the defendants that their burdens, already sufficiently heavy, should be thus increased, but I cannot regard that as any excuse for the creation of a nuisance if otherwise they are responsible for one. The nuisance is the result of their works, and of the treatment in those works of what is delivered there by their sewers. It may be increased by the addition of the brewery waste, but it is to a large extent, and I think mainly, caused by the sewage, and I cannot hold them excused because with that sewage they perforce mix something else. There is one point made by the defendants which has really been disposed of by what has been already said, but it was so strongly enforced in argument that it deserves special notice. The defendants say that at most the nuisance created by them is of a temporary character, and that it is not the practice of the court to grant an injunction, or, indeed, any relief at all, in respect of a temporary nuisance. With the general proposition I agree, and there is no occasion to refer to the cases cited, but I cannot regard this nuisance as temporary. It has already endured for a long period, and, although a great improvement is observable, I cannot find as a fact that it has yet ceased or within a reasonable period is likely to cease altogether. The works are admitted to be still in an experimental stage, and under certain circumstances which as regards the direction of the wind and the state of the atmosphere are sure to recur, and as regards other things are extremely likely to recur, I cannot anticipate the early and entire removal of the nuisance without many alterations of and additions to the works which must necessarily occupy considerable time. I will anticipate an application to suspend the enforcement of the injunction which I propose to grant by saying that such application will be reasonable and ought to receive the attention of the court, but I cannot on that ground withhold a grant of injunction. I am now at liberty to turn to the main question of law, which is the most important feature of the case. In order properly to consider it I must assume that a nuisance public and private created by the works of the defendants has been established. The defendants say that such nuisance is not actionable. One of the learned counsel for the defendants stated that they were under absolute compulsion to execute these works—these very works—and that if they failed to execute them they were liable to a *mandamus* to compel them to do so. The other counsel for the defendants put the case somewhat differently. He said that in this case there is a positive duty upon the corporation to do the works in this particular manner—that it is a defined obligation and not merely permissive—and he illustrated the distinction by a reference to *Canadian Pacific Railway Company* v. *Parke* (*ubi sup.*). Undoubtedly the first passage in the headnote, which is taken from the judgment, delivered by Lord Watson, does draw this distinction, but it is misleading without reference to the context. Lord Watson is dealing with the two cases of *Metropolitan Asylums District Managers* v. *Hill* (*ubi sup.*) and *London, Brighton, and South Coast Railway Company* v. *Truman* (*ubi sup.*), and pointing out why the principle applied in the former case did not govern the latter. As regards the latter case, he says that the House of Lords held that the provisions of the Act there under consideration which related to the acquisition and use of a yard by a railway company were intended by the Legislature to be imperative in the same sense as its provisions relating to the use of the railway. This indicates what was meant by the distinction between permissive and imperative, and shows, I think, that the suggestion of absolute compulsion raises a false issue. For a general statement of the law I will content myself with quoting one passage from Lord Blackburn in *London, Brighton, and South Coast Railway Company* v. *Truman* (*ubi sup.*), and one passage from a judgment in the Privy Council delivered by Lord Macnaghten in *East Fremantle Corporation* v. *Annois* (*ubi sup.*). There are other passages in the judgments of the first of these two cases deserving special attention, but in *London, Brighton, and South Coast Railway Company* v. *Truman* (*ubi sup.*) Lord Blackburn says: "I do not think there can be any doubt that if on the true construction of a statute it appears to be the

intention of the Legislature that powers should be exercised, the proper exercise of which may occasion a nuisance to the owners of neighbouring land, and that this should be free from liability to an action for damages or an injunction to prevent the continued proper exercise of these powers, effect must be given to the intention of the Legislature." And in the other case Lord Macnaghten, in delivering the judgment of the Privy Council, says: "If persons in the position of the appellants acting in the execution of a public trust and for the public benefit do an act which they are authorised by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action." In each of these cases, and in each of the passages cited, reference is made only to the right of an individual to maintain an action, but no attempt was made in argument to distinguish between a case of the Attorney-General suing on behalf of the public and that of an individual seeking to maintain a private right, and I apprehend that no such distinction is possible. Do the facts of this particular case bring it within that principle, or is it not governed by the decision in *Metropolitan Asylums District Managers* v. *Hill* (*ubi sup.*), about which I will say no more, because the real question is not so much whether that decision governs it as whether it falls to be decided according to the principle stated in the other authorities to which reference has been made? If it does not the defence fails. It is necessary to consider the position of the defendants. They are a sanitary authority having all the powers conferred on such an authority by the Public Health Act 1875, but acting subject to the limitations and restrictions imposed by that Act. These limitations and restrictions are for the most part concerned with the construction of works beyond the borough, the acquisition of land, and the power of borrowing money, but, important as they are, they need not be specified. There is, however, one restriction which must be carefully noticed. Sect. 27 of the Act enables them to construct any works within their district, or, subject to the provisions of the Act, without their district, but provides that as regards this power and other powers given by the same section no nuisance shall be created by the exercise of them. If, therefore, the defendants purport to exercise a power given by the Act they cannot plead immunity from an action for nuisance on the ground that such nuisance is authorised by statute, for it is in express terms plainly prohibited. It really was not contended that down to the year 1900 anything had been done to interfere with this prohibition. The Local Government Board had sanctioned the defendants' purchase of land for the purpose of sewage works, they had approved plans of the works according to a particular scheme, and later the substitution of an entirely different scheme, and further, they had sanctioned the borrowing of money for the purpose of enabling the works to be constructed, but they at no time and in no manner purported to do more than to enable the defendants by means of their sanction to exercise the powers conferred on them by the Act of 1875 in the manner and to the extent not permissible without such sanction. The fact that the provisional order and the Act of Parliament confirming it form part of the machinery of this sanction did not in the slightest degree affect the situation. But in 1900 something different occurred, and this is the turning point of the defendants' case. They were then endeavouring to enlarge the limits of the borough, and the aid of the Local Government Board being required, that board took advantage of the opportunity to insist on their making the much-needed and long-delayed provision for disposal of sewage. By art. 21 of the provisional order of that year, which was confirmed by the Act of Parliament, it was provided that it should be the duty of the corporation within six months after the commencement of that order to proceed to carry out and execute works for the disposal of sewage of the borough approved by the Local Government Board. There is more to which attention must be called, but let me pause here to consider what was intended. It is a question of construction of language, and on the solution of that question depends the other, whether the defendants' contention is right or not. They say that they were under an obligation to submit plans for the approval of the Local Government Board, and that, having obtained such approval, they were under the further obligation to execute works according to the plans so approved. I do not so read the article. In my judgment the true meaning of it is that they were bound to carry out and execute works for the disposal of the sewage of the borough, and that here the statutory obligation ceased. No doubt they would not have performed their obligation to execute works if these works were not approved by the board, but that is only a condition of the efficiency of the works. The test whether they had properly done what they were ordered to do is not by itself part of the obligation imposed. The rest of the article provides that in the event of the corporation not proceeding with such works within the limited period or not proceeding with the same with due diligence the requirements of the article may be enforced in manner provided by sect. 299 of the Public Health Act 1875. It is to be observed that nothing here is said about the approval of plans, but only the execution of works is contemplated; and it seems to me that on the true construction of the article as a whole what is empowered to be there enforced is the execution of the proper works, and no more. It is true that on an application under sect. 299 a question might arise whether such works as had been executed were approved by the Local Government Board or not; but the possibility of such a question does not, I think, affect the construction of the article. The statutory obligation is to carry out and execute works for the disposal of sewage, and no more. Read in this way, the article really means that the defendants shall within the time limited exercise the powers conferred on them by the Act of 1875; and the approval of the Local Government Board is merely an incident to such exercise; it in nowise removes the prohibition not to create a nuisance. The question arising under the 17th section of the Public Health Act 1875 must be treated separately. The defendants' view is that this provision is only intended to interfere with the right which the local authority would otherwise have had to do what is here prohibited, or, to use the words of the argument, that the section is a fetter upon the

violation of private rights. It cannot be suggested that any private right of Mr. Talbot is violated, and if the view expressed be sound it follows that Mr. Talbot has no right of action. So far so good. Mr. Talbot makes no complaint under this section. But it is further said on behalf of the defendants that this statutory provision is not a matter which concerns the public at all, and that therefore the Attorney-General equally has no right of action. I am unable to follow this argument. If it is a matter which does not concern the public, the Attorney-General cannot sue; but there I think the defendants' case breaks down. It is not for the court to inquire why it seemed good to the Legislature to forbid a local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse without the purification mentioned in the section; but, in providing that nothing in the Act should authorise that which would have been otherwise permissible, the Legislature seems to me to have distinctly forbidden it, and it must, I think, be concluded that it was forbidden on public grounds. Reference was made to the case of *Attorney-General* v. *London and North-Western Railway Company* (*ubi sup.*) as supporting the defendants' view; and, if once it is conceded that the provision was made without reference to any public right or matter but merely for the security of a private interest, it is not difficult to quote passages from the judgments in that case favourable to the argument; but otherwise it really is not in point. Many cases might be quoted on the other side; but it is sufficient to refer to *Attorney-General* v. *Cockermouth Local Board* (*ubi sup.*), which, be it observed, was distinctly recognised as an authority in the other case by the Court of Appeal. The substance of the case now cited may be summed up in a few words quoted from the judgment of Sir George Jessel: "I am of opinion that the defendants have infringed the terms of the Act of Parliament, and that if they take the privilege at all they can only take it subject to such terms as are imposed by the Act of Parliament." If the Attorney-General is entitled to sue, it is not contended that it is incumbent upon him to allege or prove injury. Disobedience to the statutory provision is enough to maintain the action. Having expressed my opinion on the facts and the law, it remains to consider what form the judgment should take. It will be convenient, in the first instance, to make declarations, and as regards the public and private nuisance there is no difficulty. They may follow the language of the claim for injunctions in these particulars, and there will be injunctions in like terms. Damages are asked by the plaintiff Talbot in respect of the private nuisance. I have no materials for assessing those damages, and I understand it to be agreed that I shall not attempt to assess them. There must be a reference either to chambers or to some referee, and that reference can follow the language of the declaration as regards private nuisance. There is more difficulty about the claim under sect. 17 of the Public Health Act 1875. I will make a declaration following the language of that section, to the effect that the defendants have conveyed sewage and filthy water into the river Frome, but as regards this I do not think it right to grant an injunction. The evidence satisfies me that the effluent is now open to no objection on this ground, and there can be no reason for granting an injunction, unless it is found in the probability of the present state of things being altered for the worse. I do not apprehend that as likely to occur so long as the defendants use their best endeavours to avoid it, and that they will do this I do not for a moment doubt. Accidents, of course, may happen, and the accident of the 20th Nov. 1904 might be urged as a reason for anticipating their recurrence and providing against it. In *McMurray* v. *Cadwell* (6 Times L. Rep. 76) I had to consider how the court ought to deal with a case of possible accident viewed from the light of an accident already occurred. I see no reason to depart from what is there laid down, and there is no occasion to add to or repeat it. Suffice it to say that here the risk of accident is not imminent, and if an accident occurs there is no reason to suppose that it will produce serious consequences. Under these circumstances it would be wrong to grant an injunction, but I must give the plaintiffs liberty to apply to give effect to the declaration if the necessity arises. The defendants must pay the costs of the action.

Solicitors: for the plaintiffs, *H. S. Clutton* and *Johnson*; for the defendants, *Chester, Broome*, and *Griffiths*, for *Lock, Reed*, and *Lock*, and *A. G. Symonds*, Town Clerk, Dorchester.

July 26, 27, *and Aug.* 8, 1905.

(Before SWINFEN EADY, J.)

PESCOD *v.* MAYOR, &C., OF WESTMINSTER. (*a*)

Metropolis—Street widening—House severance—Right of corporation.

By an indenture dated the 24th March 1887 *certain premises were demised for twenty-one years from the 25th March* 1887 *at the rent of* 750*l. By an indenture dated the 1st Sept.* 1891 *the lease was assigned to the plaintiff, who since that date used the premises for his business as a tailor.*

On the 13th June 1905 *the plaintiff was served with notice under Michael Angelo's Taylor's Act* (57 *Geo.* 3, *c.* 29) *that the premises project into and obstruct or prevent the corporation of W. from widening the street P., and requiring him to treat for the sale of the premises to the corporation of W.*

The plaintiff alleged that the notice to treat was in fact given at the request of the London County Council, and that it was intended to throw 22*ft. of the plaintiff's premises into the roadway and assign the residue to an hotel company. The plaintiff alleged that the back portion of his premises constituted a valuable site for business purposes, and that he was desirous of retaining his interest therein. He asked for a declaration that the adjudication that the premises projected into P. was wrong and* ultra vires, *and for an injunction restraining the defendants from proceeding under the notice to treat. The defence was that if* 22*ft.* 6*in. were cut off only* 20*ft. would be left, and that it would be impossible to cut off* 22*ft* 6*in. from the front of the building without pulling it entirely down.*

(*a*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Held, that the defendants had bonâ fide *adjudicated that the whole house was essential to the widening of P., and that the action must be dismissed with costs.*

ACTION.

By an indenture dated the 24th March 1887, and made between Charles Edward Clifford of the one part and the Waterloo House and Swan and Edgar Limited of the other part, the shop and premises on the ground floor, with the basement beneath the shop, and one room and a studio on the entresol-floor, forming part of No. 30, Piccadilly, were demised for twenty-one years from the 25th March 1887 at the rent of 750*l*.

By an indenture dated the 1st Sept. 1891 the lease was assigned to the plaintiff, who since that date used the premises for the purpose of his business as a tailor.

On the 13th June 1905 the plaintiff was served with notice under 57 Geo. 3, c. 29, that the premises project into, obstruct, and prevent the corporation of Westminster from widening the street called Piccadilly, and requiring him to treat for the sale of the premises to the corporation of Westminster.

The plaintiff alleged that the notice to treat was in fact given at the request of the London County Council, and that it was intended to throw 22ft. of the plaintiff's premises into the roadway and assign the residue to an hotel company.

The plaintiff alleged that the back portion of his premises constituted a valuable site for business purposes, and that he was desirous of retaining his interest therein.

The plaintiff asked for a declaration that the adjudication that the premises projected into Piccadilly was wrong and *ultra vires*, and for an injunction restraining the defendants from proceeding under the notice to treat.

The defence alleged that No. 30. Piccadilly, was an old house. If 22ft. 6in. was thrown into the street a depth of only 20ft. would be left. It would be impossible to cut off 22ft. 6in. from the front of the building without pulling it entirely down.

Macmorran, K.C. and *Chubb* for the plaintiff.—The notice to treat is not *bonâ fide*. It purports to be given by the corporation of Westminster, but it is really given on behalf of the London County Council. It is admitted that the whole of the plaintiff's premises are not required for widening the street. He is entitled to carry on his business in the part which is not required, but there is a contract to sell this part to an hotel company.

Eve, K.C. and *Methold* for the defendants.—It is impossible to take 22ft. 6in. off an old house and leave a depth of 20ft. without pulling down the whole house. It is not like the removal of a porch, which would not involve a substantial alteration of the character and condition of the house:

Gordon v. *Vestry of St. Mary Abbotts, Kensington*, 71 L. T. Rep. 196; (1896) 2 Q. B. 742.

You can take part only of a piece of land:

Gard v. *Commissioners of Sewers of the City of London*, 52 L. T. Rep. 827; 28 Ch. Div. 513.

If a porch, conservatory, or cellar can be removed without substantially destroying the house as a house, that can be taken. But if a substantial proportion is taken by the authority, so that the use of the house is substantially injured and can no longer be enjoyed as it was before, then the whole must be taken:

Gibbon v. *Paddington Vestry*, 83 L. T. Rep. 136 (1900) 2 Ch. 794.

The remainder of the premises after 22ft. 6in. had been thrown into the street would be useless to the lessee:

Aldis v. *Corporation of the City of London*, 80 L. T. Rep. 683; (1899) 2 Ch. 169.

They also cited

Fearnley v. *Limehouse Board of Works*, 80 L. T. Rep. 351;

Fearnley v. *Limehouse Board of Works*, 64 J. P. 328;

Teuliere v. *Vestry of St. Mary Abbotts, Kensington*, 53 L. T. Rep. 422; 30 Ch. Div. 642.

Attwater for the Piccadilly Hotel Company who were interested in the building scheme.

Thomson for Notaras, an underlessee of the plaintiff of part of the premises.

Macmorran replied.

Cur. adv. vult.

Aug. 8.—SWINFEN EADY, J.—The plaintiff is the lessee, for a term of which about two and a half years are unexpired, of the basement, ground floor, and entresol of a house, No. 30, Piccadilly, where he carries on the business of a tailor and breeches maker, under the name of Nicholls and Co. He has sublet part of the basement and ground floor to Mr. Notaras, a tobacconist, for the residue of the term, with a nominal exception. The defendants claim to take the plaintiff's premises under Michael Angelo Taylor's Act, for the purpose of widening Piccadilly, and duly served a notice to treat dated the 10th June 1905. The plaintiff alleges that the adjudication made by the defendants, that the whole of the house No. 30 would be necessary for that purpose, was wrong and *ultra vires*, and he asks for an injunction to restrain the defendants from proceeding under their notice to treat. The plaintiff alleges that the defendants require only part of the house for street widening—namely, a strip extending backwards from the Piccadilly front for about 22ft. 6in.—and that he is willing to sell that part, and cannot be required to sell the whole. He also alleges that the adjudication of the defendants that it is necessary to take the whole house was not made *bonâ fide*, the defendants having previously agreed to resell to the P. and R. Syndicate Limited, now the Piccadilly Hotel Limited, the portion not actually required for street widening. On the hearing of the plaintiff's interlocutory motion it was objected that the plaintiff in any case had a right of pre-emption under sect. 96 of the Act, and this was conceded by the defendants, which explains why the point was not further raised at the trial. The defendants insisted at the trial that for the purpose of the street widening it was necessary to take the whole house. The plaintiff's premises at No. 30, Piccadilly, consist of the following particulars: (1) On the ground floor two shops, having a total frontage to Piccadilly of 18ft. and a total depth of 64ft., the width of the back being 25ft. for a

depth of about 32ft.; (2) the basement beneath the whole of the ground floor; and (3) a large room of about 650 superficial area at the back of the premises on the entresol floor, the nearest side of such room to the street being 26ft. therefrom. The plaintiff has not any interest in the front portion of the entresol floor, nor in the first, second, third, and fourth floors of the house fronting Piccadilly, except in respect of a claim to flues and to a cistern for water, which I will mention presently. Fronting Piccadilly there are four floors above the entresol, with a separate entrance, part of the same house, although numbered separately, and all the upper floors extend not only over the two shops of the plaintiff, but over this separate entrance adjoining, the total width of the entire building on the Piccadilly front being about 25ft. At the extreme rear the premises do not rise above the entresol floor, which is lighted by two skylights as well as by windows. This back addition extends about 24ft. or 25ft. to the rear of the main building. The plaintiff contends that it is physically possible to pull down and remove so much of the entire building as lies to the south of a line shown in red ink on the plans, and which is 22ft. 6in. back from Piccadilly. This is the new building line of Piccadilly. He contends that so much of the building as is north of that line must be left standing, at all events that portion in which he is interested, that care must be taken in pulling down the front portion, so as to support properly the back portion left standing. The result of doing what the plaintiff contends for would be to leave a portion of the house 25ft. wide by about 18ft. deep resembling a tower of four floors, with the whole front removed and exposed and no means of access to it, as the staircase is in the front portion to be pulled down, and there is not sufficient room to erect a fresh staircase. Some of the witnesses described this portion as about 18ft. square, but this is a mistake. The width of the building, so far as the plaintiff's interest extends, is only 18ft. on the Piccadilly front; but the entire width of the building, including the separate entrance to the floors, and the width of the upper floors, is 25ft., as plainly appears from the model verified by Mr. Andrew Young. This tower, 25ft. by 18ft., would be of no use whatever. Mr. Alexander H. Turner, an experienced house agent now carrying on business in South Audley-street, but formerly of Piccadilly, nearly opposite the premises in dispute, a witness called by the plaintiff, said that he could not even suggest any manner in which the rear portion of the four floors could be utilised, after the front portion had been removed in the manner proposed by the plaintiff. The conclusions of fact to which I come are that it would be physically possible to pull down the front portion and leave the rear portion standing, but that the cost of so doing would be very excessive—that it could not be done without entering upon every floor of the rear portion remaining standing, and placing struts and ties to uphold it, when the front part had been removed, and also entering upon the adjoining land each side and placing raking shores there to afford the rear portion external support, and that the opinion of Mr. Stenning, the architect and surveyor, was well founded that when this had been done the district surveyor would immediately come in and condemn the back portion as a dangerous structure. It was also put in evidence that the plaintiff has another action pending in this court against the Piccadilly Hotel Company Limited, who, he alleges, have acquired the leasehold interest in the whole house, subject to his own underlease of a part. That company, he alleges, have acquired and pulled down the buildings surrounding No. 30, and to a small extent have commenced the demolition of No. 30. He claims that the premises in his lease are heated by means of four fireplaces, all provided with chimney flues passing up through the building (some six stories in height) above the roof, and that the premises are provided with a water supply by means of a cistern placed immediately under the roof, with pipes passing down through the building to the plaintiff's said premises, providing him with an excellent supply of water at high pressure. The plaintiff in that action claims an injunction to restrain any interference with the upper portion of the premises No. 30 so as to interfere with his chimneys and flues, water tanks, and supply pipes. The position, therefore, is that the rear portion would be useless and probably dangerous to leave standing, but that the plaintiff is seeking to restrain its being pulled down, as thereby damage would be occasioned to the easements and appurtenances of his premises. There are other difficulties in the plaintiff's way. If the front portion only of his premises is acquired, there must be a considerable time when he will be totally excluded from his premises by reason of the danger involved in pulling down, and when this is completed he would be cut off from access to the public street until the roadway and path can be formed and made into a fit state to throw open to the public. The defendants explained that they have to construct vaults under the path, and to turn arches over them, and the headway above the arches where the men will be working is too low to allow of wooden gangways being placed in position so as to give temporary access to the plaintiff's shop over the heads of the workmen engaged. The plaintiff based his case upon this—that as the whole ground area proposed to be taken under the notice to treat was not intended to be thrown into the public roadway, the defendant must be restricted to the part actually intended to be so dealt with, as he was willing to convey that part only. In my opinion, the plaintiff has not any absolute right to restrain the defendants from taking more land than is intended to be actually dedicated to the public. The statute contemplates that they may take more—sect. 80 empowers the local authority to lay the sites of houses, walls, and buildings, and also other lands, tenements, and hereditaments acquired by them "or so much thereof as they . . . shall think proper, into the said streets or public places." Lord Chelmsford pointed out in *Thomas* v. *Daw* (15 L. T. Rep. 200; L. Rep. 2 Ch. 1, at p. 7) that the words "or so much thereof" must be construed to apply to houses as well as to lands, otherwise this absurdity would follow—that the commissioners would be imperatively bound to lay the whole of the sites of the houses into the streets. Again, sect. 96 of the Act enables the local authority to resell lands purchased by them, after they have first been offered for sale to the persons from whom they were purchased. This also shows that the statute contemplated that they

might take more land than the actual strip required for street widening. In my judgment the question which I have to determine is whether the defendants have honestly and in good faith adjudged that the whole of the house or building No. 30 projects into, or obstructs, or prevents them from altering, widening, or extending Piccadilly, and that the possession, occupation, and purchase of the whole of the house will be necessary for that purpose. That is the adjudication which the defendants have made, and I have arrived at the conclusion that they have done this in good faith and that in their view the possession, occupation, and purchase of the whole building will be necessary to enable them to widen Piccadilly as they propose. The position and dimensions of the building, the structural arrangement of its contents, the considerable portion of its site actually intended to be thrown into the public street, and the subdivision of the house into portions held for different terms, with the claim to chimneys and flues going up the full height of the building, and to a water-cistern at the top with service pipes from it, all point to the wisdom and prudence of the course adopted by the defendants. With this, however, I am not concerned. If, however, it were necessary for me to form a judgment as to whether the possession, occupation, and purchase of the whole building were necessary to enable the defendants to widen Picaddilly to the extent proposed, I should decide that question in the affirmative. It was insisted by the plaintiff that, as a matter of law, the defendants could not take compulsorily more than the site intended to be thrown into the street, if, as was the case, he was willing to part with that portion. Such a rule, if it existed, would be productive of the greatest inconvenience where a house is divided into different floors which, or parts of which, are leased separately, and where some of the lessees might require the whole of their interest to be purchased, while others took the opposite view and claimed to retain everything not intended to be thrown into the street. Moreover, such a rule would enable the owner of a very limited interest in a small part only of a house to require that part to be left, although the removal of the portion necessary to be pulled down might render the whole of the rest of the house perfectly useless. The language of the Act itself does not afford any support for such an argument. In *Teuliere* v. *Vestry of St. Mary Abbotts, Kensington* (*ubi sup.*), Pearson, J. put the case of a vestry taking so much of the buildings that the portion left was a mere wall, or a staircase and one or two kitchens, and said that it would be unreasonable as regards the owners for the vestry not to take the whole, and as regards the vestry to make them pay for all damage by severance. He certainly, therefore, took the view that if only a small portion of the building was left, not actually required for the street, the owner would have no right to restrict the vestry to the portion intended for the street, and to make the vestry pay compensation for severance. Again, in *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (*ubi sup.*), it was said by the present Master of the Rolls, at p. 754: "If a particular part of a house can be pointed to which the vestry, *bonâ fide*, find is the only part which obstructs the improvement, and that part is separable from the house, so that it can be removed without destroying the house as a house, then I should say that there is nothing to prevent the vestry from compulsorily taking that part only. If, on the other hand, the thing, in respect of which they form their judgment that it obstructs and is necessary to be removed, is so indissolubly linked with the whole fabric of the house that, in the opinion of the jury, it cannot be removed without practically destroying the identity of the house as a house, then I think the vestry are not entitled to say that 'part thereof' only obstructs or that 'part thereof' only is necessary to be removed for the purpose of the improvement. Under those circumstances I am of opinion that the vestry could not stop short of taking the whole." In the present case it is quite clear that the portion of the building which is necessary to be removed, to lay the site of it into the street, is so indissolubly linked with the whole fabric of the house that it cannot be removed without practically destroying the identity of the house as a house. The identity is altogether gone when nearly two-thirds of the main building is removed and four upper floors are left as a mere shell with no means of access and no space to make one. Under these circumstances the defendants could not stop short of taking the whole. I may add that when once the conclusion of fact has been arrived at, that it is essential for the defendants to acquire the whole building for the purpose of widening Piccadilly, the adjudication of the defendants to that effect does not become *ultra vires*, nor can *mala fides* be attributed to the defendants, because, before the date of the adjudication, an arrangement had been come to with regard to the resale of so much of the site of the building as was not required for street widening. So far as the plaintiff's interest is concerned this is subject to his right of pre-emption; and upon the facts it is clear that the defendants are not putting in force their compulsory powers colourably only as regards street widening in respect of any part of the building. There is no ground for the contention that as regards the rear portion the ostensible purpose of the defendants is not the real one, and that the real purpose is to resell the back portion to the hotel company. I am quite satisfied that the real purpose of the defendants, the purpose for which their compulsory powers are being used —honestly and *bonâ fide*—is to acquire the whole building for the purpose alone of street widening. The result is that the action fails, and must be dismissed with costs.

Solicitors: *Mead* and *Son*; *W. A. Blaxland*; *Ashurst, Morris, Crisp*, and *Co.*; *Jennings, Son*, and *Allen*.

June 7, 8, *July* 17, 18, *and Aug.* 11, 1905.

(Before JOYCE, J.)

ELSDON *v.* MAYOR, &c., OF HAMPSTEAD. (*a*)

Local government — Metropolis — New street — Paving expenses—Apportionment among frontagers—Property "bounding or abutting"—Intervention of court—Declaratory judgment—Metropolis Local Management Acts 1855 (18 *&* 19 *Vict. c.* 120), *s.* 105, *and* 1862 (25 *&* 26 *Vict. c.* 102), *s.* 77.

In 1901 *the council of the metropolitan borough of H. resolved to pave a new street in the borough known as G.-gardens, and apportioned the expenses among the frontagers.*

The street and the land on both sides of it had formerly been the property of a waterworks company, which had in 1881 *conveyed the land on the west side to the C. trustees, and had subsequently conveyed the land on the east side to E.*

The apportionment of 1901 *included houses facing to another road, erected on the land of the C. trustees, gardens or grounds belonging to which houses extended to G.-gardens, though separated from it in some places by the remains of a fence. It also included E's property.*

The council, however, subsequently entertained doubts whether the land on which the fence stood belonged to the C. trustees, and in 1904 *they rescinded their former apportionment and made a new one, not including the property of the C. trustees, and assessing only a nominal sum on the land on which the fence stood.*

In an action by E. against the council for a declaration that the apportionment of 1904 *was invalid, and that no valid apportionment had been made, with consequential relief:*

Held, on the documentary and other evidence, that the property of the C. trustees bounded or abutted on the new street, and ought to have been included in the apportionment of 1904, *which was therefore invalid; and that the plaintiff could maintain an action for a declaration to this effect, notwithstanding* Grand Junction Waterworks Company *v.* Hampton Urban District Council (78 *L. T. Rep.* 673; (1898) 2 *Ch.* 331).

TRIAL OF ACTION.

On the 10th Oct. 1901 the defendants, the council of the metropolitan borough of Hampstead, passed a resolution under sect. 105 of the Metropolis Local Management Act 1855 and sect. 77 of the Metropolis Local Management Act 1862 that a portion, 834ft. 11in. in length, of a new street called Gondar-gardens, within the borough, should be paved in the manner mentioned in the resolution, and that the estimated expenses, amounting to 2040*l.* 2*s.* 8*d.*, should be apportioned to and charged upon the owners of the houses and land forming or bounding or abutting on such portion in manner in the resolution mentioned, the apportionment being at the rate of 1*l.* 3*s.* per foot of frontage.

The land upon which the new street stood and that for a considerable distance on each side of it had formerly belonged to the Grand Junction Waterworks Company, who had erected a wooden fence across the land in a direction generally from north to south.

In 1881 the company sold and conveyed to the trustees of the will of a Mr. H. P. Cotton (in this report referred to as the Cotton trustees) all the land on the west side of the fence, "together with all and singular buildings, fences, hedges, ditches, drains, ways, paths, passages, mines, minerals, commons, common of pasture, rights, profits, privileges, advantages, and appurtenances whatsoever to the said hereditaments hereby conveyed or intended so to be or any part thereof belonging or in anywise appertaining or with the same or any part thereof now or heretofore demised, used, occupied, or enjoyed." The Cotton trustees then proceeded to grant leases of the land thus conveyed to them up to the boundary between what they had purchased and the land retained by the waterworks company; and houses were erected on the land thus leased, facing on to another parallel road named Sarre-road, but with gardens or grounds at the back extending down to the fence, on the east side of which the new street "Gondar-gardens" had subsequently been constructed.

Several of the houses had openings with gates on to the pavement or side walk (all of which had not been flagged) of Gondar-gardens; but portions of the old fence still remained between the gardens and the street in a dilapidated state, standing on a strip of land less than a foot in width.

The waterworks company had afterwards conveyed land on the east side of the fence to the plaintiff, Miss Elsdon; and she was the owner and in receipt of the rack rents of houses erected on this land, one of which houses stood on the west side of Gondar-gardens and the remainder on the east.

The apportionment of Oct. 1901 comprised both the plaintiff's houses and those of the Cotton trustees facing on to Sarre-road, together with the other premises and land on both sides of Gondar-gardens. The sum assessed on the Sarre-road houses was over 500*l.* The various properties were described in it and the respective sums due from them apportioned to them; but the owners were not named or otherwise specified, and in some cases (not those of the plaintiff's houses or the Sarre-road houses) property was described simply as "garden ground" or "land."

Before the paving works had been completed it was suggested on behalf of the owners or occupiers of the Sarre-road houses that the strip of land on which the fence stood belonged to the waterworks company, and that the Sarre-road houses therefore did not abut upon Gondar-gardens; and the defendants, acting on this view, passed, on the 3rd March 1904, a resolution purporting to rescind the resolution and apportionment of the 10th Oct. 1901.

On the 14th April 1904 they passed a fresh resolution apportioning the expenses in manner mentioned therein.

This new apportionment, while it included the property of the plaintiff on the east side of Gondar-gardens and other property on that side, and also the house belonging to the plaintiff and other property on the west side, did not include any of the Sarre-road houses; and "land upon which old fence stands" on the west side was assessed at 10*s.* only.

The sum to be raised being the same as before, the 500*l.* odd formerly assessed on the Sarre-road

(*a*) Reported by H. W. LAW, Esq., Barrister-at-Law.

houses was placed upon the property in Gondar-gardens.

In Dec. 1904 the defendants served notice on the plaintiff's tenants, under sect. 96 of the Metropolis Local Management Act 1862, to pay their rents to them; and orders were subsequently made by the justices directing the tenants to pay the sums claimed.

On the 6th Feb. 1905 the plaintiff commenced this action, claiming a declaration that the apportionment of the 14th April 1904 was invalid and that no valid apportionment had been made, an injunction restraining the defendants from demanding or receiving payment of the apportioned expenses from her tenants, an injunction to restrain the defendants from exercising any of the powers conferred upon them by the Metropolis Local Management Acts in respect of a valid apportionment, and repayment of any moneys recovered or received from the plaintiff's tenants in pursuance of such apportionment.

Younger, K.C. and *Martelli* for the plaintiff.—The apportionment is no real apportionment at all, but mere caprice or negligence on the part of the defendants. If they are right, they could put the whole cost of the work on the frontagers most likely to be able to pay, for the 10*s.* is purely nominal, and it is as though the land on which the fence stands had been exempted from the apportionment, which is beyond the powers of the council:

Williams v. *Wandsworth Board of Works*, 1 Q. B. Div. 211;
Hampstead Corporation v. *Midland Railway Company*, 91 L. T. Rep. 661; (1904) 2 K. B. 802.

In the latter case the very council who are defendants here obtained a declaration that a similar strip of ground was liable to be assessed. But in fact the Sarre-road houses abut on the street. The apportionment is not *bona fide*, and the court will give relief against it.

Macmorran, K.C. and *Courthope-Munroe* for the defendants.—The local authority are entitled to adopt any principle they please in making the apportionment:

Metropolitan District Railway Company v. *Vestry of Fulham*, 73 L. T. Rep. 330; (1895) 2 Q. B. 443.

And that principle cannot be questioned before any tribunal:

Nesbitt v. *Greenwich Board of Works*, 32 L. T. Rep. 762; L. Rep. 10 Q. B. 465.

And see also

Grand Junction Waterworks Company v. *Hampton Urban District Council*, 78 L. T. Rep. 673; (1898) 2 Ch. 331;
Livingstone v. *Westminster Corporation*, (1904) 2 K. B. 109.

The former apportionment was a perfectly good one; but the authority have power to rescind it and make a new one if the works have not been completed:

Bishop v. *Wandsworth Board of Works*, 82 L. T. Rep. 766.

It is the strip of land on which the fence stands, not the Sarre-road houses, that abut on the street; and the authority were entitled to assess it at 10*s.* They may put all but a nominal sum on the property of which they know the owners.

Younger, K.C. in reply.—*Barlow* v. *Vestry of Kensington* (55 L. T. Rep. 221; 11 App. Cas. 257) and *Grand Junction Waterworks Company* v. *Hampton Urban District Council* (*ubi sup.*) show that the court has jurisdiction to review such an apportionment as this, and to restrain the defendants from receiving payment from the plaintiff's tenants under the order of the magistrates. The plaintiff's only remedy is to come to the court.

Cur. adv. vult.

Aug. 11.—JOYCE, J.—The 105th section of the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120) contains provisions for the paving of new streets; and empowers the vestry or board (in this case the corporation of Hampstead), if they deem it necessary or expedient that a new street should be paved, to pave the same; and provides that the owners of the houses forming such street shall, on demand, pay to the authority the amount of the estimated expenses, the amount to be determined by the surveyor for the time being of the vestry or board. Then a later Act, the Metropolis Local Management Act 1862 (25 & 26 Vict. c. 102), provides in sect. 77 that, where the vestry exercises the powers under the section I have already quoted, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses of paving the same, as well as the owners of houses therein, provided that the authority may charge the owners of land in a less proportion than the owners of houses; and that any such costs and expenses, &c., shall be apportioned by the vestry or board, and be recoverable in the way provided by the section, and that any such amount shall be recoverable from the present or any future owner, and so on. Now, some time since the borough of Hampstead proceeded to exercise these powers with respect to a new street, or part of a new street, known as Gondar-gardens, within the borough. [His Lordship then read the terms of the resolution of the borough council of the 10th Oct. 1901, and continued:] Now, such resolution appears to me to be right and proper in every respect so far as I can make out, subject only to this, that it did not name the persons to be charged, or specify them otherwise than in the manner I have stated, by a general description of owners and a description of the premises the owners of which were to pay. Apart from the words of the Act, this description appears to me to be indefinite and to involve serious elements of uncertainty. For instance, there is an apportionment against property described simply as "garden ground, 139*l.* 4*s.* 4*d.*," and, lower down, against "land, 419*l.* 2*s.*," without any further specification or description whatsoever in reference to such garden ground or land. This observation, no doubt, does not apply equally to the houses in Sarre-road, because they are described as houses known as No. 8, and other houses known as No. So-and-so in that road. But for the fact that Mr. Macmorran, who, of course, has a very great experience in these matters, assured me that that was the ordinary mode of making apportionments, I should have doubted whether this so-called apportionment was not bad for uncertainty. I should have thought that either the owners should have been referred to by name, or that at least the lands ought to have been specified so that there should

be no possible question as to where or what they were. Now, Sarre-road is a street which may be described generally as lying to the west of and generally parallel to the portion of Gondar-gardens with respect to which the question in this action arises. The houses in Sarre-road front to and are numbered in that road. There are gardens or grounds at the back which extend down to Gondar-gardens, and would appear to any ordinary observer—and I may say that I have taken the opportunity of looking at the *locus in quo* myself—to abut upon the new street. Several have openings with gates to and from the foot pavement or side walk, because it is not yet completely flagged; in fact, very little of it is flagged on the western side of the street. Now, there is or was an old wooden fence, at present much dilapidated, and in parts no longer existing, between the site of the new street and the ground at the back of the Sarre-road houses belonging to them. The apportionment I have mentioned having been made, the inhabitants or owners of these houses in Sarre-road started the ingenious theory that their tenements did not abut upon Gondar-gardens by reason, as they alleged, that the narrow strip of land, really less than a foot in width, upon which the old fence between the gardens of the houses in Sarre-road and the new street stood or used to stand did not belong to them, but to someone else—namely, the Grand Junction Waterworks Company. Thereupon, on the 14th April 1904, the council, having rescinded the resolution of Oct. 1901 making the first apportionment, made another apportionment. This it is asserted by their counsel they were entitled to do so long as the work remained uncompleted—that is, so long as it remained unexecuted; and I was referred to *Bishop* v. *Wandsworth Board of Works* (82 L. T. Rep. 766), a decision of Ridley, J. Having regard to this case, counsel for the plaintiff, while not admitting the decision to be correct, did not argue to the contrary before me, but assumed that, as a court of first instance, I should follow the decision of Ridley, J. Of course, if the apportionment made by the authority were determined to be invalid, no one could question that a fresh apportionment could be made. This new apportionment omits all mention of the houses in Sarre-road, and inserts instead "land upon which old fence stands"; and it purports to charge the owner or owners of the land, whatever it may be, so referred to with the nominal sum of 10*s.*, the difference between this and the aggregate sum, more than 500*l.*, charged on the houses in Sarre-road by the original apportionment being thrown upon the owners of other properties in Gondar-gardens. Some of these properties belong to the plaintiff, who very naturally objects to have the assessment of her property materially increased in this manner. It was admitted by counsel for the defendants that by the expression "land upon which old fence stands," which is the only description, it was intended to refer to the strip of land which was alleged to intervene between the property of the Sarre-road owners and the new street. Upon investigation I am satisfied that there is no foundation in fact for the theory that the gardens or grounds of the houses in Sarre-road are cut off from the new street called Gondar-gardens by any intervening strip of land whatsoever, either belonging to the Grand Junction Waterworks Company or to any person other than the owners of the houses in Sarre-road. The facts are that the land upon which the new street stands, and that for a considerable distance on each side (in particular extending on the west up to Sarre-road and so including the site of the houses in that road and their gardens or grounds at the back), formerly belonged to the waterworks company. Across this land, in a direction generally from north to south, they erected the wooden fence, now dilapidated, of which I have spoken. In 1881 the company sold and conveyed to the Cotton trustees all the land on the west side of this old fence. [His Lordship read the general words in the conveyance, and continued:] I cannot doubt that by this conveyance the land on the west up to at least the centre line of the fence, and so as to include the western half thereof, if indeed it did not include the eastern half also—that is, the whole—passed to the Cotton trustees; and in any view of the case this conveyance passed the western half of the fence and conferred certain rights in the eastern half of the fence, for the entire fence served and was required to keep in all the cattle of the purchasers and to exclude those of the vendors; and the vendors could not, having regard to the terms of the conveyance which I have read, afterwards remove or destroy any part of this fence to the obvious detriment of the parties under the conveyance. The Cotton trustees proceeded to grant leases of the lands thus purchased by and conveyed to them up to the boundary, whatever it was, between what they purchased on the west and the land retained by their vendors, the waterworks company, on the east. These are the leases of the houses and premises in Sarre-road; and the waterworks company have conveyed to the present plaintiff their land on the east side of the fence up to the same boundary. This, in my opinion, is the true construction of the conveyance and of the leases. The new street, Gondar-gardens, as laid out on the west comes up to the self-same boundary—that is to say, the old wooden fence or the centre line thereof. There is no intervening strip belonging to or claimed by the waterworks company or anyone else. I hold as a matter of fact that if the houses in Sarre-road are not houses fronting the new street, still the lands of the Cotton trustees demised to the lessees of the houses in Sarre-road do within the meaning of that term in the statutes bound or abut upon the new street, and so were liable to have, and ought to have, some portion of the expenses of paving apportioned upon the owners in common with the other owners in the new street. It was contended before me that if the corporation could not discover or found difficulty in ascertaining who the owners of some of the houses or lands forming or abutting upon the new street were, they might apportionate the whole of the expenses, or all but a nominal sum, upon the owners whom they did know. This appears to me to be, to say the least of it, a somewhat startling proposition. What the Acts provide is that the expenses shall be apportioned upon the owners of the houses forming and the land abutting upon the street; not such as the authority may happen to know or may happen to be able without any trouble to discover. Then it was said, and authorities were cited for it, that

the court could not question or refuse the principle upon which the apportionment was made, if it was made *bonâ fide*. That may be so as among the several persons liable; but the apportionment, whatever may be the principle (if any) adopted in making it, must be made upon the right people, including all liable; none can be left out. If the properties of the lessees in Sarre-road abut on the new street, as in my opinion they do, some portion of the expenses must be apportioned upon them. It was suggested, I think, also that, if the site of the fence, or part of the site of the fence, between the Sarre-road houses and Gondar-gardens did belong to the lessees of those houses, still the apportionment upon the land on which the old fence stands complied with the provisions of the Acts, and was in point of fact an apportionment upon the lands abutting upon the new street. This suggestion, if made, does not to my mind deserve serious consideration. The apportionment is to be made upon the houses forming and the lands abutting upon the new street. It is not to be made upon the fences or the sites of the fences in front of those properties where, as here, there is not any intervening strip, the property of a third person. In my opinion the apportionment of the 14th April 1904 is illegal and invalid, and under the peculiar circumstances of this case I think that, notwithstanding what was said by Stirling, L.J. (then Stirling, J.) in *Grand Junction Waterworks Company* v. *Hampton Urban District Council* (78 L. T. Rep. 673; (1898) 2 Ch. 331), this is a case in which an action can be maintained and ought to be allowed to be maintained for a declaratory judgment, whether any consequential relief is or could be claimed or not. Therefore I declare that the apportionment objected to is illegal and invalid. [His Lordship gave the plaintiff liberty to apply as she might be advised for an injunction if the apportionment were sought to be enforced and generally, and ordered the defendants to pay the costs of the action.]

Solicitors for the plaintiff, *Last* and *Sons*.
Solicitor for the defendants, *A. P. Johnson*.

KING'S BENCH DIVISION.

May 29 *and* 30, 1905.

(Before JELF, J.)

WEDNESBURY CORPORATION *v.* LODGE HOLES COLLIERY COMPANY LIMITED. (*a*)

Highways—Repairs—Mines under highway—Subsidence of highway by working mines underneath—Highway vested in urban authority—Liability of mineowner to restore highway—Proper measure of damages—Cost of restoring highway to original level—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *s.* 149—*Highways and Locomotives* (*Amendment*) *Act* 1878 (41 *&* 42 *Vict. c.* 77), *s.* 27.

Where a mineowner in working his mines under a highway, which is vested in an urban authority under sect. 149 *of the Public Health Act* 1875, *brings down the highway and causes a subsidence of the same by such working, the urban authority are not necessarily entitled to recover from the mineowner the cost to them of restoring the road to its former level; and in such case the proper measure of damages payable by the mineowner is the cost to the urban authority of making the road as commodious to the public as it was before, and not the cost of restoring the road to its former level.*

FURTHER CONSIDERATION in an action tried before Jelf, J., at Birmingham, without a jury, a special jury having been discharged by consent.

The action was brought by the plaintiffs, the corporation of Wednesbury, for damages to a road or highway in the borough caused by the defendants working and getting their mines and minerals.

The statement of claim set out that the plaintiffs were the urban authority for the borough of Wednesbury, and had vested in them a certain disturnpiked road or highway within the borough known as Dangerfield-lane; that the defendants were the lessees of the coal mines and minerals under the road and adjacent thereto, and in the years 1902 to 1904 they so worked and got their mines, and so negligently worked and got them, that they caused the road to sink several feet below its original level for a length of about 280 yards, and broke up and greatly damaged the surface; that the plaintiffs had necessarily expended about 405*l.* in repairing the road and restoring it to its former level, but by reason of the adjoining land having also sunk and of the defendants having refused to allow the plaintiffs to put embankments on the defendants' land on either side of the road to support it when raised, the plaintiffs had to reduce the width of the metalled surface thereof by 3½ft. to the further damage of the plaintiffs; and that, by reason of the defendants having so let down the road the plaintiffs had also been put to the cost of 37*l.* 15s., for the sinking of a dumb well at the upper end of the road to catch storm water and domestic refuse water, and prevent it from flooding the surface thereof. The plaintiffs claimed 500*l.* damages.

In their defence the defendants denied any negligence in working the mines, and said that they worked the mines under the road, as they were entitled so to do, in a proper and usual manner, and that by reason of the workings the road, together with the surrounding land, was lowered in a general and gradual manner, and (save for the slight damage to the surface) so as to cause no injury to the road and no interruption or impediment to the passage of the public over the same; that the lowering of the road did slightly break and damage the surface of the same, and the defendants alleged that, so far as such breaking and damage was caused by the defendants, it could have been repaired without raising the road to its original level, and that the repairs, including a proper provision for draining the surface of the road, could have been executed at a cost of 60*l.*, which they brought into court in respect thereof.

They further pleaded that, in pursuance of sects. 18 to 27 of the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17) and the Public Health Act 1875 (Support of Sewers) Amendment Act 1883 (46 & 47 Vict. c. 37), the defendants, on or about the 27th March 1902, gave notice in writing to the plaintiffs of the intention of the defendants to work the mines, but the plaintiffs did not within thirty days after such notice state

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

their willingness to treat with the defendants for the payment of compensation for the mines, whereupon it became lawful for the defendants to work the mines in a usual manner and without doing wilful damage; that the sinking of the dumb well referred to in the claim (if ever it was done, and if it became necessary for the purposes alleged, which facts were denied) became necessary through injury to the sewers and other sanitary works of the plaintiffs caused by the defendants working their mines after the notice above mentioned, and in a usual and proper manner, wherefore the defendants submitted that they were not liable in respect of those matters.

The defendants, whilst denying all liability beyond the 60*l.* paid into court, brought a further sum of 20*l.* into court.

At the trial it was admitted by the defendants that their mining operations had caused the road at the part in question and the land surrounding it to sink to a considerable extent, and that the plaintiffs had a cause of action against them in respect thereof; and the only dispute was as to the measure of damages recoverable by the plaintiffs.

The plaintiffs said that the cost of doing the work came to 440*l.*, and after allowing a deduction of 35*l.* for the repair of the surface in the ordinary way, if there had been no subsidence, they claimed a sum of 405*l.*, which they said they had actually incurred in raising and restoring the road as nearly as possible to its original level, which sum included the cost of putting in retaining walls to raise the road above the surrounding land, which remained at the sunken level, and the cost of fences to protect the public from the danger of falling over.

It was not disputed on the part of the defendants that, if the plaintiffs were entitled to recover on the basis that the defendants were liable for the cost of restoring the road to its original level, the sum of 405*l.* claimed by them was substantially correct, and the learned judge found as a fact that upon that basis 400*l.* was a fair sum for the plaintiffs to recover—that is, if they were entitled to recover the cost of restoring the road as nearly as possible to its original level.

The defendants, however, contended that that was not the proper measure of damages, but that the proper basis was the cost of making the road as commodious to the public as it was before and they said that for a sum of 65*l.* the road could be made as commodious to the public as before.

The plaintiffs' evidence was that upon that hypothesis it would require a sum of 95*l.* to make the road as commodious to the public as it was before, but upon that basis the learned judge found that at all events the sum of 80*l.* paid into court was sufficient.

Sect. 149 of the Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

> All streets, being or which at any time become highways repairable by the inhabitants at large within any urban district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority. The urban authority shall from time to time cause all such streets to be levelled, paved, and repaired . . . as occasion may require; they may from time to time cause the soil of any such street to be raised, lowered, or altered as they may think fit, and may place and keep in repair fences and posts for the safety of foot passengers. . . .

Sect. 27 of the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77) —under the heading "Saving for Minerals"— provides:

> Notwithstanding anything contained in section sixty-eight of the Public Health Act 1848, or in section one hundred and forty-nine of the Public Health 1875, all mines and minerals of any description whatsoever under any disturnpiked road or highway which has or shall become vested in an urban sanitary authority by virtue of the said sections, or either of them, shall belong to the person who would be entitled thereto in case such road or highway had not become so vested, and the person entitled to any such mine or minerals shall have the same powers of working and of getting the same or other minerals as if the road or highway had not become vested in the urban sanitary authority, but so nevertheless that in such working and getting no damage shall be done to the road or highway.

Hugo Young, K.C. and *C. F. Vachell* for the plaintiffs.—So far as the highway is concerned the defendants, although they have a right to work the minerals under the highway, have no right to let down the roadway so as to destroy a road which is public property. The statutory power with reference to working and getting minerals under a disturnpiked road or highway, is contained in sect. 27 of the Highways and Locomotives (Amendment) Act 1878, which puts the matter quite clearly and which provides that the mines under the highway remain the property of the owner, and that the owner can work and get the same in the same manner as if the roadway had not become vested in the urban authority, and the section has this important provision with regard to the working, "but so nevertheless that in such working and getting no damage shall be done to the road or highway." That shows that the owner of the mines cannot work the mines so as to damage the highway. The Public Health Act 1875 had—in sect. 149—vested all these roads in the urban authorities, and sect. 27 of the Act of 1878 was passed for the purpose of settling the question as to what extent the roads were so vested. It is not disputed, therefore, that the defendants have a right to work their mines under the highway, but as they have damaged the highway they must pay for such damage. Up to this point there is really no difference between the parties, and the only question is, upon what basis the defendants are to pay. We submit that the proper measure of damages is, and the plaintiffs are entitled to recover, the whole cost of restoring the road to its original level. The road is vested in the plaintiffs under sect. 149, and by such vesting they have a proprietary right in the highway, which puts them in the same position as a private owner with regard to the subsidence of his property by the working of mines underneath. It is said for the defendants that they may let down this road, and that instead of being a level road they may leave it so that the public would have to go down into the hollow or valley so caused and up again. If that were so, the plaintiffs could not without great expense, if at all, get the water away from the road, and they could not properly repair it and make it a proper and convenient road for public use without restoring the

level. The upkeep of the road would become much more expensive, and there would always be an accumulation of water at the bottom of the road which it would be most difficult to get rid of and which would render the traffic most difficult for the users of the highway, with the risk of the water flowing over the adjoining lands, and the local authority declined to have a road where the water was coming down from both sides instead of a dry high road. In the second place, even if the proper basis for damages be the cost of making the road as commodious to the public as before, the works which the plaintiffs had done were in fact necessary to make the road as commodious to the public as it was before. In the next place, the plaintiffs, in deciding what works were necessary to restore the road, were entitled to take into consideration any subsequent workings by the defendants, which would render the scheme proposed by the defendants altogether impracticable. Even if there were no appreciable damage by reason of the subsidence, the plaintiffs would be entitled to nominal damages for the injury to their proprietary right:

Attorney-General v. *Conduit Colliery Company*, 71 L. T. Rep. 771; (1895) 1 Q. B. 301.

Montague Shearman, K.C. and *Disturnal* for the defendants.—By sect. 27 of the Highways Act 1878 the mines under the highway remain the property of the defendants, and therefore the defendants have power to work their mines under the highways, but if in so working their mines they let the road down, then they must make good the damage. The only real question therefore between the parties is, upon what basis the measure of damages which the defendants have to pay for the injury done to the road has to be estimated, whether it is, as the plaintiffs allege, the cost of restoring the road to its original level, or is, as the defendants contend, the cost of making the road as commodious to the public as it was before. It is true that under sect. 149 of the Public Health Act 1875 this highway "vests" in the plaintiffs as the urban authority: but the right that so vests in them is not an absolute right, but a limited right only, and gives the plaintiffs only such property in the road as is necessary in the interests of the public for the proper preservation of the road. In *Coverdale* v. *Charlton* (40 L. T. Rep. 88, at p. 90; 4 Q. B. Div. 104, at pp. 116-117), Bramwell, L J. deals with the meaning of the word "vest" in sect. 149, and, after pointing out that the word "vest" may have two meanings—one, that it gives the property in the soil, the freehold, the surface, and all above and below it. With regard to that construction of the word he says (4 Q. B. Div., at p. 116): "But that would be such a monstrous thing to say to be necessary for the proper control of the streets by the local board, that I cannot suppose it to mean such a thing." Then, after disposing of that meaning of the word "vest," he goes on to give the meaning to be adopted. He says: "What then is the meaning of the word 'vest' in this section? . . . The meaning I should like to put upon it is, that the streets vest in the local board *quâ* street; not that any soil or any right to the soil or surface vests, but that it vests *quâ* street. . . . The meaning I put upon the word 'vest' is, the space and the street itself, so far as it is ordinarily used in the way that streets are used, shall vest in the local board." That disposes of the contention that the property in the highway is vested in the local authority to the same extent as property is vested in a private owner, or that the local authority have the same rights with regard to damage to the road as a private owner would have. The case of *Mayor, &c., of Tunbridge Wells* v. *Baird* (74 L. T. Rep. 385; (1896) A. C. 434) is to the same effect, and shows that the vesting under sect. 149 does not vest the sub soil in the urban authority, and that the urban authority had no power to excavate the soil and erect lavatories thereunder. He also referred to

Attorney-General v. *Conduit Colliery Company* (*ubi sup.*).

The plaintiffs are not entitled to the cost of restoring the road to its original level. That is not the proper measure of damages. The proper measure of damages is the cost which the plaintiffs are put to in performing their statutory duty, which is to keep the roads in the district in repair. That is the utmost they are entitled to; and, as the Attorney-General is not a party to this action, the utmost the plaintiffs can recover is in respect of their own limited rights. If the plaintiffs want to enforce any public rights they can get the permission of the Attorney-General and enforce them in his name, but that has not been done here, and therefore the plaintiffs cannot claim anything in respect of any injury to the public at large. All they can claim is the cost to them of making the road as commodious for the use of the public as it was before; and the evidence shows that according to the scheme of the defendants that could have been done for about 65*l.*, and as they have paid 80*l.* into court the judgment ought to be for them. Lastly, the plaintiffs are not entitled to take into account any prospective damage by any future working of the mines by the defendants; they can only take the damage as it existed at the time of action brought.

Jelf, J. read the following judgment:—As I have now formed a definite opinion upon this case, I think in the interest of the parties it is desirable that I should give my judgment at once instead of waiting to put it into a more elaborate shape. The action is brought by the corporation of Wednesbury against the Lodge Holes Colliery Company to recover damages for injury caused by the mining operations of the defendant company to a highway called Dangerfield-lane, vested in the plaintiffs as the highway authority under the Public Health Act 1875, s. 149. At the trial before me without a jury at Birmingham, the defendants admitted that their mining operations had caused the road and the surrounding land to sink to a substantial extent, and that this gave the plaintiffs a cause of action against the defendants, and the question resolved itself into one of damages. It is to be observed, though it hardly bears upon the particular issue in this case, that the Attorney-General is not made the party complaining, and that the plaintiffs, therefore, in my opinion, can only recover what they have suffered, without regard to any ulterior disadvantages to the public. Now, the plaintiffs claimed 405*l.* as the expense which they had actually incurred in restoring the road as nearly as possible to its original level, including the

consequential cost of retaining walls to raise it above the adjoining lands which remained at their sunken level, and fences to protect the public from the danger of falling over the precipice so caused. The defendants did not deny that, if the plaintiffs were entitled in principle to claim damages on the lines above suggested, the figures were substantially correct, and I find as a fact on that hypothesis that 400*l.* is a fair amount for the plaintiffs to recover. The defendants, however, denied that the measure of damages was what it would cost to restore the road nearly to its original level, and maintained that for a sum of 65*l.* the highway could be made as commodious for the public as it was before, and they paid a sum of 80*l.* into court as sufficient to satisfy the plaintiffs' claim. On the hypothesis that the defendants were right in the principle adopted by them, the plaintiffs gave evidence that a sum of about 95*l.* would have been required to do the work which the defendants put at 65*l.* On this part of the case I think the defendants' figures are more reliable than the plaintiffs, and I am satisfied that, at all events, the sum of 80*l.* paid into court is sufficient if the defendants are right as to the basis of what work ought to be charged for. The really important dispute, therefore, was what basis was the right one. The plaintiffs relied on two contentions—one of law and one of fact. In law they contended that their proprietary right entitled them to charge the defendants with the cost of restoring the road to its original level. Secondly, in fact, they maintained that the work which they had done in restoring the road to its old level was necessary in order to render the road as commodious for the public as before, especially as regards the method of dealing with the surface water. As to the first contention, I am of opinion that it is not well founded in law. The plaintiffs have, no doubt, a proprietary right in the road by virtue of the 149th section of the Public Health Act 1875 for the purpose of protecting the public in the use of the road. But it is a limited right, and I think it is to be gathered from the comparison of the cases of *Coverdale* v. *Charlton* (40 L. T. Rep. 88; 4 Q. B. Div. 104), the *Tunbridge Wells Corporation* v. *Baird* (74 L. T. Rep. 385); (1896) A. C. 434), and *Attorney-General* v. *Conduit Colliery Company* (71 L. T. Rep. 771; (1895) 1 Q. B. 301), that that right is confined to what is necessary to maintain the road as a highway. Further, the 27th section of the Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77), passed to remove doubts created by the case of *Coverdale* v. *Charlton* (*ubi sup.*), shows that the mines under the highway remained the property of the mine owners, but so that, in working them, no damage is done to the road. It is not necessary to consider whether an injunction could be obtained in the case of apprehended subsidence of the road from its original level, because here the cause of action is admitted, and the only question is one of damages, and so long as the road is made as commodious as before *qua* road, I think no further damage can be claimed by the plaintiffs against the defendants, as the action is by the plaintiffs alone. No case was cited in support of the plaintiffs' contention, and, indeed, the case of *Attorney-General* v. *Conduit Colliery Company* (*ubi sup.*) seems to me to be against it, and to point to the conclusion that in such a case the damages would be only nominal. In the case of a private road, where the proprietary right is unlimited, even there I do not think a right to claim the costs of restoring a private road sunk by mining operations to its original level can be claimed, though no doubt, besides the cost of making it as commodious as before to the owner, something might be charged for any loss of amenities sustained. Nor do I think it could be claimed, and I think I may say, *à fortiori*, I do not think it could be claimed in the case of a road authority which has the limited proprietary right to which I have referred. On the second point, the question of fact, in view of all the evidence on both sides, I am satisfied that the road could have been made as commodious as before by means of the scheme suggested by the defendants, and that the water difficulty could have been satisfactorily dealt with by the cutting down of the slight hill and the filling up of the slight valley as described in the evidence—those being the two obstacles which, without such cutting down and filling up, would have prevented the flow of the surface water along that road at its sunken level to the same spot to which it was conducted before the subsidence, and which spot remained at the same level as before. It was contended by the plaintiffs that as regards the work which they did and with which they seek to charge the defendants, they were entitled to take into consideration, in deciding what it was prudent for them to do, not only the state of things existing at the date of the writ, but the probability of subsequent workings by the defendants which would have made the defendants' scheme impracticable. I am of opinion therefore that, so far as this action is concerned, the damages must be calculated on the basis of what existed at the time of action brought. *Non constat* that the defendants would work so as to cause further subsidence, nor in fact up to the present time, so far as the evidence goes, has the road at the governing point D on the plan to which the water was conducted before and to which it would have been conducted by the defendants' scheme, sunk so as to affect the mode of getting rid of it from thence. In my opinion, therefore, the sum of 80*l.* paid into court is enough to satisfy the plaintiffs' legitimate claim, and I give judgment for the defendants with costs since the date of the payment into court, the plaintiffs to have the costs up to the time and including the payment into court.

Judgment for the defendants.

Solicitors for the plaintiffs, *Thomas Jones*, town clerk, Wednesbury.

Solicitors for the defendants, *Bower, Cotton, and Bower*, for *Thursfield* and *Messiter*, Wednesbury.

June 1 *and* 2, 1905.

(Before Lord ALVERSTONE, C.J., KENNEDY and RIDLEY, JJ.)

REX *v.* GRAHAM. (*a*)

Coroner—Inquest in prison—Duty of coroner in holding—Death of prisoner caused by wound inflicted before admission to prison—Previous investigation by magistrates on charge of assault—Duty of coroner to hold full inquiry after previous investigation — Coroners Act 1887 (50 & 51 *Vict. c.* 71), *ss.* 3, 4, 6.

When an inquest is held by a coroner in a prison upon the body of a person who has died within the prison, it is the duty and obligation of the coroner to make as full and complete an inquiry touching the death of the deceased as in the case of an ordinary inquest outside the prison; and his duty of making inquiry does not necessarily terminate when the jury have found that no one in the prison is to blame for such death.

If the inquest be upon a prisoner who has died within the prison from the effects of a wound inflicted upon him before his admission to the prison, and if the circumstances under which the wound was inflicted upon the deceased have been previously investigated by magistrates on a charge and cross-charge of assault, and the magistrates have found that the prisoner was the aggressor and was alone to blame and have sentenced him to imprisonment in respect of such assault, the fact of such previous investigation by the magistrates, and their finding that the prisoner was alone to blame for the injury inflicted upon himself, does not exonerate the coroner from the obligation of holding as full an inquiry into the circumstances under which the wound which caused the death of the deceased was inflicted as if no such investigation by the magistrates had taken place.

RULE calling on Mr. John Graham, His Majesty's coroner for the ward of Chester, in the county of Durham, to show cause why an inquest should not be held, either by the coroner or by any other coroner of the county, touching the death of one John James Hutcheon, deceased, and why a writ of *certiorari* should not issue to remove into the High Court all and singular inquisitions taken by or before him by Andrew T. Shepherd, his deputy, at the parish of St. Oswald, in the ward of Chester, on the 24th Jan. 1905, and why the inquisitions and proceedings thereon when returned should not be quashed and set aside.

The rule was moved by the Attorney-General upon the following affidavit made by the Earl of Desart, Solicitor to the Treasury and Director of Public Prosecutions, in the matter of an inquisition taken on the 24th Jan. 1905 before Mr. John Graham, coroner for the ward of Chester, in the county of Durham, by Andrew T. Shepherd, his deputy, upon the body of John James Hutcheon:

1. John James Hutcheon aforesaid died in His Majesty's prison at Durham, where he was undergoing a sentence of two months' imprisonment with hard labour, on the 22nd Jan. 1905.

2. An inquest was held upon the body of the said John James Hutcheon at Durham, on the 24th Jan. 1905, by Andrew Thomas Shepherd, deputy coroner, on behalf of John Graham, His Majesty's coroner for the ward of Chester, in the county of Durham. A copy of the inquisition then taken and of the evidence taken thereon is now produced and shown to me and marked A.

3. The said evidence consists of the deposition of the clerk, two warders, and the doctor of the said prison, and testify that the deceased was received into the said prison, to undergo sentence as above mentioned, on the 23rd Dec. 1904, and that he was then suffering from a wound over his left eye; that on the 2nd Jan. 1905 the said wound showed signs of suppuration, and, finally, on the 20th Jan. the deceased became helpless, and died at 3.15 a.m. on the 22nd Jan. The result of a post-mortem examination went to show that the immediate cause of death was paralysis following upon injury to skull, which had set up a large abscess in the brain.

4. The finding of the jury upon the said inquisition was that the said John J. Hutcheon died from paralysis following upon some injury to the skull which had set up a large abscess in the brain, such injury having been occasioned before his admission to the said prison, but there was no finding as to the manner in which the deceased came by the injury which was found to have caused his death as aforesaid, nor was any evidence whatever on this point taken before the deputy coroner.

5. After the taking of the said inquisition His Majesty's Principal Secretary of State for the Home Department caused inquiry to be made into the circumstances under which the said injury had been received by the deceased, and in response to such inquiries, as I am informed and believe, the several statements were obtained which are now produced and shown to me and marked B.

6. From the said statements it appears as follows: The deceased resided at Sunderland. At about 11 p.m. on the 16th Dec. 1904 the wife of the deceased discovered one Gilbert Monarch committing an indecent assault upon the son of herself and the deceased, aged seven years. The deceased subsequently arrived and had a dispute with Monarch. During the course of the subsequent struggle one Mary Kish, with whom Monarch lodged, and who had hitherto taken no part in the dispute, fetched a metal door knocker and struck the deceased upon the left side of the forehead with it, causing blood to flow freely, and dazing the deceased. Monarch then struck him on the head with a metal fire-grate. Subsequently the deceased revived and struck the said Kish on the head with a poker.

7. On the 22nd Dec. summonses were issued against the deceased on the complaint of Kish and Monarch respectively, and against Kish on the complaint of the deceased for assault. The summons against Kish was dismissed, while upon each of the summonses against him the deceased was committed to Durham Prison for one month's imprisonment with hard labour, two months in all. On admission to the prison the deceased alleged that the wound on his forehead from which he was suffering was caused by a blow from a piece of old iron.

8. It appears from the said statements to be probable that the injury from which the deceased died was caused by a blow from a metal instrument not inflicted in self-defence, and it is important, in the interests of public justice, that another inquest should be held upon the body of the deceased at which the persons making the said statements and others could be compelled to attend and give evidence with a view to its being ascertained whether the wound of which the deceased died was consistent with its having been inflicted in the manner alleged, and by whom it was inflicted, and if such wound was inflicted by any person in self-defence or otherwise.

9. I make this application under the authority of His Majesty's Attorney-General.

The affidavit of the deputy coroner (Mr. Andrew Thomas Shepherd), who was a solicitor of some thirty years' standing, and who for the last twenty-three years had acted as deputy

(*a*) Reported by W. W. OTR, Esq., Barrister-at-Law.

coroner for Mr. Graham for the ward of Chester, in the county of Durham, sworn on the 16th May, was as follows:—

1. On the 24th Jan. 1905 I held an inquest, as the deputy of the coroner, at His Majesty's prison at Durham upon the body of the said John J. Hutcheon, who had died within the prison whilst detained therein as a prisoner under two warrants of commitment on summary conviction for assaults committed by him within the county borough of Sunderland by certain justices of the peace having jurisdiction therein and acting in and for the county borough (distant about fifteen miles from the prison), and I say that I then lawfully acted as such deputy coroner, inasmuch as the said John Graham was unable to act as coroner in person, because he was then confined to his bed suffering from severe injuries sustained by him in a carriage accident, which occurred on the 3rd Jan. 1905, and from which he did not recover until the 6th March 1905.

2. I have read the affidavit of the Earl of Desart, Solicitor for the Affairs of His Majesty's Treasury and Director of Public Prosecutions, sworn on the 15th April 1905, and I do not propose to controvert any of the facts therein set forth.

3. At the said inquest the jurors and myself were satisfied as to the exact cause of death of the said John J. Hutcheon, relying on the evidence of Dr. Gilbert (surgeon to the said prison), who had, upon my order as deputy coroner, made a careful post-mortem examination of the body of the said John J. Hutcheon, and we believed that any injury he had received had been inflicted prior to his reception into the said prison, and therefore no person connected with the said prison was to be held accountable for his death.

4. It appeared to me that no evidence was then obtainable to show precisely how the said John J. Hutcheon had sustained his injuries, but it was suggested that the same might have been received in chance-medley during the assaults in respect of which the justices had convicted the said John J. Hutcheon and committed him to prison as the only person in fault, and that he was the aggressor in the commission of the said assaults (persons he had charged with assault on a cross-summons having, as I have since learnt, been dismissed by the justices); and, there being no allegation that any person or persons was or were liable to be dealt with for either murder or manslaughter, neither the jury nor myself considered it necessary in the interests of justice to do more than return the verdict we did, which was practically an open verdict, although setting out the exact cause of death.

5. I desire to point out that a verdict of murder or manslaughter by a coroner and his jury is not final; it is merely a preliminary finding equivalent to an indictment or a true bill found by a grand jury at assizes after a preliminary hearing by justices of the peace, upon which an accused person may be put upon his trial at the assizes, and in practice there is frequently a double preliminary inquiry—namely, by a coroner and his jury so far as evidence enables them, and then by justices of the peace, but it is not at all unusual, where there is an absence of satisfactory evidence obtainable at the coroner's inquest charging any particular person or persons with being criminally culpable, for an open verdict to be returned (the exact cause of death having been first properly ascertained by a post-mortem examination of the body), leaving the justices and the chief constable and police officers at a subsequent period when sufficient evidence may be obtained to follow up the case and prosecute and commit for trial in the ordinary way the person or persons then found to be culpable, and as a matter of course any verdict which a coroner and his jury might have previously returned would not operate as a bar to such subsequent proceedings by the justices and police. Therefore in the case now in question I submit (with all due deference) that, so far as the evidence before us, when the inquest was held, warranted, we returned a proper and consistent verdict sufficient for the purposes of the inquest showing conclusively the cause of death. And I further submit that, if evidence could be subsequently obtained upon which any person or persons could be reasonably charged with murder or manslaughter, the justices at Sunderland (within whose jurisdiction the assaults took place) could, if they thought fit, exercise their powers of hearing and committal, and would not require any assistance from my inquisition and depositions beyond the evidence of Dr. Gilbert as to the exact cause of death which he ascertained in making the post-mortem examination had ordered for my inquest.

6. On the grounds herein set forth I respectfully submit that the rule obtained should be dismissed.

A further affidavit was made by the Earl of Desart on the 25th May as follows:

Referring to my affidavit sworn on the 15th April, I wish to add that I was on the 29th March 1905 informed by Mr. Charles W. Barker, the clerk to the justices, by letter that on the hearing of the summonses for assault referred to in my affidavit no notes were taken of the evidence given. I am informed by the chief constable of Sunderland that the only witnesses called before the justices on the hearing of the summonses were the deceased John James Hutcheon and his wife on the one side, and Mary Kish and Gilbert Monarch on the other.

It appeared that the proceedings in the case were taken by the direction of the Attorney-General in consequence of a letter sent by the widow of the deceased to the Home Office.

The Coroners Act 1887 (50 & 51 Vict. c. 71) provides (under the heading "Inquest"):

Sect. 3 (1). Where a coroner is informed that the dead body of a person is lying within his jurisdiction, and there is reasonable cause to suspect that such person has died either a violent or an unnatural death, or has died a sudden death of which the cause is unknown, or that such person has died in prison, or in such place or under such circumstances as to require an inquest in pursuance of any Act, the coroner, whether the cause of death arose within his jurisdiction or not, shall, as soon as practicable, issue his warrant for summoning not less than twelve nor more than twenty-three good and lawful men to appear before him at a specified time and place, there to inquire as jurors touching the death of such person as aforesaid. (2) Where an inquest is held on the body of a prisoner who dies within a prison, an officer of the prison or a prisoner therein or a person engaged in any sort of trade or dealing with the prison shall not be a juror on such inquest. (3) When not less than twelve jurors are assembled they shall be sworn by or before the coroner diligently to inquire touching the death of the person on whose body the inquest is about to be held, and a true verdict to give according to the evidence.

Sect. 4 (1).. The coroner and jury shall, at the first sitting of the inquest, view the body, and the coroner shall examine on oath touching the death all persons who tender their evidence respecting the facts and all persons having knowledge of the facts whom he thinks it expedient to examine. (2) It shall be the duty of the coroner in a case of murder or manslaughter to put into writing the statement on oath of those who know the facts and circumstances of the case, or so much of such statement as is material, and any such deposition shall be signed by the witness and also by the coroner. (3) After viewing the body and hearing the evidence the jury shall give their verdict, and certify it by an inquisition in writing, setting forth, so far as such particulars have been proved to them, who the deceased was, and how,

when, and where the deceased came by his death, and, if he came by his death by murder or manslaughter, the persons, if any, whom the jury find to have been guilty of such murder or manslaughter, or of being accessories before the fact to such murder.

Sect. 6 (1). Where Her Majesty's High Court of Justice, upon application made by or under the authority of the Attorney-General, is satisfied either—(*a*) that a coroner refuses or neglects to hold an inquest which ought to be held; or (*b*) where an inquest has been held by a coroner that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, or otherwise, it is necessary or desirable in the interests of justice that another inquest should be held, the court may order an inquest to be held touching the said death, and may, if the court think it just, order the said coroner to pay such costs of and incidental to the application as to the court may seem just, and where an inquest has been already held may quash the inquisition on that inquest.

By sect. 48 of the Prison Act 1865 (28 & 29 Vict. c. 126) an inquest must be held upon the body of a prisoner who dies in prison. It provides:

It shall be the duty of the coroner having jurisdiction in the place to which the prison belongs to hold an inquest on the body of every prisoner who may die within the prison. Where it is practicable, one clear day shall intervene between the day of the death and the day of the holding of the inquest; and in no case shall any officer of the prison, or any prisoner confined in the prison, be a juror on such inquest.

Mr. Graham, in person, showed cause against the rule, and contended that his deputy had discharged all the duty that was incumbent upon him in finding a verdict as to the cause of the man's death; that his deputy had no knowledge or information when he went to hold the inquest in the prison that the case was anything more than the ordinary case of a prisoner coming from a very rough part of Sunderland, and there was nothing in the information supplied to him to lead him to believe that this was anything more than an ordinary assault in a drunken fight which had been fully inquired into by the magistrates who had committed the deceased man under two convictions for assault; that if there had been no previous inquiry by the magistrates he would have considered it his duty to have inquired into the charge and have taken the responsibility of the whole proceedings; that the whole matter had been inquired into by the magistrates, and they had arrived at the conclusion that the deceased man was in fault and was the aggressor; that if there is a death in prison there must be an inquest, and in such case it is most important to find whether any of the prison officials or other person in the prison was to blame, which was done in this case. There was no evidence before his deputy that anyone was criminally responsible, and, if magistrates of presumed ability have inquired into an assault and have arrived at a certain conclusion, there is no reason, unless there is strong evidence to the contrary, why the machinery of the coroner's court should be put into motion to initiate proceedings which the magistrates themselves would be perfectly capable of doing. [He dealt with the facts of the case, and submitted that it was not a case for further inquiry by the coroner].

Sir *Robert Finlay* (A.-G.) (*H. Sutton* with him), for the Crown, in support of the rule.—This is not a matter of any attack being made either upon Mr. Graham or his deputy, and it is said that a communication ought to have been made to Mr. Graham before applying to the court, but there was no use in making any such communication, as it is simple law that a coroner cannot hold a second inquest except under order of the court. The case raises two questions which are of the greatest possible importance and deserve the utmost consideration—namely, whether when a death takes place in prison, the coroner's duty is simply to inquire if the prison officials are to blame; and, secondly, if an assault has taken place and the magistrates have inquired into it, and death afterwards ensues, whether the coroner is thereby exonerated from holding as full an inquiry as he would have done if no magistrates' investigation had been made. The verdict of the jury ends in these words: "Such injury having been caused before his admission to the said prison." That finding may be a proper finding, but it would seem to imply that a further inquiry as to the circumstances could be dispensed with. The verdict of the jury ought to go on and deal with the case just as in the case of a death out of prison. It seems to have been suggested that the primary object of an inquest in prison is to ascertain whether the death had anything to do with an injury that happened in prison; that is one most important object. But it ought not to be even suggested that when the death takes place in prison the jury ought to stop at finding that the injury was sustained before the man came into prison. They must go on and ascertain the circumstances as in the case of any other death. [Lord ALVERSTONE, C.J.—I understood Mr. Graham to say that if there had not been a magisterial inquiry he would have thought it his duty to hold a further inquiry. Mr. Graham.—Yes. I have not contended, and do not in the least contend, that an inquest in prison is different from an inquest out of prison, or that the inquiry ought to stop when it is found that none of the prison officials is to blame, and if there had been no magisterial inquiry I should have thought it my duty to have made a further inquiry. It was the fact of the magisterial inquiry having taken place that disarmed my deputy.] That admission that an inquest touching a death in prison is to be conducted in precisely the same way as in the case of any other inquest removes the first point, and leaves the question whether the fact of an inquiry having taken place by the magistrates on a charge of assault relieves the coroner from the duty of inquiry into the matter. It is submitted that the fact of the previous inquiry having taken place is no reason whatever, when death has ensued, why the duty of the coroner is not to inquire how the man came by his death. That is laid down in terms in the Coroners Act itself, and it is simply a compendious way of stating the duty of the coroner as given in Hale's Pleas of the Crown (vol. 2 p. 60), where the older authorities on the question are summarised. The contention that the circumstance of a magisterial inquiry into an assault having taken place exonerates the coroner and his jury from inquiring just as fully into the circumstances of death, if death afterwards supervenes, as if such summons for assault had not been dealt with is not sound. The inquiry into the assault is one thing, but when death afterwards

supervenes as the result of an injury received during the assault, then the inquiry into the causes of death is another thing altogether. The two inquiries are separate and distinct. The case assumes another and a much graver aspect when death supervenes, and it would be most mischievous if the opinion were to prevail that because a summons for assault has been investigated in a summary way by the magistrates, the people coming from a disreputable quarter of the town, that should preclude the performance of the duty by the coroner with regard to the inquiry as to the cause of death. The duty of the coroner in holding these inquests is set out in sects. 3 and 4 of the Coroners Act 1887. The jury are "diligently to inquire touching the death of the person" (sect. 3, sub-sect. 3), and they are to certify by their verdict "who the deceased was, and how, when, and where the deceased came by his death" (sect. 4, sub-sect. 3). In this case the jury did not do that; they merely found that death resulted from paralysis following an injury to the skull, and that such injury took place before his admission to prison; they stopped short and left undischarged the most material part of their duty because it was said that there had been an inquiry before the magistrates. Moreover, the Director of Public Prosecutions is entitled, in the interests of justice, to the assistance of an inquiry which the coroner is bound to hold. [He referred to and read Hale's Pleas of the Crown (vol. 2, pp. 60, 61, 62), as to the duty of coroners, and also to the statute 4 Edw. I, passed in the year 1276 and entitled De Officio Coronatoris, which was an affirmation of the common law as to such duties, and submitted that, on the facts of the case as disclosed in the statements made in the exhibits to the affidavits, there had not been a sufficient inquiry, and that there ought to be a further inquiry.]

Lord ALVERSTONE, C.J.—I have, not without hesitation, come to the conclusion that this rule must be made absolute; but I wish to say that I do not think the slightest reflection of any sort or kind rests either upon Mr. Graham or upon his deputy, Mr. Shepherd. I think that the real ground for making this rule absolute is that which was pressed by the learned Attorney-General after cause had been shown against the rule, as to the extreme importance of maintaining the duty of the coroner. The duty of the coroner under the statute is to inquire fully into the cause of death. The Attorney-General in his argument has not made any reflection at all upon Mr. Graham's conduct, and I must say that Mr. Graham has behaved with extreme fairness in coming forward and protecting his deputy, and I wish to repeat that I think that no reflection rests either upon Mr. Graham or Mr. Shepherd. They thought they were doing their duty, and they thought they had done it; and, for reasons which I will refer to, they were really at the time almost justified in that position. It is to be observed when we look at the documents which were before the coroner when the inquest was held that there was the police report, which, practically speaking, was colourless so far as telling the coroner anything special about the matter. It referred to the death in the prison, and, as pointed out by both Mr. Graham and the Attorney-General, the necessity of an inquest in the case of a death in a prison arises from the fact that a person has died in prison. It is for the general protection of those who would not have protection unless there be an inquest. Therefore it is not optional, so to speak, for the coroner to hold an inquest, but he is bound to hold an inquest whenever there is a death in a prison. The medical notice given to the coroner stated that there was a wound on the left-hand side of the forehead, which was present on reception in the prison and had originated before reception on the 23rd Dec., and that paralysis was caused by some brain lesion and heart failure. The deputy coroner, acting, no doubt, on the instructions of Mr. Graham, concurred with Mr. Gilbert that there should be a post-mortem examination. On the other depositions it appeared that the deceased had been in prison from about the 24th Dec. until the 22nd Jan. Then the result of the post-mortem examination was: "I have made a post-mortem examination of the body, and have ascertained that the actual and precise cause of death was paralysis following upon injury to skull which had set up a large abscess in the brain." In the light of what we now know, that probably was a matter which might have led the coroner to make a further inquiry, but, taken by itself, it does not follow as a matter of absolute necessity that that might not have been a sufficient description, having regard to the fact that the man had been in prison for a whole month. But there is another matter which, I think, rather misled Mr. Shepherd and Mr. Graham—namely, that some statement of the medical officer stated that the man had made no complaint. Mr. Graham rather complained and asked for the authority which justified a statement made by Mr. Gilbert, which is contained in the affidavit of Lord Desart, that a complaint had been made. In his report of the 23rd March, Mr. Gilbert does say that the man had complained when he entered the prison—"Prisoner on his admission was suffering from a wound which he said was caused by a blow from a piece of old iron." So far as the coroner's duty is concerned, it is not unimportant to observe that in the statement before him there was no suggestion of any complaint made by the prisoner. The inquest proceeds, and the verdict was that the deceased "John James Hutcheon, a prisoner in His Majesty's prison at Durham, died from paralysis following upon some injury to the skull which had set up a large abscess in the brain, such injury having been occasioned before his admission to the said prison." Whatever may be my view as to what the duty of the coroner is, one cannot but think that at that time, having regard to the fact that it was an inquest in a prison, and that the man had been there for weeks, it might well have occurred to a gentleman perfectly competent and exercising his duty that sufficient inquiry had been made. We have been told that no communication was made to Mr. Graham before this rule was moved. I think, to a gentleman in the position of the coroner, there being no suggestion that he has ever been unwilling to obey any proper instructions, it is rather unfortunate that, when there is going out an adverse motion against him, the circumstances were not brought to his knowledge in the first instance, and that he was not asked for some explanation. That does not make any

difference, in my opinion, as to what order we ought to make in this case, because I think, after cause has been shown against this rule, that there ought to be further inquiry. I cannot, however, help feeling that, when a rule is going to be moved against a public official, some communication ought to be made to him, and I am sure the Attorney-General will agree with me as to that. I further wish to say that I demur altogether to the suggestion that the persons who have to take the responsibility of investigating statements and directing a prosecution have any right to have the assistance of a preliminary inquiry by the coroner in order that they may make up their minds whether they ought to prosecute or not. With that part of the argument of the Attorney-General I must say I cannot agree. Assuming that the inquest has been properly conducted, even though some further information comes to light, I think the police authorities who are responsible for prosecutions must test the evidence put before them for themselves, and take out such summonses as they think right; and I think that, from the point of view of assisting them in making up their own minds, they cannot call upon the coroner to make the preliminary inquiry, which it may be necessary for them to make in the best way they can before they will determine whether to lay a charge or not. I have said this much because I am particularly anxious to point out that in the original conduct of this inquest I do not think there was anything to which exception could be taken, and that upon some of the grounds upon which the rule was urged I am not myself prepared to agree. Putting aside all particular incidents and arguments in this case, I now come to that which is the real point in the case. Mr. Graham has shown cause against this rule, and has shown cause for saying that there ought to be no further inquiry. That brings us to the point which the learned Attorney-General pressed upon us, upon which he founded the public importance of this question as to what the duty of the coroner is. I cannot help thinking that if we take the affidavit of the deputy coroner, he did to a certain extent proceed upon the theory which Mr. Graham rather urged in the beginning of his argument, that inquests in prison are to a certain extent different from other inquests, because their object, or one of their objects, is to show that no harm had come to the man while in prison, and that nothing more had been done to the man while in prison and away from public gaze. I entirely agree that that is one of the objects, but, in my opinion, it cannot be properly contended that the fact that the inquest takes place in prison exonerates the coroner from the obligation and duty of making a full inquiry. Without imputing anything, even an error of judgment, to the deputy coroner, I cannot help thinking that he did approach the question from the point of view that it was not necessary for him to do more than inquire into what had gone on in the prison. That has been disclaimed in court, and Mr. Graham has said distinctly that he does not maintain that the coroner is in any way excused from inquiring into a case in which the matter ought to be inquired into; but at the same time he has shown cause against the rule, and therefore it is contended that under the circumstances of this case no further inquiry ought to be ordered. Mr. Shepherd says in his affidavit that at the inquest he and the jurors were satisfied as to the exact cause of death, and he refers to the post-mortem examination, and then he says: "We believed that any injury he had received had been inflicted prior to his reception into the said prison, and therefore no person connected with the said prison was to be held accountable for his death." As to that part of it, I think that important object of the inquest was fully attained. Then in his affidavit he goes on to say: "It appeared to me that no evidence was then obtainable to show precisely how the said John James Hutcheon had sustained his injuries, but it was suggested that the same might have been received in chance-medley during the assaults, in respect of which the justices had convicted the said John J. Hutcheon and committed him to prison as the only person in fault, and that he was the aggressor in the commission of the said assaults; and, there being no allegation that any person or persons was or were liable to be dealt with for either murder or manslaughter, neither said jury nor myself considered it necessary in the interests of justice to do more than return the verdict we did." I think, with very great respect to the deputy coroner, that that allegation discloses that he has not quite fully grasped the position. It is clear that there was either a suggestion or statement made before him of an affray and a struggle, and it also appears that there had been some inquiry before the justices; but he does not seem to have had before him—in fact, he could not have had before him if the learned Attorney-General is rightly instructed—any detailed information as to what was proved before the justices, for no statement seems to have been made of the depositions. It did therefore come to his knowledge that there had been some affray or a struggle in which the injury to the skull was suggested as having been received. In my opinion, under those circumstances, the coroner does not fully discharge his duty by stopping there and making no further inquiry. If he cannot obtain evidence, and if it turns out that there is really no substantial matter which can be brought before the coroner, of course a proper verdict can be returned. But I do not think that the deputy coroner quite realised what his duties were in his position as coroner. I cannot help feeling that not unlikely the facts of this being an inquest in prison and of the injuries having occurred a month before and outside the prison to a large extent may have influenced his mind in abstaining from any further inquiry. Of course the matter of the low neighbourhood in which the affray took place and of its distance away from the prison are not matters which can in any way relieve the coroner from his responsibility; from one point of view they might increase it. That being my view as to what the position was, I need only shortly refer to what the obligation recognised by the statute is. That obligation is many centuries old, as appears from Hale's Pleas of the Crown and other very ancient books. The Coroners Act of 1887 provides in sect. 3: "Where a coroner is informed that the dead body of a person is lying within his jurisdiction . . . or that such person has died in prison . . . the coroner . . . shall as soon as practicable issue his warrant" for summoning a jury, and,

after viewing the body, the jurors shall give their verdict and certify it, "so far as such particulars have been proved to them, who the deceased was, and how, when, and where the deceased came by his death, and, if he came by his death by murder or manslaughter, the persons, if any, whom the jury find to have been guilty of such murder or manslaughter, or of being accessories before the fact to such murder": (sect. 4, sub-sect. 3). Those words "how, when, and where the deceased came by his death" do not, in my judgment, mean, for the purpose of dealing with the duty of a coroner, merely the actual cause of death as certified by a medical man. But they may mean, and I think in this case they would mean, an inquiry of how, when, and where the injury to the skull, such as it was, was received. I think it is no excuse, rendering further inquiry unnecessary, that the injury has taken place out of prison. That being my view of the coroner's duty, which I think is confirmed by the old authorities read by the Attorney-General and by others which I need not now refer to, we have only to consider our duty under sect. 6 of the Act. It provides: "Where Her Majesty's High Court of Justice, upon application made by or under the authority of the Attorney-General"—therefore it is a very important matter, because the application is to be made by the Attorney-General — "is satisfied . . . (*b*) where an inquest has been held by a coroner that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, or otherwise, it is necessary or desirable, in the interests of justice, that another inquest should be held, the court may order an inquest to be held." I desire to point out, in furtherance of what I have said as to the obligation on public authorities to give notice before a rule of this kind is moved, that there are many cases under this section in which the conduct of a coroner as coroner might very seriously be called into question, and therefore I think, on the common principles of justice, he should have notice given to him, and he should be asked for or should have some opportunity of explanation if a rule is going to be moved, so that the full facts may be before the learned Attorney-General before he makes the motion. But once we get it that there has been insufficiency of inquiry, then I think the Attorney-General has a duty to bring such a matter before the court, and, taking the view that I do that there was a duty at the time of the inquest before the deputy coroner to go further than the mere inquiry as to the direct cause of the abscess, being the wound, and to inquire how the wound was caused, in my opinion there was an insufficiency of inquiry. I was pressed in the course of the Attorney-General's argument by the words "necessary or desirable in the interests of justice." I say again that if that was only for the purpose of enabling the police authorities—the prosecuting authorities—to make up their mind, I should be very slow to say that it was sufficient to order a fresh inquiry. I cannot conceive that that responsibility ought to be, even indirectly, shifted to the coroner. But I agree with the learned Attorney-General that there is a public duty of the coroner, which is part of the law of this land, that there should be inquiry and a sufficient inquiry into the cause of the death, whether there is going to be a prosecution or not. It is in the interests of those who might rest under suspicion if there was no sufficient inquiry that we must make the rule absolute, but it is not a case for costs, and the Attorney-General does not ask for them. Mr. Graham has contended that no further inquiry is necessary; in that, according to the view I take of the case, we differ, and we make this rule absolute on public grounds which the learned Attorney-General has expressed, and not as in any way making the slightest reflection, even of an error in judgment, upon these gentlemen under the circumstances which they had to face.

KENNEDY, J.—I am not prepared to dissent from the judgment which has been given, and, although I agree that that is the right course to pursue which my Lord has so clearly laid down as his view, I fully share the hesitation which he has expressed in coming to that conclusion, and very shortly I wish to say why. The duty of the coroner, which is not in dispute, and which was brought before us with every research by the Attorney-General, is now laid down for us in the statute—sect. 4 of the Coroners Act 1887. It is there said that there is to be at the first sitting a view of the body by the coroner and the jury, "and the coroner shall examine on oath touching the death all persons who tender their evidence respecting the facts, and all persons having knowledge of the facts whom he thinks it expedient to examine." In a case of this kind a coroner may, by the terms of that very section, be under a duty through his proper officer, if there be one, or through the police, to take care that witnesses are summoned to attend. There can be no question not only that that is so, but that it ought to be done where there is anything obscure or doubtful about the facts, and, although persons do not come forward to tender their evidence, public justice may require that there should be a fuller inquiry than could take place without such active steps being taken by the coroner. But it seems to me that the intention of the section in the words "whom he thinks it expedient to examine" was to invest the coroner with a considerable amount of discretion, a discretion to be exercised with care, and a discretion which in any question of doubt ought always to be exercised in favour of taking trouble to have a public inquiry. What has troubled me here is this: We have to deal with this concrete case. Was there anything obscure or doubtful about this matter at all? A man dies in prison. He had been there and under treatment for a month all but a day. He had come there with an obvious wound on his head, which was from the first the subject of medical inquiry and afterwards of medical care, and he dies from the consequences of that wound. Therefore there was nothing hidden or obscure or doubtful about his condition when he arrived as to the cause of death, or that in some form or other that would be due to violence. Unquestionably, it being an act of violence, it would otherwise have required some elucidation; but the man came notoriously into the prison under a conviction for assault, entailing a punishment of two months' imprisonment at the hands of the magistrates who had heard him and had heard the woman who has set the Attorney-General and the Home Office in motion in this case after this inquest, and they had heard a man named

Monarch and a woman named Kish. It is now suggested by the information which has been brought before us by the Director of Public Prosecutions in the statements which are made exhibits to his affidavits that it was the woman Kish whose blow with some metal knocker had caused this man's death. That matter had been investigated by the magistrates not only on the charge against the prisoner, but on the countercharge by him against Kish for violence to him. The magistrates convicted the deceased, having heard the man and having heard the woman who is now the source of this new proceeding, and, with regard to her, obviously from other facts that appear before us on the depositions they did not treat her as a person worthy of credit, after investigation through the police. On the hearing of the case they had evidently disbelieved this woman, because they had in the result found this man guilty of a substantial assault, and, hurt though he was, they punished him with two months' hard labour. As regards the case of Monarch, the deceased had been tried and found guilty, and in the case of Kish he had pleaded guilty to the charge. On these particular facts I speak with great diffidence, knowing how carefully these matters are considered by those who are responsible in a public office for motions like the present. I am not prepared to differ from my Lord on the ground which he has put so clearly and so well that I need not repeat it. But upon those facts—nobody coming before the deputy coroner and tendering himself as a witness—it was at least doubtful whether anything would be gained by bringing there under subpœna the woman who might have come there voluntarily instead of writing to the Home Office afterwards, to give her evidence, but who did not do so; or by calling the other persons who could give evidence, one of whom, Monarch, had successfully persuaded a lawful tribunal investigating this matter in a court of law that he was not guilty of any assault, and the other (Kish) with regard to whom the deceased practically admitted that he was to blame. I bow to the opinion of those who may see behind these matters more than appears to me, because they act with great experience, and with the greatest care and sense of responsibility; but I do feel for this coroner in this matter that when no witness came forward, and the facts had been investigated to that extent, that it is going quite as far as I should be prepared to go to say that there was something here which in the interests of justice required further investigation. While it is perfectly true, as the Attorney-General has said, that the death of a person in such a case is the most serious of all consequences and is the most to be investigated, I am not quite sure that that is sound with regard to the question we have to consider in this case, because in point of law the responsibility for causing the death was the responsibility which would also have made the doer of the act a criminal for the assault. Unless the act which caused the death was criminal, the fact that death resulted would not make it criminal. The magistrates seem to have thought that the assault was received by the deceased from a person who was defending himself, or, at any rate, that it was not proved to have been otherwise; and if the assault which caused the man's death was done in the way in which the magistrates judged not criminal, then it would not make it any the more criminal that unhappily that blow resulted in death. But, as my Lord has said, there is no doubt that the important thing is to have absolute publicity, and to have all things sifted, however unlikely it may be that something may be gained by the sifting. There is no doubt also that in this case there is no finding by the jury how this blow was caused, and in most cases it is absolutely necessary in the interests of public justice that that should be done. Therefore, as that was not done in this case, I am not prepared to dissent from the view that has been taken, notwithstanding the circumstances, which, for the reasons I have given, I thought I was bound to state in regard to a public official who has laborious work to do, who comes here to defend himself without notice, and who has had certain facts before him certainly not unimportant. The great thing is to have publicity, and to prevent by any possible chance there being a miscarriage of justice and the person who has committed a crime not being brought to justice; and the only effect of another inquiry will be to further those interests. Therefore for those reasons I assent to my Lord's view of the case.

RIDLEY, J.—I agree with the judgment of my Lord. I think he has clearly expressed what is the ancient and what is also the modern duty of a coroner, and it is not necessary to repeat anything upon that point. I wish merely to say this, that it was not proper in ancient days, nor is it now in my judgment, that the coroner should cease inquiry merely on having arrived at a conclusion that some injury has been inflicted on the deceased. I am speaking of the general rule. He must inquire, as a rule, how that injury came to be inflicted. It is now conceded by all that that is his duty in general, and more particularly it applies to the cases where there has been a death in a prison, because there seems at one time to have been a misapprehension, to some extent at all events, as to that, and it seems to have been thought that, if you once can arrive at the conclusion that no one in the gaol is responsible for the death, there is an end of the matter. Mr. Graham has told us that he does not now and never has really entertained that view. I happen to have seen something of this matter the other day in looking through the Coroners' Rolls which were published by the Selden Society. I find that in the time of Edward II. the coroners for Northamptonshire were required to inquire into the case of several deaths which had occurred in the parish of Northampton in the reign of Edward II. Several of the prisoners were found to have died from ill-treatment in prison, but there was one who had died from an injury inflicted upon him before he arrived in prison. The coroner found and reported that that was the fact, and he went on to say that this person, who had committed a burglary and was being taken into custody for the burglary, resisted apprehension and was struck by one of the constables or bailiffs in the forehead with a fork, which was the injury which caused his death, and therefore no felony. Perhaps it is hardly worth quoting that as an authority, because it is here conceded that the duty of the coroner does not terminate merely because he has found that no one in the prison is to blame. That case, however, is singularly

like the present one, and I therefore thought that briefly quoted it might assist the position which it is necessary for us to make clear in the interests of the public. My brother Kennedy has referred to the inquiry that took place before the magistrates in regard to this matter, in the course of which the deceased man was found to have committed an assault and was sentenced to imprisonment. With great submission to what he has said, I think first of all that we ought not to allow the particular facts upon which any particular case has arisen to influence our opinion upon the general principle of law; but in this present case, if we are to hold to principle, I am not able to see how it should necessarily follow from the fact that the justices convicted the deceased man of assault that therefore this injury was not inflicted by Kish. If there was a fight, which it appears there was, there were mutual blows, which is the conclusion at which I arrive, and, if there was a fight and mutual blows in the course of which it happened that Kish inflicted this injury with the knocker from which the man died, it would be a case in which—technically or not, deserving of punishment or not—it would seem to me that a case of manslaughter would be established upon which it would be proper to go to a jury. I do not say that that would be the result of it, because very likely it might turn out otherwise. It is not possible to say; but, if it is open to that reading of the facts, I cannot quite follow the coroner in thinking that the inquiry before the magistrates can be held to be conclusive of that matter. However, I wish to say that the proper view as regards that point, if we regard that subject, is to say that no great importance should be given to it in view of the fact that we are asked on principle as to what is the duty of a coroner. With the rest of the remarks that have been made I entirely agree.

Rule absolute, without costs. Inquisition quashed and order for a further inquiry.

Solicitor for the Crown, *Solicitor to the Treasury.*

Thursday, Aug. 3, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

HARGREAVES (app.) *v.* BALDWIN (resp.). (*a*)

Motor-car—Driver—Information for driving "in a manner dangerous to the public"—Evidence of excessive speed—Admissibility of evidence upon charge of driving "in a manner dangerous to the public"—Motor Car Act 1903 (3 *Edw.* 7, *c.* 36), *s.* 1, *sub.-s.* 1.

Upon the hearing of an information under sect. 1, *sub-sect.* 1, *of the Motor Car Act* 1903, *against the driver of a motor-car for having driven the motor-car on a public highway "in a manner which was dangerous to the public," evidence of the speed at which the motor-car was driven is admissible and may be taken into consideration by the justices, although the sub-section makes it a separate and distinct offence for a person to drive a motor-car on a public highway "at a speed which is dangerous to the public."*

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

Rex *v.* Wells (91 *L. T. Rep.* 98) *explained and distinguished.*

CASE stated by the Court of Quarter Sessions for the county of Bedford on an appeal by the appellant Hargreaves, of Shinfield-grove, Reading, from a conviction by the justices sitting at a court of summary jurisdiction, at Biggleswade, in the county of Bedford, on the 20th July 1904, for that he the said Hargreaves had, on the 5th July 1904, driven a certain motor-car on a certain public highway there situate, called Potton-road, in a manner which was dangerous to the public, contrary to the provisions of sect. 1 of the Motor Car Act 1903 (3 Edw. 7. c. 36), in respect whereof the justices imposed a fine of 5*l.* upon the defendant, and ordered that he should pay 19*s.* 6*d.* costs.

The appeal came on for hearing at the general quarter sessions of the peace held at Bedford on the 2nd Nov. 1904, when, upon hearing counsel for both sides, the court dismissed the appeal with costs, but on the application of the appellant they consented to state this case.

The following facts were proved in evidence before the court:—

Upon the day in question, the 5th July 1904, about 5.45 in the afternoon, one Major Sharp was riding a bicycle on the Potton-road, between Sandy and Potton, in the direction of Potton, Bedfordshire, in company with his brother Richard Sharp.

Major Sharp was riding thirty or forty yards ahead of his brother; about fifty yards behind his brother a cyclist named Hull was also riding in the same direction. Immediately in front of Major Sharp a cart, driven by one Giddings, was proceeding at a walking pace on the left-hand side of the road and in the same direction.

At a point in the road known as Deepdale the appellant, in a motor-car of 25 horse-power, proceeding also in the direction of Potton, at a speed of not less than twenty miles per hour, overtook and passed without mishap, first the cyclist Hull, and then the cyclist Richard Sharp, and then came up to Major Sharp. At the time the appellant came up to Major Sharp he (Major Sharp) was on his off-side of the road, preparing to pass the cart then in front of him as aforesaid. In consequence of the speed at which the appellant's motor-car was then being driven, and of the appellant's neglecting to slow up so as to permit Major Sharp to pass the cart and get in front of it, Major Sharp was compelled to either place himself between the cart and the appellant's motor-car, or turn his bicycle sharply across the road and get behind the cart. In attempting to adopt the latter course Major Sharp fell from his bicycle and sustained some personal injuries. Major Sharp, having since the hearing before the justices gone to India, was not called before the court of quarter sessions; but Police Superintendent Williams, in cross-examination, gave the following statements as having been made by Major Sharp before the justices:

Major Sharp said he was flurried by the noise of the motor, not having heard the horn; that he got to the side of the road as quickly as he could. He did not say he crossed the road, but that there was a bank of dust so that he could not see, and he attributed the accident to getting too near the loose stones at the side of the road. He did not attribute the accident to getting round the cart.

The car did not stop or slacken its speed, but proceeded on its way, and passed a horse and cart in charge of a man named Hills at considerable speed about half a mile further on (thereby frightening the horse and causing it to become restive); but the horse was admittedly afraid of motor-cars, and Hills was at its head when the motor-car passed.

It was established by the respondent's evidence that the day was dry and dusty, and that there was a "following" wind; that the appellant sounded his horn on approaching the cyclists more than once; that he was driving on his proper side of the road; that the road was straight, with a clear view for some 300 yards where the accident took place, and that the metalled portion was about 20 feet broad.

It was contended by counsel for the appellant: (*a*) That upon a charge under sect. 1, sub-sect. 1, of the Motor Car Act 1903 of driving a motor-car "in a manner which is dangerous to the public, having regard to all the circumstances of the case . . ." evidence as to excessive or dangerous speed was irrelevant, and ought not to be taken into consideration, since by the same section to drive a motor-car "at a speed which is dangerous to the public, having regard to all the circumstances of the case . . ." is constituted a separate offence. (*b*) That, apart from evidence of excessive speed, there was no evidence before the court that the appellant had driven his motor-car "in a manner which was dangerous to the public."

It was contended by counsel for the respondent: (a) That, in dealing with the offence charged against the appellant, speed was an element to be taken into consideration. (b) That, quite apart from the question of speed, regard being had to all the circumstances of the case, and particularly to the amount of the traffic then upon the highway, there was evidence upon which the justices could find that the appellant had committed the offence charged against him.

The justices in quarter sessions overruled the appellant's first contention, and they also found as a fact that, apart from the question of speed, the appellant did on the day in question drive the motor-car on a public highway in a manner dangerous to the public, regard being had to all the circumstances of the case, and they thereupon dismissed the appeal with costs, as before stated.

The question for the opinion of the court was whether the court of quarter sessions were right in dismissing the appeal.

If the court should be opinion in the affirmative, then the order of quarter sessions was to be affirmed; if in the negative then the order of quarter sessions was to be quashed, and the court was requested to give such judgment or to make such order as ought to have been given or made by the Court of Quarter Sessions.

The Motor Car Act 1903 (3 Edw. 7, c. 36) provides:

Sect. 1 (1). If any person drives a motor-car on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway, that person shall be guilty of an offence under this Act.

Sect. 11 (1). A person guilty of an offence under this Act, for which no special penalty is provided, shall be liable on summary conviction in respect of each offence to a fine not exceeding twenty pounds, or in the case of a second or subsequent conviction to a fine not exceeding fifty pounds, or in the discretion of the court to imprisonment for a period not exceeding three months. (2) Any person adjudged to pay a fine exceeding twenty shillings under this Act may appeal against the conviction, in the same manner as he may appeal if ordered to be imprisoned without the option of a fine.

H. St. John Raikes for the appellant.—The conviction in this case is bad and ought to be quashed. The charge upon which the appellant was convicted was the charge under sect. 1, sub-sect. 1, of the Motor Car Act 1903, for driving his motor-car on the highway "in a manner which was dangerous to the public, having regard to all the circumstances of the case." Upon this charge evidence was given that the appellant was driving at an excessive speed. That evidence was inadmissible. In *Rex* v. *Wells* (91 L. T. Rep. 98), it was held that in sect. 1, sub-sect. 1, of the Motor Car Act 1903, "driving at a speed which is dangerous to the public," and "driving in a manner which is dangerous to the public," constitute two separate and distinct offences under the section, and it was held that where a person was summoned and convicted of driving a motor-car in a public highway "at a speed or in a manner" which was dangerous to the public, the conviction was bad inasmuch as it coupled two separate and distinct offences together, and did not specify the particular offence of which the person was convicted. There being therefore two offences, upon a charge of one offence, evidence relating to the other offence ought not to be given; and upon a charge, as in this case, of driving in a manner which was dangerous to the public, evidence as to driving at an excessive speed ought not to be given, as that relates to the totally separate offence of driving at a speed which is dangerous to the public. [Lord ALVERSTONE, C.J.—In *Rex* v. *Wells* (*ubi sup.*), we never said that such evidence might not be considered by the justices.] It is submitted that the evidence as to excessive speed was not admissible, and that, apart from that evidence, there was no other evidence before the justices. [Lord ALVERSTONE, C.J.—The quarter sessions found as a fact that, apart from the question of speed, the appellant did drive the motor-car on the day in question in a manner which was dangerous to the public, and that was a question of fact for them.] The appellant is tried upon an information which, although not double, in the sense of containing two offences, as in *Rex* v. *Wells* (*ubi sup.*), is really open to the same objection by the admission of evidence which is applicable to a different offence. He referred to

Hamilton v. *Walker*, 67 L. T. Rep. 200; (1892) 2 Q. B. 25;

Cotterill v. *Lempriere*, 62 L. T. Rep. 695; 24 Q. B. Div. 634.

Stimson, for the respondent, was not called upon.

Lord ALVERSTONE, C.J.—In this case the appellant was convicted of driving a motor-car on a public highway in a manner which was dangerous to the public, and it was contended on his behalf that the justices were wrong. I cannot

agree with that contention. I am clearly of opinion that one cannot consider, or might not be able to consider, the question of driving in a manner which is dangerous to the public in such cases as these without considering the speed at which the person was driving, and I therefore think that speed is an element which can be taken into consideration when the charge is one of driving to the danger of the public. However that may be, I am also clearly of opinion that there was evidence, apart from the question of speed, upon which the quarter sessions could find, as they have done, that the appellant was driving to the danger of the public, and therefore this court cannot interfere. It has not been shown that there was any mistake of law, and therefore this appeal must be dismissed.

LAWRANCE, J.—I agree.

RIDLEY, J.—I agree. *Appeal dismissed.*

Solicitors for the appellant, *Gribble, Oddie,* and *Co*, for *J. Lyon,* Cambridge.

Solicitors for the respondent, *Purkis* and *Co.*, for *Piper* and *Piper,* Bedford.

July 31, *Aug.* 1 *and* 4, 1905.

Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

REX *v.* BRAILSFORD AND MCCULLOCH. (*a*)

Criminal law—Conspiracy—Conspiring to do an act tending to public mischief—Combination to procure passport in name of one person to be used by another person — Indictable misdemeanour.

A combination of persons for the purpose of obtainiy, and the obtaining from the Foreign Office of a passport by the false statement or representation that it is intended for the use and protection of a certain named person while travelling in a foreign country whereas in fact it is intended to be used by a different person not recommended to the Foreign Office, is an indictable misdemeanour at common law, upon the ground that it is an act which is injurious to the public and tends to bring about public mischief.

In such a case it is for the court, and not for the jury, to determine whether the act done might tend to public mischief or not, and it is for the court to direct the jury upon that point, as it is not an issue of fact upon which evidence can be given.

MOTION in arrest of judgment upon an indictment for conspiracy against the defendants Brailsford and McCulloch, who were tried before Lord Alverstone, C.J. and a special jury in the King's Bench Division, the indictment having been removed into the High Court from the Central Criminal Court, and were found guilty on the first count of the indictment for conspiring to obtain from the Foreign Office a passport in the name of the defendant McCulloch, on the false representation that he intended to use it himself for travelling in Russia, whereas in fact it was intended to be used by another person.

The indictment recited that

The Principal Secretary of State for Foreign Affairs, acting on behalf of the King, grants to subjects of the King intending to travel in certain foreign countries, amongst others, in the dominions of the Czar of Russia, passports under the hand of the King's Principal Secretary of State for Foreign Affairs, in pursuance of the friendly and peaceable relations existing between the King and the Czar of Russia and their subjects respectively, the passports being addressed to all those in the dominions of the Czar whom it might concern requesting and requiring them in the name of the King to allow the liege subjects of the King being in possession and producing such passports granted as aforesaid to pass freely and without let or hindrance, and to afford them every assistance and protection of which they might stand in need when travelling in the dominions of the Czar; that the said passports are so granted by and with the authority of the King to British-born liege subjects of the King under certain regulations issued by and with the authority of the Principal Secretary of State for Foreign Affairs which require the production of a declaration by such subject intending to travel to and in the dominions of the Czar of Russia with such passport wherein he declares that he is a British subject, his declaration being verified by another declaration made by a person resident in the United Kingdom following one of certain specified professions and employments, declaring to the best of his knowledge and belief that the declaration theretofore made by the subject requiring the passport was true, and that such subject was a fit and proper person to receive such passport, which regulations further require that the subject to whom such a passport has been issued should sign such passport as soon as he receives it from the Principal Secretary of State, and thereafter before commencing to travel in the dominions of the Czar of Russia, the subject should present the same for examination at the Russian Consulate General in London, and subjects of the King who had complied with the regulations were wont to travel to and in the dominions of the Czar of Russia with such passports so granted, and whilst travelling in those dominions upon their lawful business or pleasure to receive and obtain under and in pursuance of the request of the King contained in such passport, assistance and protection and permission to pass freely and without let and hindrance from those in the foreign State to whom the passport was addressed.

And the indictment further recited that

The defendants Henry Brailsford and Arthur McCulloch, well knowing the premises, on the 1st Oct. 1904 and on divers other days thereafter, in the county of London and within the jurisdiction of the Central Criminal Court, unlawfully did conspire, combine, confederate, and agree together and with divers other persons unknown, unlawfully and fraudulently by divers false pretences and misrepresentations upon and by virtue of a certain declaration made in pursuance of the above regulations, and subscribed by the defendant McCulloch and verified by another declaration made and subscribed by one Bertram Christian, which declaration so signed by McCulloch was followed by an application for a passport for the purpose of travelling to and in the dominions of the Czar of Russia, which application falsely to the knowledge of the defendants pretended and represented that he the said McCulloch truly applied for and desired such a passport as aforesaid to be issued to himself for the purpose of himself travelling in Russia, whereas in truth and in fact the defendant McCulloch did not truly apply for and desire such passport to be issued to himself for the purpose of himself travelling in Russia, and that the defendants so conspired to obtain from and cause to be issued by the Principal Secretary of State for Foreign Affairs a passport to and in the name of McCulloch recommending and entitling him to the exercise and enjoyment of the privileges afforded to the subjects of the King while

(*a*) Reported by W. W. OAR, Esq., Barrister-at-Law.

travelling with such passports in Russia, in order that and with intent that the passport having been so issued to McCulloch in his own name should thereafter be wrongfully and fraudulently used by some person whose name is unknown other than the said McCulloch for the purpose of travelling in the dominions of the Czar in the name of McCulloch and as a subject of the King, and as the person to whom the passport had been issued by the Secretary of State.

The indictment further recited that

The defendants in pursuance of the said conspiracy did cause and procure to be forwarded to the Marquess of Lansdowne at the Foreign Office a declaration dated the 25th Oct. 1904, signed by the defendant McCulloch, and another declaration signed by Bertram Christian, which declarations were as follows:

I, the undersigned, Arthur Henry Muir McCulloch, residing at Ardwall, Gate house, N.B., at present residing at 9, Berwick-street, All Saints, Manchester, hereby declare that I am a British-born subject, having been born at Edinburgh, on the 25th July 1860, and not having lost the status of British subject thus acquired, and I hereby apply for a passport for the purpose of travelling to Russia.

And I, the undersigned Bertram Christian, barrister-at-law, residing at 1, Temple-gardens, E.C., hereby declare that to the best of my knowledge and belief the above made declaration of the said Mr. A. H. M. McCulloch is true, and that he is a fit and proper person to receive a passport.

The indictment furt her recited that

The defendants in further pursuance of the said conspiracy did procure to be delivered to them upon and by virtue of those declarations and application a passport signed by the Marquess of Lansdowne in the following words:

We, Henry Charles Marquess of Lansdowne, . . . His Majesty's Principal Secretary of State for Foreign Affairs, request and require in the name of His Majesty all those whom it may concern to allow Mr. Arthur Henry Muir McCulloch (a British subject) travelling to Russia to pass freely without let or hindrance, and to afford him every assistance and protection of which he may stand in need. Given at the Foreign Office, London, the 28th day of October 1904.—(Signed) LANSDOWNE.

The indictment further recited that

The defendants and other persons whose names were unknown afterwards and in pursuance of the said unlawful conspiracy did cause and procure to be signed upon the said passport by some person whose name is unknown other than the defendant McCulloch, a signature purporting to be the signature of the said McCulloch under the words appearing upon the face of the passport "signature of the bearer," and that the defendants in further pursuance of the said unlawful conspiracy on the 14th Nov. 1904, did produce the passport at the Consulate-General of Russia, at 17, Great Winchester-street, London, and there and then procured the same to be viséd and signed by the Russian Consul-General, and that the defendants in further pursuance of the conspiracy did send and cause and procure to be sent the passport having thereon the visé and signature of the Russian Consul-General out of the United Kingdom to a certain person or persons unknown for use when in Russia by a person whose name is unknown other than the said McCulloch with the intent and purpose that the passport should be so used in the dominions of the Czar of Russia by the said person whose name is unknown to the evil example of all others in the like case offending, in contempt of our said Lord the King and his laws, in fraud of the said regulations issued by and with the authority of the said principal Secretary of State for Foreign Affairs, to the injury and prejudice and disturbance of the lawful, free, and customary intercourse existing between the liege subjects of our said Lord the King and the subjects of the said Czar of Russia to the public mischief of the said liege subjects, and to the endangerment of the continuance of the peaceful relations between our said Lord the King and the said Czar of Russia and their subjects respectively, and against the peace of our said Lord the King, his Crown, and dignity.

There was a second count in the indictment alleging that the defendants obtained the passport by similar false and fraudulent pretences and misrepresentations, but without any allegation of conspiracy.

At the trial before Lord Alverstone, C.J. and a special jury, in the King's Bench Division, on the 26th July, Mr. Bertram Christian was called as a witness, and explained the circumstances under which he signed the application form for the passport for the defendant McCulloch; that he did not personally know McCulloch, and that, as the form did not seem to imply that personal knowledge was necessary before signing the application form, he signed it at the request and upon the representation of the defendant Brailsford, whom he had known for several years as a man of high character, that the application was a *bonâ fide* application for the defendant McCulloch whom he (Brailsford) had known as an old friend.

The manager of the Hotel Bristol in St. Petersburg was called and stated that in Jan. 1905 a man, who stated that he came there from Riga on private business, came to the hotel and stayed about a month; that this man handed witness the passport and witness took it to the police and received it back viséd; after a few days the man asked to have it returned to him, and it was returned to him; that on the night of the 25th Feb. an explosion took place in this man's room, and it was found that the man was killed as a result of the explosion, and the passport was found upon his body by the police. He had passed under the name of McCulloch, and the passport bore that signature.

In a statement made and signed by the defendant McCulloch, and admitted in evidence, he stated that about the end of Oct. 1904 Brailsford wrote to him and asked him if he would fill up a form of application for a passport for the purpose of helping someone to get literature into Russia, and he consented to do so to oblige him, and he filled up the form, but he himself had no intention of going to Russia; that the signature "McCulloch" to the application was in his handwriting, but the signature "McCulloch" to the passport was not in his handwriting.

Evidence was given that both the defendants were men of high character and standing.

Lord Alverstone, C.J. directed the jury that, if persons agreed together to obtain a document of the character of a passport, knowing that it would be used by another person than the person for whom it was obtained, that would be an offence that would bring the persons guilty of it within the criminal law; and that, if the jury were satisfied that the defendants had combined to obtain this passport in the way described, they ought to find a verdict against them.

The jury found the defendants guilty of conspiracy, and said that they had not considered the second count, and the learned judge directed a

verdict of not guilty on the second count in the indictment.

Sentence was postponed, in order to give the defendants an opportunity of raising before the Divisional Court certain objections to the indictment on legal grounds.

July 3.—Sir *Robert T. Reid*, K.C. (*J. A. Simon* with him) for the defendants.—We move in arrest of judgment upon the ground that the indictment shows no indictable offence, and also for a new trial, and the proceedings on motions in arrest of judgment are generally the same as upon a motion for a new trial: (Short and Mellor, p. 254). [Lord ALVERSTONE, C.J.—The two things, notice of motion for a new trial and to enter judgment for the defendants *non obstante veredicto* are two separate things, and must be kept distinct.] Then with regard to the motion in arrest of judgment, all that is stated in this indictment is that the effect of what was done was to endanger the relations existing between Great Britain and the Czar of Russia. The indictment comes to that, and does not state that it was the intention of the defendants so to embroil the two countries. The question then is, Is the obtaining by A. of a passport intended to be used by B. in itself a criminal offence. The Crown will have to prove that the mere fact of combining to obtain such a passport is in itself a criminal act. [Lord ALVERSTONE, C.J.—The ground on which the counts might be held to be good is "acts deemed to be injurious to the public," and "acts involving public mischief," Stephen's Criminal Law, 5th edit., pp. 123-4]. In Wright on the Law of Conspiracies, p. 28, there is set out a list of combinations which may be criminal, although they are for acts not criminal apart from combination, and the act alleged to have been done in the present case is not one of them. At the very utmost the conspiracy in this case was a conspiracy to do an act—not criminal—which might be injurious to the public. The first question therefore is, can a person be indicted for going to the Foreign Office and obtaining a passport intended to be used by another person. There is no case in the books to show that such an act is a *malum in se*. If it is so laid down now then this court would be laying that down for the first time and would be declaring a new criminal offence. In Stephen's History of the Criminal Law, vol. 3, p. 359, the learned author, speaking of the power of the court to declare new offences, proceeds: "Though the existence of this power as inherent in the judges has been asserted by several high authorities for a great length of time, it is hardly probable that any attempt would be made to exercise it at the present day; and any such attempt would be received with great opposition, and would place the bench in an invidious position. The last occasion on which such a course was taken was the treatment of conspiracies in restraint of trade as a common law misdemeanour." In Stephen's Digest of Criminal Law, 5th edit., p. 123, art. 178, the learned author deals with "undefined misdemeanours," and from the instances there given this offence would not be an indictable misdemeanour. He says that acts deemed to be injurious to the public have in some instances been held to be misdemeanours, but it is only where there is an analogy between such acts and other acts which had been held to be misdemeanours (see also Bl. Com., vol. 4 (edit. 1825), p. 162). In *Treeve's* case (2 East's Pleas of the Crown, p. 821), the defendant, Treeve, a common brewer, was indicted for selling bad food to French prisoners of war who were detained in this country, and he was convicted, and upon a motion in arrest of judgment on the ground that the offence was not indictable the court upheld the conviction. That was a well-known offence, and the case was really tried as a conspiracy to do an act tending to public mischief. [Lord ALVERSTONE, C.J.—Is not the offence here analogous to that in *Treeve's* case (*ubi sup.*), which was the case of an act tending to bring the King's name into discredit. I find from the book containing the original notes of the judges that that was the offence in the original indictment, and the case did not proceed on the basis of its being a well-known offence at common law.] [He referred on this point to Wright on Criminal Conspiracies, pp. 30, 78, 92, and to *O'Connell's* case, p. 94.] Those are really conspiracies to commit a crime, and it is said at p. 30 that combinations directed against the government or public safety may be criminal, although the acts might not be criminal in the absence of combination. The case of *Reg.* v. *Jameson* (75 L. T. Rep. 77; (1896) 2 Q. B. 425), was under the Foreign Enlistment Act 1870, and it was never suggested that there was any offence apart from that Act. So, in the case of the *Alabama* no suggestion was ever made that it was indictable, though it was a conspiracy. The cases are all cases of conspiracy to commit a crime. The indictment in this case is far too wide. It is not alleged that the object of the defendants was hostility to this country; it does not say that there was any intent to endanger the peace of the kingdom as between this country and the Czar. It simply states that the defendants had conspired to obtain for McCulloch this passport to be used by somebody else. That was not a crime and no criminal proceedings can be taken in respect of it.

Sir *Robert Finlay* (A.-G.) and Sir *Edward Carson* (S.-G.) (*H. Sutton*, *C. W. Mathews*, and *Bodkin* with them) for the Crown.—The indictment disclosed an indictable offence, and the defendants were properly convicted. Our law consists in applying old and well established principles to new circumstances as they arise, and the principles of the common law can adapt themselves to new combinations of circumstances: (see the opinions of the judges when consulted on the Codification of the Criminal Law, vol. 53 of Parliamentary Papers for the year 1854, pp. 7, 9, 19, 23, and 43). Coming to the authorities, they clearly establish that the indictment disclosed an indictable offence. In *Rex* v. *Higgins* (2 East, 5, at pp, 20-21), Lawrence, J. says (at p. 21): "Secondly, all offences of a public nature, that is all such acts or attempts as tend to the prejudice of the community are indictable." In *Rex* v. *Wheatly* (2 Burr., at p. 1127) Lord Mansfield says: "The offence that is indictable must be such a one as affects the public. As if a man uses false weights and measures and sells by them . . . so if a man defrauds another under false tokens. For these are deceptions that common care and prudence are not sufficient to guard against. So, if there be a conspiracy to cheat. . . . Those

cases are much more than mere private injuries; they are public offences" and at p. 1129 he points out that if there be a conspiracy it is another case. The principle there is that a combination to do a wrong thing becomes a public wrong on account of the combination, and the present case comes within that principle. The defendants combined to do this thing, knowing that the intention was to hand over this passport to be used by another person. That is within the public mischief aimed at in these cases. In *Jefferys* v. *Boosey* (4 H. L. Cas., at. p. 936) Pollock, C.B. quoted what was said by Willes, J. in *Millar* v. *Taylor*, (4 Burr. 2303), and said: "I entirely agree with the spirit of this passage, so far as it regards the repressing what is a public evil, and preventing what would become a general mischief . . . I think the common law is quite competent to pronounce anything to be illegal which is manifestly against the public good." Pollock, C.B. there recognises the principle that whatever is a public mischief is an indictable offence. That passage is cited with approval in Stephen's History of the Criminal Law, vol. 3, p. 359; and in Stephen's Digest of Criminal Law (5th edit., p. 305, art. 365) it is said: "Everyone commits the misdemeanour of conspiracy who agrees with any other person or persons to do any act with intent to defraud the public . . . such a conspiracy may be criminal, although the act agreed upon is not in itself a crime." Buller, J. in *Young* v. *The King* (3 T. R., at p. 104), says: "To make an offence indictable at common law it must be public in its nature." In these cases the public nature of the offence was in the using of false weights and measures; here it is in the doing of an act which equally tends to the public mischief. The defendants did a wrongful act which from its very nature was calculated to cause public mischief between the countries, and which therefore comes within the principle of the cases cited. It was the "doing an act, of which the probable consequence may be highly injurious": (per Lord Ellenborough, C.J. in *Rex* v. *Dixon*, 3 M. & S., at p. 15). It is enough if persons do an act which as its natural consequence has mischievous consequences, although not so intended. "All frauds affecting the Crown and the public at large are indictable": (East's Pleas of the Crown, p. 821; 4 Bl. Com., 21st edit., pp. 161-162). So, putting on false marks with intent to cheat (*Reg.* v. *Closs*, 1 Dears. & B. 460), and bribery (*Rex* v. *Vaughan*, 4 Burr. 2494) are indictable. It is upon the same principle that a common nuisance is indictable, as being an act tending to public mischief. Then there are several cases as to the law of conspiracy. Willes, J., in advising the House of Lords in *Mulcahy* v. *The Queen* (L. Rep. 3 H. L., at p. 317), says "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means." Cockburn, C.J. states the law to the same effect in *Reg.* v. *Warburton* (23 L. T. Rep. 473; L. Rep. 1 C. C. R. 274, at p. 276; 11 Cox C. C. 584), where it was held that a conspiracy to defraud a partner was an indictable conspiracy. There it was held to be indictable to combine to do a wrong to a private person, and therefore *à fortiori* to do a wrong of a public nature. Lord Macnaghten in *Quinn* v. *Leathem* (85 L. T. Rep. 289, at p. 291; (1901) A. C. 495, at p. 510) puts it on the same ground, and Lord Brampton says that the principle is equally applicable to conspiracies made the subject of civil actions as to conspiracies in criminal cases. In *Reg.* v. *Aspinall* (36 L. T. Rep., at p. 301; 2 Q. B. Div., at p. 59) Brett, J. mentions several instances of agreements which come within the rule, and he refers to *Reg.* v. *Warburton* (*ubi sup.*), and to *Rex* v. *De Berenger* (3 M. & S. 67), in which it was held to be a criminal conspiracy to agree to endeavour to raise the price of the public funds on a particular day by false rumours, and on the ground of public mischief. Grose, J. in *Rex* v. *Mawbey* (6 T. R. 619, at p. 636) states the principle in similar terms. In *Reg.* v. *Parnell* (14 Cox C. C. 505, 508) the whole law on the point is gone into by the Irish court. Another class of cases is where the object aimed at is immoral. A conspiracy may be to do a lawful act by unlawful means: (*Reg.* v. *Bunn*, 12 Cox C. C. 316). There is here not only the public mischief, but it is founded upon misrepresentation and fraud—namely, a fraud upon a great public department of State, and the real element in most of these cases is fraud or cheating. There is no difference in principle between *Rex* v. *Vaughan* (*ubi sup.*)—a case of attempting to bribe a Privy Councillor—and the present case. There is the cheating of the officer and the fraud of the public brought about by that cheating; and the broad principle is that the act was a matter of public importance and tended to public mischief.

Sir *Robert Reid*, K.C. in reply.—There is no crime that is not aimed at the public mischief, and from that it is contended that everything which tends to public mischief is a crime, which is false reasoning. So far as the criminal law is concerned it is not sufficient that the act might produce mischief to the public. If this is a crime either principle or precedent must be given for it. Neither principle nor precedent can be given, and without principle or precedent there can be no conviction. Neither necessarily nor probably would public mischief follow from the defendants' act. [It was arranged that the motion for a new trial should be taken separately as an *ex parte* motion.]

Aug. 1.—Sir *Robert Reid*, K.C. (*J. A. Simon* with him) moved for a rule *nisi* for a new trial upon the ground that there was no evidence of an intention to cause public mischief or of the acts in question having tended to cause public mischief, and whether it was the intention to cause public mischief or the tendency to cause that mischief that was necessary, was a question for the jury and not for the judge. The intention in law which is necessary to constitute every criminal act is a question of fact for the jury, whether that intention is to be inferred from the necessary consequences of the defendants' acts, or is to be inferred from the evidence. It is for the jury, and not the judge, to draw that inference; and if it be said that whatever tends to the public mischief is a crime, then the whole case as to that has to go to the jury. In order to show a tendency to public mischief it is not enough to show that the passport got into the hands of a criminal person. It was necessary to show that the tendency of the act was one which necessarily led to public mischief, and if an act leading to public

mischief was an offence, then that principle must, as in the case of libel, be subject to this safeguard that it is for the jury to determine whether that particular act, or class of act, came within the rule, and that was not for the ruling of the judge, as in this case. In the first place, there was no evidence of injurious tendency; and, in the second place, the whole question as to any tendency to be inferred ought to have gone to the jury. The court refused to grant a rule.

Cur. adv. vult.

Aug. 4.—The judgment of the court (Lord Alverstone, C.J., Lawrance, and Ridley, JJ.) was read by

Lord ALVERSTONE, C.J.—This was a motion in arrest of judgment upon an indictment against Henry Noel Brailsford and Arthur Henry Muir McCulloch, against whom a jury found a verdict of guilty on the first count of an indictment in respect of a conspiracy to obtain a passport from the Foreign Office in the name of McCulloch to be used by another person. It is not necessary to repeat at length the allegations in the indictment; its scheme may be summarised as follows: It sets out the practice with regard to passports and the conditions upon which they are issued; it alleges a conspiracy between the defendants and other persons not known to obtain by false and fraudulent pretences and misrepresentations a passport in the name of Arthur Henry Muir McCulloch; it alleges the sending in of the necessary documents by Brailsford and McCulloch in the name of McCulloch, and the issuing of the passport thereon. It then alleges the use of the passport by other persons not known, and concludes with the following averment: "And the said other persons whose names are unknown, in further pursuance of the said conspiracy, combination, confederacy, and agreement, did send and cause and procure to be sent the said passport lastly hereinbefore set forth, having then thereon the *visé* and signature of the said Russian Consul-General, out of the United Kingdom to a certain person or persons unknown, for use when in Russia by a certain person whose name is unknown other than the said Arthur Henry Muir McCulloch, with the intent and purpose that the said passport should be so used in the dominions of the Czar of Russia by the said person whose name is unknown as aforesaid to the evil example of all others in the like case offending in contempt of our said lord the King and his laws in fraud of the said regulations issued by and with the authority of the said Principal Secretary of State for Foreign Affairs, to the injury and prejudice and disturbance of the lawful, free, and customary intercourse existing between the liege subjects of our said lord the King and the subjects of the said Czar of Russia, to the public mischief of the said liege subjects and to the endangerment of the continuance of the peaceful relations between our said lord the King and the said Czar of Russia and their subjects respectively, and against the peace of our said lord the King, his Crown and dignity." The indictment contained a second count alleging as an offence the obtaining of a passport by similar false pretences, but without any allegation of conspiracy. The jury, as already stated, found both defendants guilty on the first count and said that they had not considered the second count, and I discharged them without their finding a verdict thereon. It was argued in arrest of judgment by Sir Robert Reid, on behalf of the defendants, that the count of the indictment upon which the defendants were found guilty was bad in law, as disclosing no indictable offence, and also on the ground that the act done—namely, the obtaining of a passport by a false representation—although an improper act, was not a criminal act or an indictable misdemeanour at common law, and that the conspiracy to obtain such passport was not an indictable misdemeanour. We are clearly of opinion that the count is good and that the conviction must stand; but in deference to the arguments of Sir Robert Reid, and as the point has never arisen directly before, we think it right to state the reasons for our decision. It is not necessary for us to decide whether apart from conspiracy the obtaining of a passport by false pretences—namely, by alleging that it was required for the use and protection of A. B., whereas it is in fact intended to be used by some third person, not known to or recommended by the Foreign Office—is of itself a misdemeanour; but as the question has some bearing on the validity of the conviction on the first count we desire to make a few observations thereon. It will be well to consider what a passport really is. It is a document issued in the name of the Sovereign, on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations, and to be used for that individual's protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office, in an official document, vouches the respectability of the person named. Passports have been known and recognised as official documents for more than three centuries, and in the event of war breaking out become documents which may be necessary for the protection of the bearer, if the subject of a neutral State, as against the officials of the belligerents, and in time of peace in some countries, as in Russia, they are required to be carried by all travellers. It is not necessary to do more than to remember certain incidents in the nineteenth century to see what grave international questions might arise in the event of a person who holds a passport receiving illtreatment in a foreign country. It cannot, of course, be maintained that every fraud and cheat constitute an offence against the criminal law; but the distinction between acts which are merely improper or immoral and those which tend to produce a public mischief has long been recognised; the cases cited by the learned Attorney-General, *Rex* v. *Higgins* (2 East, at pp. 20 and 21), *Rex* v. *Wheatly* (2 Burr., at p. 1127), *Young* v. *The King* (3 T. R., at p. 104) are authorities for this view. They are supported by the reasoning in the judgment in *Rex* v. *De Berenger* (3 M. & S., at p. 76), *Rex* v. *Dixon* (3 M. & S. 11), and *Treeve's* case (2, East, P. C. 821), and a reference to the original record of the decisions of the judges, which is in the possession of the Lord Chief Justice, shows that *Treeve's* case did not depend upon the ground given at p. 822 of East. The whole chapter under the title of "Cheats" in that work is worthy of perusal. It is, however, unnecessary to consider this point further, because we are clearly of opinion that the act done—viz., the obtaining of a passport by a false pretence—is

an act of the kind which would render a conspiracy to carry it into effect unlawful, and we think that both defendants have been rightly convicted of criminal conspiracy. Whatever attempts may have been made from time to time to strain the law of conspiracy or bring within its purview combinations to perform acts to which no objection can be taken, when done by a single individual, no question of the kind arises in this case. For a great many years it has been the law of England that conspiracy consists "in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect the very plot is an act in itself and the act of each of the parties . . . punishable, if for a criminal object, or for the use of criminal means" (*Mulcahy* v. *The Queen*, L. Rep. 3 H. L., at p. 317). This definition is expressly approved by the House of Lords in *Quinn* v. *Leathem* (85 L. T. Rep., at p. 297; (1901) A. C., at p. 529). It cannot be seriously disputed that the obtaining a passport from the Foreign Office, by the false statement that it was required for a person named therein and recommended to the Foreign Office, with the intent that it should be used by another and different person who has not been recommended, is a cheat and conspiracy to deceive the Foreign Office, and obtaining the document by means thereof is a criminal conspiracy. We are, therefore, clearly of opinion that the first count of the indictment upon which the defendants were found guilty is good, and the conviction stands. In addition to the objection taken on motion in arrest of judgment, a motion was made by Sir Robert Reid on Tuesday last for a new trial upon the ground that there was no sufficient evidence in support of the indictment, and that the jury had been misdirected, in that it had not been left to them to find that the act done might tend to public mischief. Without saying there cannot be acts upon which an innocent construction might be put or that in some cases it might not be for the jury to find as a fact whether the act was innocent or not, we are clearly of opinion that no such argument can possibly be urged in this case. In criminal as well as in civil cases persons are responsible for the natural consequences of their acts. It was not disputed that there was abundant evidence that the defendants did combine to obtain a passport in the name of McCulloch with the intent that it should be used in Russia by some other individual, and that in fact it was so used with their knowledge and consent. We are of opinion that it is for the court to direct the jury as to whether such an act may tend to the public mischief, and that it is not in such a case an issue of fact upon which evidence can be given. Assuming the matter to relate to the issue of a public document by a public department of State, and it is obtained by a false representation for an improper purpose—that is, for use by a different person passing himself off as the *bonâ fide* holder—we are of opinion that it is injurious to the public and tends to bring about a public mischief. It is scarcely necessary to cite authority, but we would call attention to the reasoning of Lord Mansfield in *Rex* v. *Vaughan* (4 Burr., at p. 2499). A further point was raised as to the misreception of evidence. We are clearly of opinion that the statement made by McCulloch was admissible, there being no evidence that the statement was otherwise than free and voluntary and there being nothing to bring the case within the rule laid down in *Reg.* v. *Thompson* (69 L. T. Rep. 22; (1893) 2 Q. B. 12), on which ground the Lord Chief Justice had excluded a letter written by Brailsford to the other defendant. For these reasons the conviction must stand.

Judgment for the Crown.

The sentence upon the defendants was that each of them should be fined in the sum of 100*l.* and should be imprisoned until the fines were paid.

Solicitor for the Crown, *Treasury Solicitor.*

Solicitors for the defendants, *Radford* and *Frankland.*

Supreme Court of Judicature.

COURT OF APPEAL.

March 29, 30, *and April* 4, 1905.

(Before Collins, M.R., Mathew and Cozens-Hardy, L.JJ.)

Rex *v.* Dodds and others. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Licensing—Existing on-licence — Application for renewal—Power of justices—No right to require undertaking—Mandamus—*Licensing Act* 1904 (4 *Edw.* 7, *c.* 23), *ss.* 1, 9.

Licensing justices have no power, under the Licensing Act 1904, *to require an applicant for the renewal of an existing on-licence to give an undertaking to observe reasonable conditions, and to refuse to issue the licence unless the undertaking is given.*

Appeal by the prosecutors from the judgment of the Divisional Court (Lord Alverstone, C.J., Wills and Kennedy, JJ.) discharging a rule *nisi* for a *mandamus* to deliver a renewal licence of a hotel, and also a rule *nisi* to hear and determine an application for a renewal of the licence.

At the annual general licensing meeting for the borough of Birkenhead, Roberts, who was the tenant and licensee of the Commercial Hotel, applied for the renewal of the on-licence of the hotel.

When the applications for the renewal of on-licences came on to be heard, the chairman of the justices announced that the licensing committee would ask all persons applying for the renewal of on-licences to give a certain undertaking on the renewal of their licences, and that the applications would be adjourned, and that notice of the required undertaking would be served upon the registered owners of the licensed premises.

Notices were then served on the owners of all the premises with on-licences within the borough, including Messrs. Walker and Son, the owners of the Commercial Hotel, stating that licensees would be required to give to the justices upon application for renewal of their licences an undertaking to observe certain conditions.

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

The conditions which the licensees were required to undertake to observe were as follows:

(1) No intoxicating liquor shall be used or supplied upon credit. (2) No intoxicating liquor shall be supplied to any child under the age of fourteen years. (3) No games, draws, or raffles shall be suffered to take place on the licensed premises (except billiards in alehouses). (4) The licensee shall devote the whole of his time to the business of this licence. (5) The back door of the premises shall be kept locked except for domestic purposes. (6) No clubs for the purpose of a distribution of drink at Christmastide or any other period shall be permitted at the premises.

At the adjourned meeting of the licensing committee, the owners of the Commercial Hotel and of all the other on-licensed premises in Birkenhead (with one exception) refused to consent to the giving of the required undertaking by the licensees.

The chairman thereupon announced that all the licences would be renewed, but that they would remain in the hands of the clerk to the licensing justices to be delivered by the clerk to the licensees upon their giving to the clerk an undertaking to observe the conditions, which were printed on the back of each licence.

The licensing meeting was then further adjourned.

At the adjourned meeting the applicants for renewal requested the meeting to adopt the course of refusing the renewal of the licences in order that the matter might be taken on appeal to quarter sessions.

The committee refused to adopt that course, and the chairman stated that the renewal of the licences was not refused, but that the licences could be obtained by the respective licensees upon giving to the clerk the required undertaking.

Subsequently Roberts, the tenant and licensee of the Commercial Hotel, applied to the clerk to the justices for his licence, but upon his refusal to give the required undertaking the licence was not delivered to him.

The Licensing Act 1904 (4 Edw. 7) provides:

Sect. 1 (1). The power to refuse the renewal of an existing on-licence on any ground other than the ground that the licensed premises have been ill-conducted, or are structurally deficient or structurally unsuitable, or grounds connected with the character or fitness of the proposed holder of the licence, or the ground that the renewal would be void, shall be vested in quarter sessions instead of the justices of the licensing district, but shall only be exercised on a reference from those justices and on payment of compensation in accordance with this Act. In every case of the refusal of the renewal of an existing on-licence by the justices of a licensing district, they shall specify in writing to the applicant the grounds of their refusal. (2) Where the justices of a licensing district, on the consideration by them, in accordance with the Licensing Acts 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on-licences requires consideration on grounds other than those on which the renewal of an existing on-licence can be refused by them, they shall refer the matter to quarter sessions, together with their report thereon, and quarter sessions shall consider all reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises and, unless it appears to quarter sessions unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the justices of the licensing district) an opportunity of being heard and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates.

Sect. 9 (2). If the justices of a licensing district refuse to renew an existing on-licence on the ground that the holder of the licence has persistently and unreasonably refused to supply suitable refreshment (other than intoxicating liquor) at a reasonable price, or on the ground that the holder of the licence has failed to fulfil any reasonable undertaking given to the justices on the grant or renewal of the licence, the justices shall be deemed to have refused the licence on the ground that the premises had been ill-conducted: Provided that where the justices, on an application for the renewal of an existing on-licence, ask the licence-holder to give an undertaking as aforesaid, they shall adjourn the hearing of the application, and cause notice of the required undertaking to be served upon the registered owner of the premises, and give him an opportunity of being heard.

A rule *nisi* was thereupon obtained on behalf of Roberts, and on behalf of Messrs. Walker and Son, calling upon the justices to show cause why a writ of *mandamus* should not issue directing them to hear and determine according to law the application for a renewal of the licence, and also a rule *nisi* calling upon them to show cause why a writ of *mandamus* should not issue commanding them to deliver to Roberts his renewal licence.

March 24.—Asquith, K.C., *Low*, K.C., and *T. Shepherd Little* showed cause.

Pickford, K.C. and *Rigby Swift* for Roberts in support of the rules.

A. H. Bodkin and *F. E. Smith* for Walker and Son in support of the rules.

Lord ALVERSTONE, C.J.—This case raises a question which I am bound to say, after the able arguments which have been addressed to us, has raised a considerable doubt in my mind as to the meaning of this Act of Parliament; but, feeling that we ought in this kind of legislation, where we can see what seems to be the clear intention of the Legislature and the purpose intended to be carried out, to give effect to it, I think we ought not to defeat that purpose and to give a decision which would destroy the powers, which I think have been given, by relying or by acting upon a very limited view of the actual meaning of the words, although I admit that the words which are used do give ground for the argument urged before us. I think that this legislation cannot be understood without bearing in mind the existing practice, which was well known and which has been correctly stated, I have no doubt, by Mr. Bodkin when he referred historically to what was the position of matters prior to the passing of this Act. With regard to statutory conditions, I believe he is right in saying that there are only the two—namely, that which was enacted by sect. 49 of the Licensing Act 1872 in regard to closing on Sundays or a six days' licence, and by sect. 7 of the Licensing Act 1874 in regard to the earlier hours of closing. But there has been, as was admitted by Mr. Bodkin in stating the case for the owners of these houses, a long and well-known existing practice whereby the magistrates have been in the habit of asking a person who came for a renewal to enter into an undertaking, and, I expect in many cases, of requiring him to enter into the undertaking if they granted the renewal. Now we are pressed

to say that all those undertakings are to be regarded as voluntary undertakings and as undertakings which would have no effect, as they had certainly no effect in law from the point of view of an undertaking except that they could be considered again when a subsequent application was made by the same person for a renewal. Now, dealing with the matter as a mere question of law, to a certain extent I agree; but I think that, inasmuch as in the great majority of these cases the statement made by the Bench that they would require an undertaking to be given would practically mean a statement that the licence would not be renewed unless the undertaking was given, the practice had become stereotyped, and that is really proved in this case so far as the previous history of these numerous licences in Birkenhead is concerned. The magistrates on renewal obtained, by the undertaking of the licensees, that which amounts to a condition, because the undertaking was such that the licensees would not have got their licences renewed unless they had given the undertaking. Now, if one appreciates that state of things, I think it is quite possible to see how the framers of this Act possibly slipped into the use of an expression which, if construed in the strict sense in which Mr. Pickford asks us to construe it, would have the effect of destroying what I may call the old practice, which I think they did not intend to do, and making this particular legislation of no effect. I think that it is necessary to look at the whole Act. By sub-sect. 1, of sect. 1, the Legislature withdrew from the licensing justices what I may call their general discretion, and left to them only the power of refusal to renew on-licences on the ground that the premises had been ill-conducted, or were structurally deficient or structurally unsuitable, or on grounds connected with the character or fitness of the proposed holder of the licence. Therefore, the power to consider what I may call the individual house, apart from the question of the number of public-houses in the neighbourhood, and the conduct of that house, and the character of the applicant or licensee, was still left to the justices. Then we come to sub-sect. 2, of sect. 9, which modifies and, to a certain extent, extends the purview and the operation of the words "ill-conducted." It provides that "if the justices of a licensing district refuse to renew an existing on-licence on the ground . . . that the holder of the licence has failed to fulfil any reasonable undertaking given to the justices on the grant or renewal of the licence, the justices shall be deemed to have refused the licence on the ground that the premises had been ill-conducted." Now, stopping there, Mr. Pickford asks us to say that the sub-section is only intended to apply to a case in which the justices have asked the publican to give an undertaking and the publican has been quite willing to give it, and, therefore, the licence has been granted with the consent of the publican upon that undertaking. Then it is said, whatever the undertaking may have been, if in a subsequent year, the justices find that the holder of the licence has failed to fulfil that undertaking, then they can decide that the premises have been ill-conducted. Now, I agree, as I have said, that, taken by itself and apart from what I may call the recognised and existing practice, the words "any reasonable undertaking given" are open to the construction that Mr. Pickford puts upon them. I am bound to say that that contention seems to me to make the legislation absolutely worthless, and I agree entirely with what Wills, J. put in the course of this argument. I cannot conceive, having regard to the consequences of this Act with regard to compensation, anybody giving an undertaking if he could get his licence without it. I think that the other words of the sub-section make the matter reasonably clear. Those words are: "Provided that where the justices, on an application for the renewal of an existing on-licence, ask the licence-holder to give an undertaking." There, again, I do not think the language is happily chosen. Asking the licence-holder to give an undertaking, if read without remembering the existing practice, does convey the idea of asking a man to give something he is willing to give; but I think that, remembering that, practically speaking, the licences would not have been renewed in old days unless these undertakings were given, the force of that argument as to construction is to a large extent weakened. But then the following words are very important: "They shall adjourn the hearing of the application and cause notice of the required undertaking to be served upon the registered owner of the premises." I cannot help thinking that the draftsman of this Act of Parliament, in using the word "required," probably from the change of language, had in his mind what the existing practice showed, that it was something which the justices required the licensee to give as a condition of his renewal. I am not using the word "condition" in the technical sense, but as a term or condition which the magistrates would impose or else the applicant would not get his licence renewed. There is another broad view which seems to me to confirm that view. The undertaking is not made to depend solely on the consent of the licensee. It is possible—indeed, I go further and say it is probable—that the publican will promise almost anything to get his licence renewed. But, in order that the consequences may follow, it must be a reasonable undertaking; and the question whether the undertaking is reasonable must be considered by the justices when they impose it, and may have to be considered again if the renewal of the licence is subsequently refused because of a failure to fulfil the undertaking. Then, further, the justices must adjourn the hearing in order that the owner may have a voice in the matter. I agree that the mere adjournment in order that the owner may have a voice in the matter might also be of value in connection with what I may call purely voluntary undertakings; but, taking the whole section together, it seems to me to point to a duty imposed upon the justices to see that they only ask for a reasonable undertaking. I cannot help feeling that the words, "ask the licence-holder to give," are used in the same sense as the word "required," in the proviso which immediately follows, which points to a requirement by the justices of an undertaking as a condition of granting the licence. I come, therefore, to the conclusion that the justices have the power to say that, if they renew the licence, the licensee must give a reasonable undertaking, subject to the owner being heard as to the question of its

being reasonable; and in this particular case no question of reasonableness arises. It has been said that that view is not correct, because sect. 4 of the Act provides that "conditions" may be imposed upon the granting of a new licence; and it has been argued that, if the Legislature had meant to use the word "undertaking" in the sense that I have indicated, we should have found the word "condition" used instead of "undertaking." I think the "conditions" in sect. 4 are really conditions with regard to the tenure of the property, and are conditions which must have in view the other provisions of the Act—namely, those which provide for securing to the public the monopoly value and those other provisions which bear upon the question of what compensation is to be paid. The words in sect. 4, sub-sect. 2 (*a*), "having regard to proper provision for suitable premises and good management," being inserted parenthetically, in my opinion, do not mean that those conditions are to refer to the management of the hotel or to the management of the inn, but to the other conditions which have to be borne in mind, the necessity of the premises being suitable, and also to be consistent with the necessity of the premises being properly managed. I ought to have read the words "and as to any other matters, as they think proper in the interests of the public." I quite agree that, taken by themselves, it is possible to say that the other matters in the interests of the public might also include the proper management of the public-house or the imposition of such conditions as might tend in the same direction as those to which we are referring. I do not think that sect. 4 was intended to touch the subject-matter with which we are now dealing. I therefore come to the conclusion that the fair reading of sub-sect. 2 of sect. 9 is that the justices may require a reasonable undertaking to be given. It seems to me that we ought not to reduce this legislation to nothing, as we certainly would do if this very close criticism of the language of the sub-section is accepted, when we can see what is the plain and manifest purpose of the Legislature. Now, I have had some doubt as to whether or not the magistrates have so acted that we ought to discharge these rules. It seems to me, as was pressed upon us in the last argument addressed to us, that there was some ground for contending that they had not refused to renew the licences; but we have always considered in this court, and we have acted upon it in more than one case, that a renewal with a condition attached to it is a conditional renewal or a conditional refusal if the condition is not complied with. I must say, speaking for myself, that I have no doubt an appeal would lie in respect of the imposition of these terms upon the renewal. If I am not right in that, of course then a question might arise as to whether or not the justices have sufficiently refused this licence to enable an appeal to lie. I think they have, but I would point out that no substantial harm is done, because this question can be raised again. The applicants have thought fit to let the time for appealing go by. I do not myself think that there is any doubt that an appeal would have lain; but, entertaining the view that I do entertain that the justices had the power to do what they have done in this case, I do not think that I ought to order them to rehear the case simply upon the ground that they, by the particular way in which the justices have acted, have prevented the present applicants for the rule from pursuing their rights, especially when I remember that they have allowed the time for appealing to go by. I think, therefore, we ought not to allow the case to go back and be reheard, and that these rules should be discharged. I should like to add that I think the case of *Reg.* v. *Bowman* (78 L. T. Rep. 230; (1898) 1 Q. B. 663) is binding upon us. I think it is right, if I may venture respectfully to say so. If we had come to the conclusion that there had been no determination except the imposition of an unlawful and *ultra vires* condition, I think we should have had power to send back the case to be reheard, which in this case would have been practically equivalent to a *mandamus* telling the magistrates to renew the licence. Therefore, in anything I have said, I do not throw any doubt on the power of this court to send back a case where the magistrates, having heard and determined the case, have imposed as a part of their decision a term which we should think beyond their jurisdiction. For these reasons, however, I have come to the conclusion that in this very important matter the grounds upon which the rules were granted fail, and that the rules must be discharged.

WILLS, J.—I am of the same opinion. This case undoubtedly raises a question of very considerable difficulty, a difficulty arising from the imperfect draftsmanship of the Act—imperfect very likely owing to the circumstances under which Acts of Parliament are passed which so often make it absolutely impossible that the whole legislation should be carefully collated at the time an Act is passed and reduced into an absolutely harmonious expression. I am very much pressed in my own judgment in this matter by two circumstances. The first is that, if we were to read sect. 9 as we are called upon to read it by the applicants, as far as renewals are concerned the Act of Parliament in this section is simply an extravagantly idle piece of legislation, because I cannot believe that there will be any possibility, if their construction is right, of anybody ever giving an undertaking of this character in the future. The effect of giving such an undertaking would be simply this, that when given, if the undertaking during the current year of the licence is broken, the magistrates would be at liberty when the next period of renewal came to refuse to renew the licence under circumstances which would prevent compensation from attaching to the suppression of the licence. On the other hand, if the licensee did not give the undertaking, he would be subject to no such disability or no such disadvantage, and, looking at what average human nature is, I cannot conceive that anybody would be foolish enough to give such an undertaking if it were not compulsory when the only consequence, as far as his own interests were concerned, would be to subject him to a very substantial disadvantage. Therefore, as it seems to me, it would reduce that piece of legislation to an absolute absurdity, or to a piece of legislation which would only be applicable to the existing licences which were actually current at the time the Act was passed. Nobody can doubt who reads the Act that it is meant to last for more than a year, and that in all its provisions it is intended to create a fresh or

altered scheme which is to operate until the Act is either repealed or amended. I cannot think that any construction which would drive us to such a consequence as that can be right, unless it is absolutely impossible to interpret the language in any other sense. Now, the second consideration which presses upon my mind, and which I think concludes the whole matter, is the use of that word "required" in the second part of subsect. 2 of sect. 9. That provides that "where the justices on an application for the renewal of an existing on-licence ask the licence-holder to give an undertaking as aforesaid, they shall adjourn the hearing of the application and cause notice of the required undertaking to be given to the registered owner of the premises," who is to be heard upon it. Well, "required undertaking" means what it says—an undertaking which they have required. How can they "require" it if they have got no power to enforce it in any way either directly or indirectly? "Required" is a word which connotes and implies the existence of some means or other of making the requirement operative. It is quite true that, before that, the expressions used are "the undertaking which is given" and "the undertaking which is asked for," but in the same breath, after using the expression "ask the licence-holder to give an undertaking," the statute calls it the "required undertaking"; and I cannot doubt from those two sets of expressions that the scheme of the Act and the necessity of giving it some intelligible and effective operation makes it necessary to treat the word "required" as being the dominating word. I need not go again into the history of the matter and the way in which these undertakings came to be given, to which my Lord has referred, except for the purpose of saying that it does explain how phraseology should have run to a certain extent into a wrong groove. But it seems to me that the difficulties which are created by the use of these expressions which point to something voluntary on the part of the licence-holder are corrected and done away with by that part of the phraseology which speaks of the "required undertaking." Now, of whom is it required? It is not required of the owner of the property; it is required of the licence-holder. The owner of the property has the right to be heard upon it, but it is the licence-holder who, after the owner of the property has been heard as to the propriety of the undertaking which is required, is to give the undertaking, and the licence-holder, if not prevented by his landlord, clearly is not likely at all to make any objection to giving an undertaking if he cannot get his licence without. It is rather a matter of form than anything else whether the proper way of looking at it is that the magistrates, having a power to require, have really the power to attach a condition which is to be considered a condition which attaches to the licence, or whether the proper way of looking at it is that they are not bound to act by way of granting the licence, which they are disposed to grant, until the undertaking is given. That is a pure matter of form, and that is only material to my mind for the purpose of seeing whether in this case the proper way is to consider that the licence has been refused, and therefore there is an appeal on that ground, or whether the proper way of regarding it is that an undertaking has been ordered to be given, as to which equally to my mind an appeal will lie because it is essentially a thing which touches the granting of the licence or the renewal of the licence. Therefore it is one of those decisions of the magistrates by which the applicant is aggrieved, if conditions which are unreasonable are imposed. The very use of that word "reasonable" in the first part of subsect. 2 of sect. 9 shows, I think, clearly what the undertaking is to be. It is to be a judicial act of the magistrates, and not to be a mere voluntary act of the licence-holder. I think this provision, which is in substance that the penal consequence of any act if the undertaking is given shall depend upon whether the requirement has been reasonable or not, is certainly curious, because in one sense and under certain circumstances it is making a petty sessional court of one year a Court of Appeal from the petty sessional court of last year. But, if that is so, it is an additional security which is given to the holder of the licence and to the owner of the property, and it is an additional reason, I think, for saying that an appeal lies in respect of the terms of the undertaking which has been required as to whether they are reasonable or not. For these reasons I agree with my Lord. Notwithstanding the difficulty is created by an unfortunate use, I think, of some of the phraseology of the Act, I have come to the conclusion that we should be doing wrong if we did not do our best to give a reasonable construction to it, and that we ought to prevent that which certainly seems to be beneficial legislation under sect. 9 from being frittered away and being rendered really a laughing-stock rather than a useful piece of legislation.

KENNEDY, J.—I am of the same opinion. This is a case of difficulty owing to the construction and the language of portions of the sections as they appear in the Act of Parliament, but I concur entirely with my Lord in the view that has been taken that in substance the only reasonable way of construing the sections, and especially sub-sect. 2 of sect. 9, is the construction which my Lord and Wills, J. have put upon it. I wish, however, in regard to it to add a few words as to a point upon which Mr. Pickford, in his very clear argument, laid especial stress. He referred to the provisions in the same Act of Parliament—namely, sect. 4, sub-sect. 2, which deals with the granting of a new on-licence and the appending to the grant of certain conditions. His argument was that it seemed unreasonable that, with regard to the powers of the justices of granting a new licence, while they might attach conditions, there was no such provision as is to be found in sect. 9, sub-sect. 2, that if those conditions are not fulfilled the justices shall be deemed to have refused the licence on the ground that the premises have been ill-conducted—in other words, that it is unreasonable that in sect. 9 with regard to the renewal there should be a result which is not appended in terms by the statute to a non-fulfilment of conditions which the justices may impose in granting a new on-licence under sect. 4. To my mind, upon consideration, it appears to me that there is really nothing in that argument and for this reason, that with regard to the conditions which may be imposed under sect. 4 there is no limitation in the Act as to the character of the conditions. There the justices may attach to the grant of the

licence such conditions as they think proper. There is no protection, if I may so call it, or limitation, if that word be preferred, such as appears in sect. 9, as to the undertaking being reasonable. The only undertaking to which it would apply would be a reasonable undertaking, and where a reasonable undertaking is broken the Legislature thought fit to provide that if an undertaking was given, which I hold the justices might require to be given, and that undertaking was reasonable, a breach of that might be treated, if the justices should act upon it in refusing the renewal of the licence again, as though the premises had been ill-conducted by reason of such non-compliance with the reasonable undertaking; whereas, under sect. 4, there is no qualification at all of conditions which may be imposed by the justices on the grant of the on-licence, and the Legislature has left entirely to the discretion of the justices that which they may impose as a condition, and, as there is no qualification of reasonableness, it seems to me to be quite fair that the statute should not have imposed as a consequence of non-fulfilment that which is expressly provided where it is also provided that the undertaking must be a reasonable undertaking. And, further than that, it must be borne in mind that with regard to the granting of the new on-licence the refusal of the justices to grant that is not subject to any appeal at all. The only matter that troubled me at all has been the question, really a formal one, upon which I should have been very sorry to come to any other conclusion than that which my Lord and Wills, J. have arrived at, as to whether in this particular case the justices, who have evidently taken such great care in the administration of a new and difficult piece of legislation, have been technically right in treating this in a way which seems to have in their judgment precluded them from saying, "We refuse this licence." It occurred to me at one time that, unfortunately, that might be a result which would involve technically, and without any regard to the merits, a duty on our part to say that they had not heard and determined, because the determination was one which was not quite the one to which they should have come in point of form, which would have enabled an appeal to go to quarter sessions. But, on reflection and after what Wills, J. has said, there appears to me to be happily nothing in that point. It seems to me, though it is not necessary to decide it, that they might have gone to a court of quarter sessions treating this as a refusal. I think my Lord has expressed that view, and I am very far from dissenting from it, but certainly I do not see why they should not appeal, if they had been really minded to do so, as persons who were aggrieved in respect of an act in regard to the renewal of the licence. No statutory provision has been cited which would have prevented an appeal being brought to quarter sessions on the ground that the justices did not renew the licence, but gave that which amounted only to an option clogged with a condition which they were not lawfully entitled to impose. I am of opinion, therefore, that these rules should be discharged.

Rules discharged.

Pickford, K.C. and *Rigby Swift* for the tenant. —The justices had no power to require the giving of this undertaking as a condition of renewing the licence. In substance the justices have refused to grant the renewal unless the undertaking is given; but if they have granted the renewal, then they are bound to issue the licence. If the former is the true view, then they have not heard and determined the application according to law, and a *mandamus* to hear and determine is the proper remedy; if the latter is the true view, then a *mandamus* to issue the licence ought to be granted. Justices can now, under sect. 1 of the Licensing Act 1904, only refuse to renew a licence upon one of the grounds specified in sub-sect. 1, and the refusal to give an undertaking to comply with conditions is not one of those grounds. The power to refuse a renewal upon any other ground is now vested in quarter sessions, and can only be exercised upon a reference from licensing justices and upon payment of compensation. Before the Act of 1904, licensing justices were in the habit of asking licensees to give undertakings, and the provisions of sect. 9 (2) of the Act of 1904 refers to voluntary undertakings of that kind. Those provisions do not give the licensing justices power to require the giving of an undertaking as a condition of renewal. If sect. 9 (2) were so construed, the effect would be to add another ground of refusal to those specified in sect. 1 (1), and would have the effect of very largely increasing the power of justices to take away licences without compensation. That would be quite contrary to the intention of the Act.

A. H. Bodkin and *F. E. Smith* for the owners. —Among the conditions which the justices have here imposed is one relating to the supply of drink to children, which goes beyond the provisions of the Intoxicating Liquors (Sale to Children) Act 1901, and the justices cannot in any case have power to impose such a condition. The form of licence which these justices have adopted, which contains a clause that it is granted subject to an undertaking to observe the indorsed conditions, is not in accordance with the statutory form of licence.

Asquith, K.C., *Low*, K.C., and *T. Shepherd Little* for the justices.—The proper course for the appellants to have taken was to appeal to quarter sessions, and, if that was an available remedy, they cannot apply for a *mandamus*. Whether the action of the justices was a refusal to renew the licence unless an undertaking to observe the conditions was given, or was a grant of the licence subject to the conditions, it was an act relating to the renewal of licences, in respect of which an appeal would lie to quarter sessions under sect. 28 of the Alehouse Act 1828:

Reg. v. *Smith*, L. Rep. 8 Q. B. 146;
Reg. v. *Cotham*, 78 L. T. Rep. 468; (1898) 1 Q. B. 802.

It was conceded before the justices that the conditions were reasonable; but, if they were not, then an appeal could be brought to quarter sessions. The condition as to supplying drink to children cannot be said to be a contravention of the Act of 1901; that Act creates a criminal offence and imposes a penalty, but this condition does not do that, but only provides reasonable additional safeguards for children. The real question in this case is as to the meaning and effect of sub-sect. 2 of sect. 9 of the Act of 1904. If the contention of the appellants is correct, it

renders absolutely nugatory the provisions of that sub-section, as to failure to fulfil any reasonable undertaking given to the justices on the grant or renewal of a licence. That provision refers and relates to the previous well-established practice of justices to ask for and obtain undertakings on the grant or renewal of a licence, any breach of which would be taken into account by the justices on a subsequent application for renewal. Sub-sect. 2 contemplates the continuance of that practice and regulates and controls it; the undertaking must be a reasonable one, and a breach thereof shall be misconduct for which the justices may, under sect. 1 (1), refuse a renewal of the licence, upon the ground that the premises have been "ill-conducted," or, at their discretion, without compensation. The proviso to sub-sect. 2, which refers to the "required undertaking," shows that the justices have under the Act power to require undertakings to be given. If the appellants are right, justices can never effectively ask for any undertaking, even in cases where the renewal of a licence has been granted subject to an undertaking before the Act of 1904; their only power would be to refer the question of renewal to quarter sessions upon a refusal to give an undertaking, in which case the renewal can only be refused on payment of compensation. That would be a curious result, and would reduce the provisions of sect. 9, sub-sect. 2, to an absurdity. Licensing justices have always had power to impose reasonable conditions:

Rex v. *Athay*, 2 Burr. 653;
Reg. v. *Wilkinson*, 28 J. P. 597;
Reg. v. *Bowman*, 78 L. T. Rep. 230; (1898) 1 Q. B. 663;
Reg. v. *West Riding of Yorkshire County Council*, 75 L. T. Rep. 252; (1896) 2 Q. B. 386.

And it was not intended by this Act to take away that power.

Pickford, K.C. in reply.—The proper remedy in this case is by an application for a *mandamus*:

Reg. v. *Bowman* (*ubi sup.*).

Cur. adv. vult.

April 4. — The following judgments were read:—

COLLINS, M.R.—The question on this appeal is whether, although the Licensing Act 1904, s. 1, has expressly limited the power to refuse the renewal of an existing on-licence to five named grounds, it is nevertheless competent to the justices of the licensing district to refuse it unless the applicant consents to give an undertaking to keep and observe certain conditions to be indorsed on the back of the licence as to the conduct and management of the business, and not covered by the five grounds named. The Divisional Court has decided that it is. A technical question arises also—viz., whether, even if the justices were wrong, the appellants ought not to have appealed to quarter sessions instead of proceeding as they have done by motion for a *mandamus*. The court below has decided the case upon the merits, and both sides are anxious that it should, if possible, not be determined on merely technical grounds. I will address myself therefore to the main question above stated. The circumstances under which the Act of 1904 came to be passed are well known. The House of Lords had finally decided in *Sharp* v. *Wakefield* (64 L. T. Rep. 180; (1891) A. C. 173) that the discretion of justices was absolute in refusing renewals except in the case of licences falling within the Act of 1869 and in existence on the 1st of May of that year. The discretion was, of course, to be exercised judicially "according to the rules of reason and justice, not according to private opinion; according to law, and not to humour": (see per Lord Halsbury in *Sharp* v. *Wakefield*, *ubi sup.*). After that decision renewals were more frequently refused on grounds of general policy, and not by reason of defects in the premises or of misconduct of the licensee. The *Farnham* case, decided in 1902, *Rex* v. *Howard* (86 L. T. Rep. 839; (1902) 2 K. B. 363), was much discussed, and legislation was called for to mitigate the hardship of individuals whose means of livelihood had been lost by the withdrawal of licences for the benefit of the community without misconduct on their part. This led to proposals of compensation, which were adopted and embodied in the Act of 1904. In order to discriminate between those who on a general reduction of licences might be deemed fairly entitled to compensation and those who might not, it was necessary to ascertain the grounds upon which the justices in any particular case had acted in refusing a renewal. It was apparently thought by the Legislature that the simplest way of working out this result was to take away the unlimited discretion of justices and substitute a limited discretion based on defined grounds, which were no doubt those by which the justices had in practice guided themselves. Hence the provisions of sect. 1 controlling the discretion and obliging the justices to specify in writing the grounds of their refusal. A practice had also grown up, known to all persons conversant with licensing procedure, for the justices, having the general discretion I have referred to, to demand from applicants undertakings as to the conduct and management of the business if the licence were renewed. We were told that such undertakings were sometimes asked for and given even in cases of licences under the Act of 1869, which had existed at the date of the passing of that Act. This brief anticipatory statement is necessary in order to appreciate the bearing of the sections and the precise point raised for decision. Sect. 1 enacts as follows: "(1) The power to refuse the renewal of an existing on-licence, on any ground other than the ground that the licensed premises have been ill-conducted, or are structurally deficient or structurally unsuitable, or grounds connected with the character or fitness of the proposed holder of the licence, or the ground that the renewal would be void, shall be vested in quarter sessions instead of the justices of the licensing district, but shall only be exercised on a reference from those justices and on payment of compensation in accordance with this Act. In every case of the refusal of the renewal of an existing on-licence by the justices of a licensing district they shall specify in writing to the applicant the grounds of their refusal. (2) Where the justices of a licensing district, on the consideration by them, in accordance with the Licensing Acts 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on-licences requires consideration on grounds other than those on which the renewal of an existing on-

licence can be refused by them they shall refer the matter to quarter sessions, together with their report thereon, and quarter sessions shall consider all reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises and, unless it appears to quarter sessions unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the justices of the licensing district) an opportunity of being heard and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates." Sect. 2 deals with the amount of compensation. Sect. 3 provides for a compensation fund. Sect. 4 deals with new licences and the attaching of conditions thereto. Sects. 5 to 8 deal with machinery. Then comes sect. 9, which, coupled with sect. 1, raises the point for decision. It enacts as follows: "(1) The provisions of this Act shall apply to the transfer of an existing on-licence as they apply to the renewal of an existing on-licence, with the substitution of transfer for renewal. (2) If the justices of a licensing district refuse to renew an existing on-licence on the ground that the holder of the licence has persistently and unreasonably refused to supply suitable refreshment (other than intoxicating liquor) at a reasonable price, or on the ground that the holder of the licence has failed to fulfil any reasonable undertaking given to the justices on the grant or renewal of the licence, the justices shall be deemed to have refused the licence on the ground that the premises had been ill-conducted: Provided that where the justices, on an application for the renewal of an existing on-licence, ask the licence-holder to give an undertaking as aforesaid, they shall adjourn the hearing of the application and cause notice of the required undertaking to be served upon the registered owner of the premises and give him an opportunity of being heard." Sub-sects. 1 and 2 create no difficulty. The latter merely makes it clear that the two classes of acts named therein may be treated by justices as falling within one of the grounds of refusal limited by the first section of the Act. It is upon the proviso to sub-sect. 2 that the decision of the court below is based. It is upon the words "required undertaking" that the learned judges mainly, if not wholly, found themselves. If these words may be fairly read as merely a synonym for the undertaking which the justices are supposed to have "asked for" in the earlier part of the sentence, the whole fabric of implication based on the use of the word "required" falls to the ground. Unless it is to be read as equivalent to "insisted upon as a condition of renewal," it cannot ground the inference drawn from it, that the Legislature assumed the existence of a power to require in that sense an undertaking, as surviving the inhibition of the first section, with the result that it must be taken to have sanctioned an additional ground for the refusal of a licence as arising upon a failure to give an undertaking. In other words, we must first construe "required" in a sense not necessarily demanded by the context, and then infer that it was intended by the use of that word to repeal or modify the express and unambiguous enactment of the first section, and vest in the licensing justices another ground of refusal, although the power to refuse except on the five grounds named has been expressly withdrawn from them and vested in the quarter sessions. Surely a bold inference to draw from such slight materials. Down to this point in the discussion there can, it seems to me, be no possible doubt as to the effect of the enactment. The intention to limit the discretion to refuse a renewal to the grounds named in sect. 1 is clear beyond controversy. "The power to refuse the the renewal of an existing on-licence on any ground other than" the five named "shall be vested in quarter sessions instead of the justices of the licensing district"; and to withhold a renewal unless the applicant will give an undertaking as to the mode of carrying on the business is, in my judgment, the same thing as to refuse it on a ground other than one of the five. *A fortiori* when the undertaking relates to matters outside the five grounds. This provision is express and absolute, and leaves nothing to implication, and yet it is contended that, notwithstanding this clear and peremptory inhibition in the governing enactment, it is to be read as not meaning what it says, but as covering and permitting a refusal on a ground not falling within any of those named, but the right to act on which is to be implied out of a proviso to a subsection which is addressed, by way of greater caution apparently, to providing that a particular line of conduct may deemed misconduct within the governing enactment. In my judgment it is not competent for this court to introduce by implication only a provision directly contradictory of an unambiguous enactment addressed to the very point itself. If we are at large to draw inferences and make implications, why are we to leave out the inference arising from the fact that the Legislature has not only abstained from enacting this sixth ground of refusal, but has by the limitation to five other grounds directly excluded it? And why are we to suppose that it intended that the refusal to give an undertaking should be a ground of refusal of the renewal when, its attention being obviously called to the existing practice as to undertakings, it addresses its enactment expressly to the breach of such undertakings when given, and not to the refusal to give them at all? The proviso, as I have pointed out, does not in its context purport to relate at all to the first section, and surely, if there is any apparent inconsistency between the two, it is the scope of the proviso which must be limited so as to make it harmonise with the primary and unambiguous inhibition of the first section. To contradict the plain language of the Act by a surmise based on such materials is, in my judgment, to substitute legislation for interpretation. But it cannot be contended that the proviso is altogether nugatory if it be held not to add another ground of refusal to those named in the first section. We learn that such undertakings were sometimes given in cases under the Act of 1869, though it is clear that the justices had no power to refuse the renewal except upon the four grounds named in that Act, and it may be that others hereafter may do what one of the applicants has done in this case, voluntarily give the undertaking asked for. Though the court below have arrived at the conclusion that the justices were acting within their powers in refusing renewals in the cases under appeal, I am,

nevertheless, entitled to pray in aid of my own opinion their decision in the case of a licence in existence before May 1869, and governed by the Act of that year. They have held that in that case the justices had no power to exact the undertaking, presumably because to do so was to refuse upon a ground other than the four named in that statute: (see *Rex* v. *Grimwade*, 53 W. R. 377; 69 J. P. 184). Now, by sub-sect. 3 of sect. 9, the grounds mentioned in sect. 8 of the Act of 1869 are substituted for the grounds mentioned in the present Act as the grounds on which the power to refuse the renewal of an existing licence is reserved to the justices of the licensing district. On what grounds they can have held that the justices had no power to refuse the renewals in those cases which do not equally apply to the cases under review I am, with deference, at a loss to determine. The words of sect. 8 of the Act of 1869 are no more clear and peremptory than those of sect. 1 of this Act, and the practice as to asking undertakings from applicants under the former Act existed, as we were told by Mr. Low, in some places. The words of the redoubtable proviso do not purport to be limited to one class of licences more than another. They are, "where the justices, on an application for the renewal of an existing on-licence, ask the holder to give an undertaking." Why is this provision to be limited to licences other than those existing in May 1869, and regulated by the Act of that year? If it does apply to them, and no reason has been given why it does not, then the court below, on their decision, must read the word "required," on which they rest the whole weight of their conclusion in the cases now under discussion, in two different senses according as to whether the licence is one governed by the conditions of sect. 8 of the Act of 1869 or not—in the former class in the sense contended for by the appellants, viz., as a synonym for "asked for"; in the latter in the sense which they have adopted as governing their decision in the cases now under appeal, viz., "stipulated for as a condition of allowing the renewal." While cordially agreeing with the decision of the court below in the case under the Act of 1869, I must, with great deference, express my inability to adopt their conclusion in the cases which are the subject of this appeal. With regard to the technical point, I think that the true effect of what the justices did was that they did not refuse the renewals in such a form as to admit of an appeal to quarter sessions. In fact, when asked to give a positive refusal so as to facilitate an appeal, they declined to do so, and insisted that they had allowed renewal. What they, in fact, had done was to cause licences to be printed containing on their face a variation from the statutory form by the introduction of the following words: "This renewal licence is granted upon the licensee giving an undertaking to keep and observe the conditions indorsed on the back hereof"; and on the back were indorsed six conditions. These licences were deposited with their clerk, to be delivered to the applicants on their giving the undertakings. Not having, in their view, refused the renewals, they did not specify in writing to the applicant the grounds of their refusal. Nevertheless, it is now contended on their behalf that the applicant was bound to treat what they had done as a refusal to renew, and to have appealed if he objected, and that the remedy by *mandamus* was, therefore, not open. It seems to me that, if I am right in the construction I have placed upon the statute, what the justices have done is to decide in favour of renewal, with a condition which they had no power to impose and which is, therefore, nugatory, and that a *mandamus* ought to go to compel them to deliver the renewal licences without the condition. If their decision cannot be so treated, then I think the result is that they have not decided the point submitted to them at all, and that a *mandamus* should go, as in *Reg.* v. *Bowman* (78 L. T. Rep. 230; (1898) 1 Q. B. 663) and *Reg.* v. *Cotham* (78 L. T. Rep. 468; (1898) 1 Q. B. 802). In my opinion, therefore, the appeal must be allowed.

MATHEW, L.J.—In these cases I differ, I need not say with much hesitation, from the opinions of my learned colleagues. I think the judgments of the Divisional Court were right, and ought to be affirmed. The statute which we are called on to construe is entitled "An Act to amend the Licensing Acts 1828 to 1902, in respect to the extinction of licences and the grant of new licences," and by sect. 10 the Act is to be construed as one with the Licensing Acts aforesaid. Before the statute in question the right of appeal to quarter sessions was granted to all persons aggrieved by any act of any justices done in or concerning the exercise of their powers. Where there was a refusal to grant the renewal of a licence, the decision of the licensing justices might be reviewed by quarter sessions, and subject to this their discretion was absolute. For many years this practice had been followed all over England of granting a renewal of a licence upon an undertaking to observe certain conditions intended to secure the orderly and proper management of licensed houses. Each applicant was required to satisfy the magistrates either by verbal or written assurances that the conditions which they required would be complied with. If any objection were made to the act of the justices in this respect it seems clear that there would be an appeal to quarter sessions. When the Act of 1904 was passed, the licences then in existence were for the most part of this limited character. The undertaking which was in these cases required was admitted to be of the usual character, and to be perfectly reasonable. This is shown by the statements which counsel were instructed to make to the justices. For many years the conditions had been accepted and assented to by those interested in licensed premises in Birkenhead. The question upon this appeal is whether the procedure which had been previously adopted of granting a renewal of a licence upon conditions had, under the Act of 1904, been placed beyond the jurisdiction of the justices. This was said to be a necessary implication from the language of the statute. Under sect. 1 the absolute discretion previously conferred upon the justices was confined to the cases therein specified, and in respect of the decision of the justices in those cases there would be for persons aggrieved an appeal to quarter sessions. Refusal to renew in cases other than those specified in sect. 1 was vested in quarter sessions instead of the justices of the licensing district. No provision is made for an application in such cases to quarter sessions. By sub-sect. 2, where the justices came to the

conclusion that the renewal of any particular licence required consideration, they were to refer the matter, together with their report thereon, to quarter sessions, and that court was, as appears from the rules, to have the power either to continue the licence or to cancel it subject to the payment of compensation as provided by the Act. They appear to have no further powers. This enactment only applies when there has been no default on the part of the applicant, and the only question is whether the licence should be continued or withdrawn. It has no application to cases where the renewal is granted on the undertaking to fulfil conditions. There is no ground for any implication so far that the authority of the licensing justices to impose conditions was in any way affected. That there was no distrust of the discretion of the justices is shown in sect. 4, where they are empowered to attach to the grant of a new licence such conditions as they think proper in the interests of the public. Further, under sect. 9, sub-sect. 2, where an applicant agrees to the condition, the justices may, upon giving an opportunity of being heard to the registered owner, grant the renewal in the exercise of their discretion, and may disregard any objections the owner may offer. But then it is said the language of sub-sect. 2 shows that the discretion of the justices can no longer be exercised when the holder of the licence objects to any conditions and refuses to enter into any undertaking. The enactment, it is argued, only applies where there has been a consent to a condition, and where there has been no consent there can be no condition or undertaking. Here it is said that, as the applicant refused to give an undertaking, the justices had no power to refuse the licence on any ground. But I see no reason why the enactment should receive this interpretation. The section in terms applies only where consent has been given. It is intended to provide a mode of punishment where an undertaking has not been fulfilled. It has no reference to the question of the terms upon which a renewal may be granted, but it is said that the proper inference from the language of the section is that consent is optional; in other words, that there should be added by implication to the section a proviso that an applicant should not be compellable to consent to a condition, however reasonable it may be. But, in the first place, under the second clause of sect. 9, sub-sect. 2, the authority of the justices to require an undertaking seems to be taken for granted. In the next place, this construction would have the effect of nullifying the section. No applicant would consent to an interference with the conduct of his business, particularly where the breach of an undertaking might jeopardise his licence. Further, the control which has hitherto been exercised by the justices would be completely swept away. This condition of things would, no doubt, be an advantage to publicans, but it would be secured at the expense of the interests of the community in each locality. Without clear language I do not think that there should be attributed to the Legislature the intention to sanction so formidable and, if I may be permitted to hazard the opinion, so lamentable a revolution in the mode which has hitherto been adopted in administering the Licensing Acts There is no apparent reason for the supposed change. With respect to what took place before the licensing justices, the evidence appears to me to be quite clear. If there were any doubt, it is removed by the subsequent correspondence. The justices declined to say that they refused the applications, for the reason that they were willing to grant them if their conditions were complied with. They were quite right in declining to give any effect to the hollow assurances offered on behalf of the trade that the publicans in the locality were anxious to do what the justices thought right. The sure test of their willingness was that they should give the undertaking required of them. I desire to express no opinion upon the decision of the Divisional Court as to beerhouses. There has been no appeal from that judgment in this respect.

COZENS-HARDY, L.J.—This appeal raises an important and difficult question as to the powers of licensing justices under the recent Act of 1904. The Birkenhead justices, acting in perfect good faith and with the sole desire to promote the welfare and order of the borough, desire to exact from all applicants for the renewal of onlicences certain undertakings, which I assume to be reasonable. The licences are in the usual form, except that the following clause is inserted: "This renewal licence is granted upon the licensee giving an undertaking to keep and observe the conditions indorsed on the back hereof." Six conditions are indorsed, but it is not contended that all those conditions should be exacted in the case of every house. The justices deny that they have refused the licences; on the contrary, they assert that they have renewed the licences, although the clerk has been directed not to hand them out unless and until the undertakings are given. The licence-holders decline to give any undertaking. The Divisional Court have held that the justices may require a reasonable undertaking to be given as a condition of granting a renewal; and the main point in this appeal is whether that view is correct. Prior to the 1st Jan. 1905, justices had a general discretion to grant or refuse renewals of licences of the class with which this appeal alone deals (*Sharp* v. *Wakefield*, *ubi sup.*); and a practice very naturally grew up by which the justices made terms with the licence-holders, and insisted, as a condition of renewal, that certain undertakings should be given. These undertakings were sometimes indorsed on the licence, sometimes entered in the clerk's book, and sometimes were verbal. I cannot doubt that this was a most wholesome practice. The undertakings were given because without them the licence would not have been renewed. The undertakings were observed because a wilful breach would have almost certainly been a fatal objection when the next application for renewal came before the justices. But, except in the manner and to the extent above indicated, these undertakings were voluntary and had no sanction. They are not mentioned in any of the licensing statutes. A great change was effected by the Licensing Act 1904 in the position of licensing justices. By sect. 1 the power to refuse renewal on any ground other than one of five particular grounds is taken away from the licensing justices and is vested in quarter sessions, and quarter sessions can only act on a reference from the justices and on payment of compensation. The only one of the five grounds on which the justices may refuse a renewal which need be

referred to is "that the licensed premises have been ill-conducted." It is, however, contended, that, notwithstanding the plain language of this sub-section, there is to be found in sect. 9 (2) an implied power in the justices to refuse renewal unless reasonable undertakings are given, or, which amounts to the same thing, to grant renewal only upon such undertakings being given. I cannot adopt this contention. It really involves the addition of a sixth ground on which the justices may refuse. The first paragraph of the sub-section lends no support to the contention. It is fully satisfied by regarding the undertaking as one which is not exacted, but volunteered. And although the second paragraph of the sub-section contains the words "the required undertaking," I think the context shows that "required" is merely equivalent to asked for or requested. The judges in the Divisional Court seem to have thought that the construction which I have adopted renders sect. 9 (2) perfectly useless, because no licence-holder would be so foolish as to volunteer an undertaking the non-fulfilment of which might entail the refusal of renewal without possibility of compensation. With the utmost respect, I am unable to concur in this view. Although the general discretion upon which the former practice of undertakings rested is gone, it is easy to see that it may still be greatly to the interest of the licence-holder to give a reasonable undertaking. For example, the justices may ask for a reasonable undertaking which they think ought to be given, and may say that if it is not given they will refer the matter to quarter sessions, under sect. 1 (2), with a view to the refusal of renewal. The licence-holder will be very desirous not to run the risk of having the renewal refused by the quarter sessions. A refusal means to him the loss of his occupation and trade, and it will be a poor consolation to him to know that compensation will be payable "to the persons interested in the licensed premises"—see sect. 2 (1) (2)—for the fraction attributable to his interest will in most cases be very small. Nor does it appear unreasonable that the registered owner of the licensed premises should have an opportunity of being heard before a voluntary undertaking is given, inasmuch as the giving of such an undertaking may result in the refusal of the licence and the loss of the compensation, the greater part of which would go to the owner. And, further, it is perfectly reasonable that the breach of an undertaking voluntarily given, after notice to the registered owner, should be held to amount to ill-conduct, so as to bring the case within the jurisdiction of the justices under sect. 1. In my opinion the old practice of exacting undertakings on renewals of on-licences cannot survive the destruction of the general discretionary power to grant or to refuse, to which the existence of the practice was due. It is not for us to legislate; our duty is limited to interpretation. In my opinion the introduction in the licence of the undertaking which is not found in the form prescribed by the Secretary of State under sect. 48 of the Licensing Act 1872 was not authorised. I agree with the judgment of the Master of the Rolls on this point. It is, however, contended by the respondents that, even if the justices were wrong in their view of the law, the appellants ought to have appealed to quarter sessions under sect. 27 of the Alehouse Act 1828, and that the remedy by *mandamus* is not available. I think this objection would be valid if the justices had refused, on wrong grounds, to grant renewal: (*Reg.* v. *Smith*, L. Rep. 8 Q. B. 146). But they did not refuse. They attempted to attach a condition or impose a term which was not authorised, and in such a case the remedy by *mandamus* is appropriate: (*Reg.* v. *Bowman, ubi sup.*). I think the proper order is that a *mandamus* should issue to the justices commanding them to deliver up to the applicants their renewed licences in the proper statutory form, without exacting any undertaking.

Appeal allowed.

Solicitors for the appellants, *Godden, Son,* and *Holme,* for *Thompson, Hughes,* and *Co.*, Birkenhead.

Solicitors for the respondents, *Lloyd-George, Roberts,* and *Co.,* for *Gerrard Copeland,* Birkenhead.

Thursday, July 13, 1905.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

MIDWOOD AND CO. LIMITED *v.* MAYOR, ALDERMEN, AND CITIZENS OF MANCHESTER. (*a*)

APPLICATION FOR A NEW TRIAL.

Nuisance — Statutory powers — Electric Lighting —Escape of electricity from main—Explosion—Damage to property—Liability of undertakers —Statutory exoneration from action in the event of nuisance—Electric Lighting Act 1882 (45 & 46 *Vict. c.* 56)—*Electric Lighting Act* 1888 (51 & 52 *Vict. c.* 12)—*Manchester Electric Lighting Order* 1890.

A municipal corporation were the undertakers for the supply of electricity in their district under an Electric Lighting Order which was confirmed by Act of Parliament. The order contained a clause that nothing in the order should exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them.

In consequence of a fault in an electric main laid down by the corporation under this order, electricity escaped and fused the bitumen in which the wires were covered. A gas was thereby produced which accumulated and presently caught fire and exploded. This explosion caused injury to premises belonging to the plaintiffs in the street were the main was laid. In an action by the plaintiffs to recover damages for this injury:

Held, that under the above mentioned clause in the order the corporation were liable in the action, apart from any question of negligence.

APPLICATION by the defendants for judgment or a new trial in an action tried before Lawrance, J. with a jury.

The plaintiffs were the owners and occupiers of certain premises in Fountain-street, Manchester, and they brought this action to recover damages from the defendants, the corporation of Manchester, in respect of the injury which had been caused to their premises by a fire and explosion resulting from an escape of electricity in the defendants' electric mains.

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

In consequence of a fault in the insulation, electricity escaped and fused the bitumen in which the wires were encased. An inflammable gas was thereby generated, which accumulated for some time, and then, escaping into a house adjoining the plaintiffs' premises, caught fire and exploded, causing the damage complained of.

The plaintiffs alleged first, that the damage complained of was the consequence of a nuisance caused by the defendants; and, secondly, that, apart from nuisance, the damage was caused by the negligence of the defendants and their servants.

The defendants contended that they had acted without negligence under the Manchester Electric Lighting Order 1890, and that the matters complained of were done or permitted by them in, and were necessarily incidental to and resulted from, the due discharge of their duty under the order, and that therefore they were not responsible to the plaintiffs in the action.

Under the Electric Lighting Acts 1882 and 1888 a provisional order called the Manchester Electric Lighting Order 1890 was made by the Board of Trade, and was afterwards confirmed by the Electric Lighting Orders Confirmation (No. 11) Act 1890 (53 & 54 Vict. c. cxcvii.).

By this order the defendants, therein called the undertakers, were required to lay down suitable and sufficient mains for the supply of electricity within the city of Manchester, and to furnish a sufficient supply to owners or occupiers within that area requiring it, provided that the electricity should be supplied by means of some system approved by the Board of Trade, and subject to such regulations and conditions for securing the safety of the public and for ensuring a proper and sufficient supply, as the Board of Trade might from time to time impose. The order also contained the two following clauses:

Clause 67. The undertakers shall be answerable for all accidents, damages, and injuries happening through the act or default of the undertakers, or of any person in their employment, by reason of or in consequence of any of the undertakers' works, and shall save harmless all authorities, bodies, and persons by whom any street is repairable, and all other authorities, companies, and bodies, collectively and individually, and their officers and servants, from all damages and costs in respect of such accidents, damages, and injuries.

Clause 70. Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them.

The system adopted by the defendants, which was approved by the Board of Trade, was to have a single system for the supply of electricity to the whole of Manchester, instead of dividing up that district into several district circuits, and it was alleged by the plaintiffs that the system adopted rendered it more difficult to localise any spot at which electricity was escaping, and that the defendants had been negligent both in adopting this system when other systems existed which the plaintiffs said were better, and also in not taking proper steps to remedy the escape of electricity immediately upon the discovery of the existence of the escape.

At the trial of the action before Lawrance, J. the learned judge left the following questions to the jury: (1) Did the system adopted by the defendants constitute a nuisance by causing danger to persons having premises adjacent to the mains?—Answer: Yes. (2) Were the defendants guilty of negligence in their adoption of the method of localising and dealing with faults?—Answer: Yes. (3) When the defendants became aware of the fault, did they deal with it for the purpose of preventing fire in a reasonable and proper manner?—Answer: No.

The learned judge, upon these findings, ordered judgment to be entered for the plaintiffs for the agreed amount of damages.

The defendants applied for judgment or a new trial.

Moulton, K.C. and *Macmorran*, K.C. (*J. W. Gordon* with them) for the defendants.—The system of electric lighting adopted by the defendants has been authorised by the Board of Trade, and under the order of 1890 the defendants are bound to supply electricity to persons desiring to have it. They cannot be liable for creating a nuisance, in respect of a matter as to which they are under such statutory duties as these:

Geddis v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430.

The defendants could not be indicted for a nuisance in respect of adopting this system of supplying electricity. They have done nothing but carry out their statutory duties. Clause 70 in the order must be read subject to the paramount duty of the defendants to lay down their electric mains. The clause cannot be construed in the widest meaning of its terms. It cannot refer to the system of electric supply, and must be limited as only dealing with incidental nuisance caused by defects of apparatus. They cited

Redhead v. *Midland Railway Company*, 20 L. T. Rep. 628; L. Rep. 4 Q. B. 379;
Hammond v. *Vestry of St. Pancras*, 30 L. T. Rep. 296; L. Rep. 9 C. P. 316;
Brocklehurst v. *Manchester, Bury, Rochdale, and Oldham Steam Tramways Company*, 55 L. T. Rep. 406; 17 Q. B. Div. 118;
Bateman v. *Poplar Board of Works*, 58 L. T. Rep. 720; 37 Ch. Div. 272;
Stretton's Derby Brewery Company v. *Mayor of Derby*, 69 L. T. Rep. 791; (1894) 1 Ch. 431.

Sir *Edward Clarke*, K.C. and *Bousfield*, K.C. (*G. Wood Hill* with them) for the plaintiffs.—Electricity is a dangerous thing, and as the defendants have brought it into their mains, it is their duty at common law to keep it from doing injury. If it escapes, it escapes at their peril:

Rylands v. *Fletcher*, 19 L. T. Rep. 220; L. Rep. 3 H. L. 330.

The defendants might have had statutory powers which would relieve them from their common law liability, but the express provisions of clause 70 in their Electric Lighting Order show that they cannot rely upon their statutory rights and duties with regard to the supply of electricity in order to escape from their common law liability in respect of a nuisance they may cause. The question here does not arise whether the system adopted by the defendants for supplying electricity to Manchester is at fault. The case is on all fours with a previous decision of this court:

Shelfer v. *City of London Electric Lighting Company*, 72 L. T. Rep. 34; (1895) 1 Ch. 287.

They cited also

Rex v. *Pease*, 4 B. & Ad. 30;
Vaughan v. *Taff Vale Railway Company*, 2 L. T. Rep. 394; 5 H. & N. 679;
Jones v. *Festiniog Railway Company*, 18 L. T. Rep. 902; L. Rep. 3 Q. B. 733;
Powell v. *Fall*, 43 L. T. Rep. 562; 5 Q. B. Div. 597;
National Telephone Company v. *Baker*, 68 L. T. Rep. 283; (1893) 2 Ch. 186;
Green v. *Chelsea Waterworks Company*, 10 Times L. Rep. 259;
Jordeson v. *Sutton Southcoates and Drypool Gas Company*, 80 L. T. Rep. 815; (1899) 2 Ch. 217;
Batcheller v. *Tunbridge Wells Gas Company*, 84 L. T. Rep. 765;
Eastern and South African Telegraph Company v. *Cape Town Tramways Company*, 86 L. T. Rep. 457; (1902) A. C. 381.

Moulton, K.C. replied.

COLLINS, M.R. — This is an application for judgment or a new trial in an action brought against the corporation of Manchester, who conduct the electric lighting of the city, to recover damages in respect of injuries caused to the plaintiff's property by an explosion which was brought about by the operation of the system of electric lighting as carried out in Manchester. The explosion took place in consequence of an escape of electricity in the defendants' mains, which had the effect of fusing the bitumen in which the wires were encased. The gas that was produced by this fusion exploded in a house adjoining the plaintiffs' premises and started the fire which injured his property. The first question that was raised was whether the defendants are protected by statute from any liability for what occurred. The defendants laid their electric mains under statutory powers and in accordance with the regulations imposed by the Board of Trade; and they contend that, as no care or skill on their part was wanting, they are protected by statute from any liability. On the other hand, the plaintiffs point out that clause 70 of the Electric Lighting Order 1890, as confirmed by statute, provides that "nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them." That raises the principal point that comes up before us for discussion. But apart from that there is another point which was urged at the trial, and upon which certain questions were left to the jury. It is this: The plaintiffs aver that the mischief which they complain of was brought about by the negligence of the defendants—that is to say that, in the first place, there were defects in the electric system employed by the defendants which rendered the mischief which in fact occurred to the plaintiffs very probable in itself, and secondly, that the defendants had not made use of the best and most recently discovered means for ascertaining the position of the source of mischief and for correcting the mischief within a reasonable time. The jury found that there was negligence on the part of the defendants which led to the accident. Judgment was given in favour of the plaintiffs on the findings by the jury and also on the ground that the defendants were liable under the statute for a nuisance, irrespective of any negligence on their part. Now, I will first deal with the point whether the defendants would be liable as for a nuisance, apart from any question of negligence. It has hardly been contended, though perhaps I cannot say it has not been contended, that there was in point of fact no nuisance here. Technically it was disputed by the defendants that there was any nuisance in fact, but I do not think for a moment that that contention can be supported. When a person has his premises blown up by an explosion next door which has been brought about by the agency of another person, it seems to me that it is impossible to say that he has not suffered from a nuisance. Whether the person who produced that state of things is liable in damages is a different matter, but it seems to me that it is quite impossible to say that in this case there was not a nuisance. A gradual accumulation of gas was brought about by the fusion of the bitumen by the operation of the overheated electric wires, and that process, after going on for some two or three hours, finally culminated in an explosion which injured the plaintiffs' property. If that was not a nuisance, I do not know what would be one. It is clear to my mind, beyond all controversy, that there was a nuisance caused by the operation of the defendants' electric system, and unless the defendants can rely on some statutory protection, they are clearly liable for the damage done to the plaintiffs. Now, the Electric Lighting Order 1890, which the defendants rely upon, contains in clause 70 the provision which I have already read, that nothing in the order shall exonerate the undertakers from any action for nuisance in the event of any nuisance being caused by them. It was very ingeniously argued by the learned counsel for the defendants that, notwithstanding that clear language, the provision must be read subject to what they say is the underlying right given by the Legislature to the defendants to place their electric mains in the positions where they have placed them, with the obligation always to keep a supply of electricity in these mains up to a certain pressure; that the defendants have done nothing except that which, by the order, they were authorised to do; and that therefore, as I understand the argument, this provision of clause 70 must be rejected as being inconsistent with the other and paramount provisions of the order authorising them to put the electric mains where they have put them. That argument seems to me to confuse the order of ideas. I think that all the provisions of the order should be read together, and the effect of reading them together is that only a qualified permission is given to the undertakers. They are empowered to lay down their mains, but only under certain terms and conditions. Underlying the whole of their powers, a condition for the benefit of the public is imposed upon undertakings of this kind which are not yet in their final stage of development and in which there may be all sorts of undiscovered risks. Therefore, although the defendants are given the privilege to lay down electric mains and to supply the city with electricity, their powers are fenced round with a provision in favour of the public, throwing upon the defendants the risk of any nuisance that may be caused by the works carried out in the exercise of those powers. Permission is given by the order to the undertakers to carry out certain works, but it is a permission qualified with an

obligation to bear the consequences of any nuisance which they may cause thereby. The order does not give them *carte blanche* to create a nuisance. If they can exercise their powers under the order without creating a nuisance, well and good. But if what they do in exercising their powers causes a nuisance, they are not only not protected by the order, but can clearly be made liable by its express provisions. It is not necessary for me to go through the decided cases that have been referred to in the argument, as they appear to me to establish clearly the law which I have just laid down. I will refer, however, to one of them, namely, *Shelfer* v. *City of London Electric Lighting Company* (*ubi sup.*). Now, the particular nuisance that was the subject of that case was not the same as that which we have to deal with now; that is to say, there was no explosion, but the mischief was of another kind. An electric lighting company had erected powerful engines and other works on land near to a house which was the subject of a lease, and owing to the vibration and noise caused by the working of the engines structural injury was caused to the house and annoyance and discomfort to the lessee. To the claim made by the plaintiff in respect of that nuisance the defendants set up precisely the same defence as has been set up by the defendants in the case now before us. Lord Halsbury, L.C. in the Court of Appeal dealt with the argument in this way. He said: "The nuisance being established, it is said, first, that the defendant company are authorised by law to carry on their business, and that, as they have done all that skill and care can effect to prevent any nuisance, they are in the same position as a railway company, and are entitled to do what they have done under the authority of the Legislature. If the analogy were a correct one, I should think the defendants had fallen very far short in their proof that they had done all that was possible to prevent a nuisance. A railway company has a definite line of operation within which it may make its works, and if it does all that can be done to prevent a nuisance in that place, the thing having to be done in that place, and by locomotive engines with the necessity of fire being carried along the railway, the Legislature is taken to have sanctioned that proceeding. No such considerations apply here, quite apart from the difference in the legislative enactments, with which I will deal presently. It is not, however, necessary to deal with this part of the case, and I only mention it to disclaim the notion that I acquiesce in the allegation that it has been proved that it is essential to the carrying on of the electric lighting business in the district in question that there should be a nuisance created." The Lord Chancellor then referred to the provisions of the Electric Lighting Act 1882 as to powers under provisional orders, and continued: "And then, in the order relied on for the authority to create the nuisance, come the words, 'nothing in this order shall exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused by them.' The general Act only gave them power subject, therefore, to the restrictions of the particular order, and the particular order makes them liable for nuisance." The words of the clause cited by the Lord Chancellor are practically identical with the words of clause 70 with which we have to deal, and it seems to me that in principle the case of *Shelfer* v. *City of London Electric Lighting Company* (*ubi sup.*) is on all fours with the present case. The defendants are not protected by clause 70 from liability to the plaintiffs for the nuisance they have caused, and therefore they are liable to make good the damage caused to the plaintiffs, apart from any question of negligence. That is enough to decide the case, but I think it would be wrong for me not to give some expression of opinion upon the point, which was very forcibly argued before us, whether the learned judge at the trial ought to have left to the jury any question as to the defendants' negligence. It seems to me that the learned judge would not have been justified in withdrawing the case from the jury, because there was evidence of negligence on the part of the defendants. It was pointed out that the defendants experienced much difficulty in localising the unquestioned mischief that was going on, and that this difficulty was due to the system which they had adopted of having only one supply of electricity to the whole of the district supplied by them—that is to say, to the whole of Manchester. The effect of having only one system was this, that when it was discovered that there was a fault somewhere, involving a leakage of electricity, the remedy adopted was simply to supply extra power so as to make good the waste. That remedy would carry with it the probable consequence of an aggravation of the existing mischief, which would ultimately result in an explosion. When the explosion had taken place the defendants would realise, probably for the first time, the spot where the mischief had been going on. The plaintiffs say that that is not a proper system, and that other systems of supplying electricity to a large district are known which are better and more reasonable for the protection of individuals. It may be that the defendants find it better to let each individual look out for himself, and to pay damages to him, if compelled to do so, for any injury he may have suffered, having on the other hand these advantages, that the supply of electricity to their customers is not interrupted, and that they avoid the difficulties which might incidentally arise if they tried to localise the fault at once. It was pointed out that in Liverpool the area of the city is divided into several circuits, so that if any leakage of electricity occurs anywhere it is known at once in which circuit it is. No doubt each of these circuits embraces a large area, but nothing like so large as the whole of the city of Manchester, and this division into circuits gives much greater facilities for finding out the exact locality of any mischief. Furthermore, there was evidence that, when information of the existence of the mischief was given to the responsible officials, they did not act with reasonable diligence, or that, at all events, steps were not taken within such time as they might and ought to have been taken, had the defendants' system for supplying information and for dealing with it when received been adequate. In point of fact, the mischief, which must have begun somewhere between eleven and twelve o'clock, was not actually ascertained at the particular place until about half-past three, and then it was ascertained only by the actual fact of the explosion. It seems to me that, the defendants

being under the obligation of taking all reasonable known means to safeguard the public against such an accident as the plaintiffs have suffered from, there was evidence fit for the consideration of the jury of a failure by the defendants to use reasonable care in ascertaining where the mischief was, and in stopping it when found. No complaint can therefore be made by the defendants on the ground that questions based on that evidence were left to the jury by the learned judge at the trial. As to the particular form of the questions I do not think it necessary to say anything. I wish my observations to be confined to the question of negligence on the part of the defendants in dealing with the mischief that arose, and not to be considered as having reference to the broader question whether the adoption by the defendants of their existing system of electric lighting involved negligence on their part. The questions that were put to the jury, though perhaps capable of a wider meaning, were directed, in my opinion, to the question whether, with reference to this particular nuisance and the damage suffered by the plaintiffs, the defendants were guilty of any negligence. I do not think it was intended to raise the question whether the electric lighting system adopted by the defendants, in itself, *ipso facto*, involved an actionable wrong. I do not for a moment dispute that, as a matter of law, a series of mischiefs might be proved to result from a particular system so as to justify a jury in finding that the system itself was a nuisance, quite apart from the particular damage which in the particular case has resulted to an individual. But that is not this case. I do not think that the jury in this case were invited to give a verdict on the defendants' system of electric lighting, apart from the particular mischief which has been caused to the plaintiffs. It is enough to say that there is one ground which in point of law places the defendants in the position of having no defence to damage caused by a nuisance for which they are responsible. The defendants' application therefore fails.

ROMER, L.J.—I am of the same opinion. The Manchester Electric Lighting Order 1890, under which the defendants are acting, expressly provides by clause 70 that nothing in the order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them. Now, here there was clearly a nuisance caused by them. The electricity which passed through their mains leaked considerably, and gave rise to a gas which accumulated and presently exploded, causing damage to the plaintiffs' property. That was a nuisance caused by the defendants which clearly renders them liable to damages under the provisions of clause 70. I can find nothing anywhere in the order which would save the defendants from liability. I agree that the order expressly authorises the defendants to carry out certain works, and I think that upon the true construction of the order it may properly be said that these special works could not be treated as being in themselves a nuisance within the operation of clause 70. For example, express power is given to the defendants to break up roads for the purpose of laying their electric mains, and a power to lay mains and to send electricity among them, but I cannot find that any authority, either express or implied, is given to the defendants by this order, authorising them to allow a leakage of electricity from their mains so as to cause an explosion or to injure the plaintiffs' property in the way in which they have injured it. That being so, I think there is an end of the case. On the authorities as they stand at the present day there is, to my mind, no reason why the defendants should not be held liable in this action. Under these circumstances it is really unnecessary for me to consider the findings of the jury on the questions that were submitted to them; but I think it right to say that I do not feel satisfied that their first finding could be supported, if that finding means, as I understand it to mean, that the mere system of electric lighting which has been adopted by the defendants in itself constitutes a nuisance. I think it right to say this, having regard to the great liabilities which such a finding might cast upon the defendants, if it were supposed to have been approved by this court.

MATHEW, L.J.—I am of the same opinion. The first finding of the jury which Romer, L.J. has just referred to would lead, as it seems to me, to an extraordinary consequence—namely, that as soon as the defendants' system of electric lighting was completed, and before it had begun to be worked, anybody who might possibly be in danger would have been entitled at once to indict the defendants for a nuisance. I do not think that the Legislature can have intended that. The provisional order requires that the system of lighting adopted by the defendants shall be approved of by the Board of Trade. That was intended to provide some protection to the public. But the approval of the Board of Trade would not be final and conclusive that the system was a safe one. It may well happen that a system which the Board of Trade thinks may be reasonably allowed may afterwards turn out to be an imperfect system. Now, supposing that the system allowed by the Board of Trade under this order should turn out to be so imperfect as to endanger the property of other persons, was it intended that the owner of property thus injured should not be entitled to appeal to the law for a remedy? It seems to me that it is impossible for anyone reading this provisional order to come to such a conclusion. The order grants to the defendants a concession to carry on a dangerous business, to which is incidental the risk of latent mischief which cannot be prevented by any care on the part of anyone. In that state of things it is entirely reasonable that the defendants should bear the inevitable loss which is consequent upon the business which they are empowered to carry on. For the reasons given by my Lord and Romer, L.J., clause 70 of the order seems to me to be decisive, and I think that clause 67 must be interpreted by the light of clause 70. With regard to *Brocklehurst* v. *Manchester, Bury, Rochdale, and Oldham Steam Tramways Company* (*ubi sup.*), I think that the nature of the business which was being carried on in that case precludes the decision from being any authority for deciding the case now before us. With regard to a tramway, it may be enough to insist that the business shall be carried on with reasonable care, because the incidents of such a business are tolerably obvious. But the difficulties and dangers incidental to carrying on the business of an electric lighting company are by no means

obvious. It is therefore perfectly reasonable that the Legislature should provide by clauses 67 and 70 of this order that the risks of this business shall be borne by those who carry it on, and not by innocent persons who may be damaged by reason of the concession granted to the defendants. As to the other points of the case, it is not necessary that I should discuss them at length. I agree that there was evidence for the jury that proper precautions were not taken by the defendants for providing an immediate remedy in the event of any accident of this sort happening. As to the point of law, it appears to me that the case for the plaintiffs has been established, and that the defendants are liable.

Application dismissed.

Solicitors for the plaintiffs, *Bower, Cotton*, and *Bower*, agents for *Janion* and *Hall*, Manchester.

Solicitors for the defendants, *Austin* and *Austin*, agents for *Thomas Hudson*, Manchester.

June 21 *and* 22, 1905.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

KIRBY *v.* HUNSLET UNION. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Poor rate—Assessment—Premises with machinery—Machinery not part of freehold—Tenant's machinery.

Premises occupied as engineering works contained machines, which formed no part of the freehold, but were placed on the premises for the purpose of making, and did make, the premises fit for the purpose for which they were used.

The machines were not affixed to the freehold, and were admitted to be "tenant's machinery."

On an appeal by the tenant against a poor rate, the recorder held that the correct basis of assessment was to ascertain what was the rent which a hypothetical tenant would give for the engineering works as a combination of land, buildings, and machines on a demise which included the right to use the machines—that is to say, on the assumption that the hypothetical tenant would get, as part of the consideration for the hypothetical rent, the right to use such machines upon the premises during his tenancy, and that in that way the machines would be properly taken into account as enhancing the rental and rateable value of the premises.

Held (*affirming the judgment of the King's Bench Division*), *that the recorder had adopted a correct basis of assessment in accordance with the principle laid down in* Tyne Boiler Works Company *v.* Longbenton Overseers (55 *L. T. Rep.* 825; 18 *Q. B. Div.* 81).

APPEAL of Kirby from the decision of the Divisional Court (Lord Alverstone, C.J., Kennedy and Ridley, JJ.) upon a special case stated by the Recorder of Leeds upon an appeal against a poor rate.

The special case was as follows:

1. The appellant is the occupier of certain premises known as the "Standard Works," where he carries on the business of a general jobbing engineer. The following is a copy of so much of the rate appealed against (which was made and allowed on the 3rd Oct. 1903) as relates to the said premises:—

No.	Occupier.	Owner.	Description.	Situation.	Estimated extent.	Gross estimated rental.	Rateable value of buildings, &c.
					A. R. P.	£ s. d.	£ s. d.
2579	Thomas Kirby.	B. Greaves and Sons and Thomas Kirby.	Engineering works and the land, buildings, machinery, and fixed plant connected therewith.	Saynor Road.	0 0 9	67 0 0	45 0 0

Before the making of the said rate the appellant was assessed in respect of the said premises at 29*l.* as the gross estimated rental and 22*l.* as the rateable value.

2. The said premises consist of an office, a model room, a fitting shop, a store, an engine room, a shed, and a yard; all of which, except the office, model room, and store, contain machinery. Some of the said machinery, such as horizontal steam-engine, shafting pulleys, steam piping, &c., admittedly forms part of the freehold. In addition to the above there are a number of machines which form no part of the freehold, and which have been placed thereon by the tenant, or his predecessor in title, for the purpose of making, and which do make, the premises fit as premises for the particular purpose for which they are used. The general character of these machines is shown in the schedule attached to this case. It was admitted or proved to my satisfaction that, with one or two trifling exceptions, these machines were not affixed to the freehold, but merely secured to the fixed shafting by belting, in order to enable the machines to be worked by the tenant whose property they were. It was for the purposes of the argument admitted by counsel on both sides that this machinery, set out in the schedule, was tenant's machinery within the meaning of the *Tyne Boiler* case (55 L. T. Rep. 825; 18 Q. B. Div. 81).

3. On the 31st Dec. 1891, the appellant, who had been in occupation of the premises since the year 1878, entered into an agreement with Benjamin Greaves, the owner of the said premises, to take the premises on lease for a term of five years from the 1st Oct. 1891, at a rent of 26*l.* per annum, the appellant covenanting to pay all rates and taxes except landlord's property tax, and the lessor to keep the premises in good tenantable repair. Since the expiration of the said term the appellant has continued to occupy, and now occupies, the premises as a tenant from year to year upon terms similar to those contained in the said agreement.

4. The appellants contended (1) that in valuing the premises, the value of the user of the machinery, other than that which forms part of the freehold, ought not to be considered; (2) that the said machinery ought only to be taken into account in so far as its presence (*a*) affords proof that the premises are fit for the purpose of the business carried on therein, and (*b*) would be likely to induce a tenant to give a higher rent for the premises than he would give if the said machinery were not upon the premises; (3) that to rate the

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

premises upon the principle contended for by the respondents would be to put an assessment on machinery other than that which forms part of the freehold, which is wrong, because the said machinery is not part of the rateable hereditaments; (4) that machinery of the class to which the said machines belong, if it were not upon the premises when a letting took place, would be bought and put upon the premises by the tenant to whom the premises were let, and not by the landlord who let the premises, and that therefore it is wrong to include the value of the machinery in the annual rent which such tenant would pay to such landlord.

5. The respondents contended that, in inquiring what was the gross estimated rental and the rateable value, the basis of the problem was to ascertain what was the rent which a hypothetical tenant would give for the premises equipped with the scheduled machines, and including the right to the use of such machines, and that in ascertaining such rent the value of the user of the said machines must be taken into account as enhancing the rental value of the freehold. It was upon this principle that the rateable value appealed against had been assessed.

6. I held that, in inquiring what was the gross estimated rental and the rateable value, the basis of the problem was to ascertain what was the rent which a hypothetical tenant would give for the engineering works as a combination of land, buildings, and scheduled machines on a demise which included the right to use the scheduled machines—that is to say, on the assumption that the hypothetical tenant would get as part of the consideration for the hypothetical rent the right to use such machines upon the premises during his tenancy—and that in this way the scheduled machines were properly being taken into account as enhancing the rental and rateable value of the freehold. I also held that the value of the user of the machinery was not necessarily to be arrived at by taking the cost or value of the machinery and putting a percentage on such value, as had been done by the respondents' valuers.

7. The question for the opinion of the court is whether I was right in law in my decision as stated in par. 6.

8. On the question of amount I reduced the assessment of the premises to 46*l.* as the gross estimated rental and 31*l.* as the rateable value. If the answer to the question of law is in the affirmative, that assessment is to stand. If the answer is in the negative, and the principle contended for by the appellant, as stated in par. 4 (1) and (2) of this case is correct, the assessment is to be reduced to 39*l.* as the gross estimated rental and 26*l.* as the rateable value.

If the court held that neither the principle of my decision, as stated in par. 6, nor the principles contended for by the appellant as stated in par. 4, (1) and (2) of this case is correct, the court is to make such order herein as it shall deem fit.

SCHEDULE OF MACHINES.

One vertical drilling machine, 2¼in. spindle, take to 26in. diameter.
One vertical drilling machine, 1 7-16in. spindle, 18in. diameter table.
One single stroke shaping machine, 14in. stroke.
One horizontal milling machine, used as a slot drill.
One 6in. screw-cutting gap lathe, 6ft. bed.
One 8¼in. wood-turning lathe, 8ft. bed.
One 4in. pattern lathe.
One 9¼in. screw-cutting gap lathe, 16ft. bed.
One 6¼in. screw-cutting gap lathe, 6ft. bed.
One 12in. sliding lathe, 9ft. 9in. bed.
One boring machine, 15ft. bed.
One lathe, double geared, 24in. centre, 3ft. face plate, 11ft. bed.
One boring lathe to 22in. in diameter, 10ft. bed.
One planing machine, 6ft. by 2ft. 2in. by 2ft. 2in.
One 30in. grindstone.
One blast fan for one fire, 2¼in. outlet.
One vertical drilling machine to 30in. diameter, 14in. centre, 2¼in. spindle.

The Divisional Court (Lord Alverstone, C.J., Kennedy and Ridley, JJ.) gave judgment in favour of the Hunslet Union.

Kirby appealed.

Balfour Browne, K.C., *W. C. Ryde* and *E. O. Simpson* for the appellant.—The decision of the recorder and of the Divisional Court was wrong. In the Court of Appeal in *Tyne Boiler Works Company* v. *Longbenton Overseers* (55 L. T. Rep. 825; 18 Q. B. Div. 81), it was decided that tenant's machinery may be taken into consideration as enhancing the value of the hereditament to be assessed, but no rule was there laid down as to how it was to be taken into consideration. In the present case, for the first time, a rule has been laid down, and that rule is wrong. It must be conceded that the machinery itself is not rateable; since the Parochial Assessment Act 1836 (6 & 7 Will. 4, c. 96) personal property is not rateable. The question then is, What is the proper method of taking it into consideration? The recorder, in the present case, has adopted a rule which has the effect of rating the machinery itself. The machinery belonged to the tenant, and he pays no rent for the user of it. This machinery is in precisely the same category as furniture. A person who takes a furnished house may be said to pay rent for the furniture, but the consideration paid for the use of the furniture is not really rent which can be taken into consideration in assessing the value of the house. The rent which a hypothetical tenant would pay for the use of machinery, which is not part of the freehold, cannot be taken into consideration; but that is what the recorder has done. The fact that machinery is on or near the premises, which is suitable for the purposes for which the premises are intended to be used, may be taken into consideration as enhancing the rent which a tenant would pay, because the machinery will cost him less in those circumstances than if he had to buy it elsewhere and convey it to the premises. That may enhance the letting value, but is a very different thing from the rule adopted in this case. That is the proper way of applying the decision in the *Tyne Boiler* case:

Crockett v. *Northampton Union*, 72 L. J. 320, K. B.

Where machinery is not part of the freehold, and is therefore not part of the rateable hereditament, there cannot be any distinction in principle between heavy machinery which stands firm by its own weight, and light or loose machinery. Machinery cannot be any the more taken into consideration in rating the premises because it is heavy and cumbrous than if it is light and loose. The real distinction is between things which are part of the premises and things which are not. Merely movable property, which is in a manufactory for the purpose of working it, cannot be taken into account in estimating the rateable value. In *Giffard* v. *Chard Union* (63 L. T. Rep. 249) the Court of Appeal only decided that the machinery was to be taken into account, not that the machinery was to be considered as part

of the premises for the purpose of rating. Such machinery as this may be taken into account as enhancing the value of the premises, but it is not rateable.

Chidley v. *West Ham Churchwardens*, 32 L. T Rep. 486;
Reg. v. *Halstead Overseers*, 32 J. P. 118;
Reg. v. *Lee*, 13 L. T. Rep. 704; L. Rep. 1 Q. B. 241, 253;
Reg. v. *Haslam*, 17 Q. B. 220;
Rex v. *Liverpool Exchange*, 1 A. & E. 465.

The decision of the Divisional Court in *Crockett* v. *Northampton Union* (72 L. J. 320, K. B.) is precisely in point, and is clearly in favour of the appellant.

J. Scott-Fox, K.C. and *Jeeves*, for the respondents, were not called upon to argue.

COLLINS, M.R.—This is an appeal from the decision of the Divisional Court on a special case stated by the Recorder of Leeds, and the question which arises is, as to the principle upon which certain premises, in which there is machinery, ought to be rated. It seems to me that the case is concluded, as the court below thought it was, by the decison in *Tyne Boiler Works Company* v. *Longbenton Overseers* (55 L. T. Rep. 825; 18 Q. B. Div. 81), which is a decision of this court, and is therefore binding upon us. Now, the learned recorder in this case, which has been stated with very great care, has defined for us the exact point which came up for discussion; and he has formulated his own view in par. 6 of the case. He says: "I held that in inquiring what was the gross estimated rental and the rateable value, the basis of the problem was to ascertain what was the rent which a hypothetical tenant would give for the engineering works as a combination of land, buildings, and machines, on a demise which included the right to use the machines—that is to say, on the assumption that the hypothetical tenant would get, as part of the consideration for the hypothetical rent, the right to use such machines upon the premises during his tenancy, and that in this way the machines were properly being taken into account as enhancing the rental and rateable value of the freehold. I also held that the value of the user of the machinery was not necessarily to be arrived at by taking the cost or value of the machinery and putting a percentage on such value, as had been done by the respondents' valuers." Now, that is what the learned recorder has formulated as his view of the matter; and he has arrived at that conclusion after hearing the rival contentions of the two parties, which are also set out in the case. The appellant contended this: "That, in valuing the premises, the value of the user of the machinery, other than that which forms part of the freehold, ought not to be considered. That the said machinery ought only to be taken into account in so far as its presence (*a*) affords proof that the premises are fit for the purpose of the business carried on therein, and (*b*) would be likely to induce a tenant to give a higher rent for the premises than he would give if the said machinery were not upon the premises." The contention of the respondents was this: "That in inquiring what was the gross estimated rental and the rateable value, the basis of the problem was to ascertain what was the rent which a hypothetical tenant would give for the premises, equipped with the machines, and including the right to the use of such machines, and that in ascertaining such rent the value of the user of the said machines must be taken into account as enhancing the rental value of the freehold. It was upon this principle that the rateable value appealed against had been assessed." Now, the point in conflict between them apparently is principally, if not exclusively, whether anything ought to be taken into consideration in respect of the use of the machines, apart from the fact that the machines are there; the appellant contending that the user ought not to be taken into consideration at all, though the fact that the machines are there ought to be considered. It seems to me that, as I have said, this case is really decided by the *Tyne Boiler Company* case (*ubi sup.*), and I think there are one or two considerations which are really conclusive upon that point. The *Tyne Boiler* case, though it is the leading case on the point, was not the first case in which the principle there laid down was adopted. In point of fact, it is really the last of a long series of cases which certainly go back as far as the decision of Patteson, J. in the case of *Reg.* v. *Haslam* (17 Q. B. 220), which was cited by the learned recorder in this case. In order to see what the *Tyne Boiler* case (*ubi sup.*) really has decided, I think that it is necessary to follow the process of evolution by which, starting with the obligation to rate a hereditament, the courts have ultimately come to include in the calculation a possible accession of value to a hereditament by something which is not, in point of fact, the hereditament itself. That extension was, it seems to me, one that was created by the decisions of the judges, because the statute itself, as has been pointed out to us, deals with "houses and land," and in the later Act with "hereditaments." Therefore nothing that is not a hereditament is the subject-matter of a rate. Those are in the words of the statute, and that was the principle upon which the courts acted after, at all events, it was declared by law that certain chattels were not made rateable. Still, they did by degrees give an extension to that principle by including subject-matter, such as machinery, which were themselves chattels, in the consideration whether or not the rateable value of a hereditament was enhanced by reason of the existence of the chattels in such a position as to be capable of being used with the hereditament, and for the purposes for which the hereditament was itself used. When one examines the judgment of the Master of the Rolls in the *Tyne Boiler* case (*ubi sup.*), we find that he is dealing with machinery which, in point of fact, was not fixed to the freehold, in the sense that it became part of the freehold in strict point of law. He was dealing with machinery which, in point of fact, were chattels, but some part of which might be called absolutely loose machinery, such as was given by way of illustration during the argument of this case—that is, tools, or the hammer which a blacksmith uses, as distinguished from the anvil; and the Master of the Rolls, in applying the principle which he applied in that case, begins by drawing the distinction between what are purely and simply movable chattels and machinery, which is more or less stable, either attached so as to be capable of being removed though attached, or resting simply by its own weight. But the class

of machinery to which he limits the principle is machinery which, as he labours to show, is used in such a manner as to raise the inference that it is intended to be permanent, and is really necessary for the use of the premises. He goes through a series of cases, beginning with the case of *Reg.* v. *Haslam* (*ubi sup.*), and points out the various things which were chattels in the legal point of view, but were used as part of the premises in the sense that they were put upon the premises for the use of the premises for a particular purpose for which the premises themselves were being used. He points out that things of that kind, although they were chattels, would still be taken into consideration on the question of rating as enhancing the rateable value of the hereditament itself. He points out that, though in many of the earlier cases there had been an actual physical attachment, that is not an essential condition of their being taken into consideration as enhancing the value; and it may be that he slightly extended the principle of the earlier cases, though I am not sure that he did so, in embracing in the class of machinery, which he thought could be treated as enhancing the rateable value of the hereditament, machinery which was in no sense attached at all—machinery which he described in different phrases, but all of them phrases implying the permanency of the machinery in its place for the carrying out of the purposes for which the hereditament itself was used. I will take this passage as formulating the principle which he adopts. He says: "I believe the rule really to be that things, which are on the premises to be rated, and which are there for the purpose of making, and which make, the premises fit as premises for the particular purpose for which they are used, are to be taken into account in ascertaining the rateable value of such premises. Of course it is not all things on the premises, or that are used on the premises, which are to be taken into account, but things which are there for the purpose of making, and which do make them fit as premises for the particular purposes for which they are used. It seems to me that, when things are brought into that category, they would pass by a demise of the premises as such as between landlord and tenant; and that so the test proposed by Lush, J. and that which I propose, become in substance identical. Taking that to be the proper test and applying it to the question in this case, I should say, in accordance with the opinion of Patteson, J. in *Reg.* v. *Haslam* (*ubi sup.*), with regard to each of the articles in question, that it is immaterial to inquire whether they are or are not physically annexed to the freehold, and that they, all of them, come within the rule as I have expressed it. They are all on the premises for the purpose of making, and they do make them fit as premises for the purpose for which they are used, and, therefore, in arriving at the rateable value of such premises they must be taken into account." Then Lindley, L.J., in his judgment emphasises the same statement. He says: "Nothing is included, so far as I understand the nature of the machinery, which would be mere loose machinery, and which would not pass to a tenant to whom the works were demised." And Lopes, L.J., summing up the matter, said: "But then there are things which, though they may not be physically attached, or may be removable without damage to themselves or the freehold, are so placed on the premises, and so essential to their use for the purpose for which they are used, and so much intended to be used with them for that purpose, that they have practically become for the time being part of the premises." Now that, it seems to me, is the principle upon which the *Tyne Boiler* case (*ubi sup.*) was decided; and that principle negatives, to my mind, the contention put forward by counsel for the appellant. They say, logically, that when once these particular things are taken out of the category of something that is attached to the freehold so as to be part of the freehold, then the thing is a chattel, and there can be, and ought to be, no distinction between chattels, by reason of one being more easily removed than another; that they are all chattels, and, therefore, the only principle upon which things can be taken into consideration at all, is the fact that they happen to be on or near the place where the hereditament which is to be rated is situated; that if they are very accessible things which are wanted, and the market for them is close at hand, that is also a matter which ought to be taken into consideration; and that it is only in that sense that the presence of those chattels can by any possibility be taken into consideration upon the question whether a hypothetical tenant would or would not give more rent by reason of the facility of getting those chattels for the purpose of using the hereditament to the best advantage. That is a perfectly logical argument, that a person has exactly the same rights with respect to movable chattels as with respect to chattels of a more cumbrous character, and that there ought to be no distinction between them. But the principle laid down in the *Tyne Boiler* case (*ubi sup.*) excludes all loose movable chattels, and therefore it shows that the principle set up and contended for by the appellant is not the principle of the *Tyne Boiler* case (*ubi sup.*). On the other hand, it seems to me quite clear that the effect of the process of evolution is, that it has put into the category of things really attached to the freehold things which may be said to be substantially in the same category as though they were attached to the freehold; that the purpose for which they are put there, and the nature of the user of them, place them, in point of fact, in the same category as if they were really attached to the freehold; and that, for rating purposes, though they cannot be rated because they are chattels—that is, they cannot be rated separately as chattels—they can and ought to be taken into consideration in the rate to be put on the hereditament, because they may enhance the value of that hereditament to the hypothetical tenant, and therefore enhance the figure at which he ought to be rated. It seems to me that this case before us is indistinguishable in fact from the *Tyne Boiler* case (*ubi sup.*), and I think that the learned recorder, in taking into consideration the facilities for user of these chattels, did no more than the *Tyne Boiler* case warranted him in doing. I agree that he was supported by the authority of the *Tyne Boiler* case, when he said that he would not treat these chattels on the principle that the appellant claimed to treat them on—namely, that he could only take into consideration the facilities given for acquiring the chattels by reason of the fact that they were near the premises, or that they happened to be on the premises. I think

treating as directly productive those lines which were used as waiting or relief lines only for the purpose of passing the through traffic through the parish; and that those lines which were necessitated by difficulties arising outside the parish, and which were in fact necessary for the standing in waiting (after shunting and marshalling) of through goods traffic, ought not to be treated as running lines, but as indirectly productive lines, and that only so many of those multiplied lines in Hornsey ought to be dealt with as directly productive as were required for the purpose of meeting the difficulties arising in Hornsey itself.

AWARD stated by an arbitrator in the form of a special case.

The case was stated between the Great Northern Railway Company, appellants, and the Assessment Committee of Edmonton Union and the Overseers of the Poor of the Parishes of Wood Green, Hornsey, Southgate, and Enfield, with reference to the rating of that portion of the Great Northern Railway system which was situate in the parishes in the Edmonton Union.

The Edmonton Union comprised all the parishes; but the case was argued and dealt with with regard to the parish of Hornsey alone, as raising all the questions and involving a greater amount of rates.

The case was as follows:

Whereas in the matter of an appeal to the quarter sessions of the peace of the county of Middlesex against a certain rate or assessment for the relief of the poor of the parish of Hornsey made the 30th Oct. 1902, between the Great Northern Railway Company, appellants, and the Assessment Committee of Edmonton Union and the Overseers of the Poor of the Parish of Hornsey, respondents, it was ordered by Bucknill, J. that the appeal should be referred to Sir Ralph Littler, K.C., and that the provisions of the Arbitration Act 1889, including those contained in the first schedule thereto so far as applicable to a reference under a submission, should apply, except as therein expressly provided, and that the arbitrator should, upon the application of either party, state his award as to the whole or part in the shape of a special case for the opinion of the court, and that the costs of the reference and award and of the appeal should be paid upon the same principles that a court of quarter sessions in dealing under the provisions of the Quarter Sessions Act 1849 with the subject of an appeal might order and direct.

The arbitrator (Sir Ralph Littler, K.C.) having taken upon himself the reference and having duly heard counsel and witnesses as to the matters hereinafter mentioned, and having been requested by both parties for their guidance in the further conduct of the arbitration to find and determine *ad interim* whether certain lines of railway of the appellants more particularly delineated and described on certain plans or diagrams submitted to him and thereon consecutively numbered were directly or indirectly productive, did find, award, and determine that certain of the lines were directly productive and that all the other lines on the plans were indirectly productive, and did reserve all other questions whatsoever in the appeal for further hearing and determination, including all questions of costs, after he should have heard counsel and witnesses thereon.

And whereas the rate or assessment appealed against was, so far as is material for the purposes of this his award, in the words and figures following—that is to say:

	Gross estimated Rental.		Rateable Value.
Lands occupied by lines of railway	£22,826	...	£18,280
Lands, buildings, offices, sidings, and appurtenances, Finsbury Park (part of).....	£1020	...	£850
Land, station buildings, sidings, and appurtenances, Harringay	£840	...	£700
Land, station buildings, engine sheds, workshops, coal, &c., offices, sheds, sidings, and appurtenances, Hornsey	£12,480	...	£10,400

And whereas the arbitrator heard counsel and witnesses in reduction and in support of the rate or assessment, he thereby found, awarded, and determined that the rate or assessment should be reduced to the amounts following—that is to say:

	Gross estimated Rental.		Rateable Value.
Lines of railway	£19,258	...	£11,757
Land, &c., Finsbury Park	£830	...	£692
Ditto Harringay ...	£676	...	£563
Ditto Hornsey	£6314	...	£5262

And whereas the respondents applied that the arbitrator should state his award in the shape of a special case so far as was material for the points there raised, the arbitrator found as follows (the award being dated the 12th Nov. 1904):—

1. There are at the stations in this parish (that is, Hornsey) certain lines of railway which constitute the only approach to the goods stations and warehouses, goods yards, and loading banks, and which in fact are used either entirely or primarily for the delivery of goods and merchandise inwards, and for the hauling out of goods and merchandise outwards.

2. The goods, merchandise, and mineral rates for by far the greater proportion of the whole of such traffic, especially at the main-line stations, are group rates, including in many cases even London traffic, and, consequently, the receipts for such group traffic are not, and as the company contend cannot, be miled out so as to ascertain the exact distance each consignment may have traversed Hornsey, and as a fact no receipts, either group or otherwise, are so miled as to include any portion of the distance traversed between the points of junction with the actual through lines; moreover, in some cases traffic has to travel beyond the stations, say, on the up line, and then to back-shunt because the goods station is on the down line, or in others it has to go on to a safety line to reach its destination, but no part of such distance is credited to the parish.

3. On the authority of the case of *Assessment Committee of Stockport Union* v. *London and North-Western Railway Company* (77 L. T. Rep. 244; 78 L. T. Rep. 180), decided by the Court of Appeal in March 1898, the primary and principal object of these lines being, as I find as a fact, to carry traffic into and from the warehouses, goods yards, and other delivery premises of the company, and the journey not being ended until the trucks come to a standstill at such warehouses, goods yards, or other delivery or receiving premises of the company, these lines must, in my opinion, be regarded as directly and not indirectly productive.

4. In the *Stockport* case (*ubi sup.*), however, the lines could be and were miled out so that the parish secured the earnings over such lines, and it was objected before me that the lines above described must be regarded as indirectly productive.

5. I considered myself bound by the *Stockport* case (*ubi sup.*), notwithstanding this distinction, and have found accordingly.

6. As, however, it appears impossible, certainly in the account year, and probably at all, to accurately mile out these distances so as to give the parish the precise credit due thereto, I have disallowed a certain and, I think, adequate amount in the items in the appellants' claim, which relate to the maintenance, repair, &c., of lines. Thus the parish do not lose the whole rateable value they would have received had I held these lines to be indirectly productive, while the company do not escape scot free from paying rates in respect of the mileage traversed thereon.

7. This is clearly an imperfect method, but I find it difficult to suggest any other which will meet the difficulty, and I have adopted it accordingly as the best estimate which can be made.

8. There are in this parish, in addition to numerous admittedly running lines, no fewer than 163 other lines, covering a very large acreage of land.

9. A number of these, however, are admittedly indirectly productive.

10. Many of them are within the description in par. 2, and I have dealt with them in precisely the same manner.

11. There are, however, a number of other lines which are used as follows: The appellants carry traffic not merely to King's Cross on their own lines, but to a goods station of their own in the City to which access is gained over the Metropolitan Railway. They also carry traffic destined for stations on the South-Eastern, the London, Chatham, and Dover, and the London, Brighton, and South Coast Railways, which also travels over the Metropolitan Railway. They also have considerable traffic over the North London Railway, with which they have a junction at Canonbury, south of Ferme Park, to the docks.

12. In the case of all these lines the hours during which the goods traffic can be carried on is very restricted owing to the enormous passenger traffic in London, and, consequently, when a train arrives at Ferme Park (in the parish) the trains, which are, so far as possible, sorted further north, according to the various destinations, have to be split up, and while those trucks going to King's Cross proceed on their journey, those for other destinations are of necessity delayed at Ferme Park, and frequently have to remain there many hours.

13. There is shunting done on some of these lines during about eight hours out of the twenty-four when they are not occupied as they are during about sixteen hours by trains waiting to be forwarded to their destination—that is, at a standstill on the lines not for purposes either of sorting, marshalling, loading, or unloading, but merely waiting for the lines south to be cleared for transit.

14. In order to get into position on such of the lines as I have allowed as directly productive, the trains for these destinations have to pass, not in a direct line from end to end of the parish, but backwards and forwards over more than one line, and sometimes have to go to a distance south in order to arrive at a more northerly position, or *vice versâ*.

15. For the reasons already given, these extra distances are not recorded, and cannot be directly, and *eo nomine*, credited to the parish.

16. In the case of *Great Eastern Railway Company* v. *Fletton* (Boyle on Rating, 2nd edit., p. 1063), decided in the Queen's Bench Division on the 6th Nov. 1882, it was said: "If trains passed up and down and round, this was a different case from passing directly through."

17. I have only allowed the appellants' claim in respect of so many of these lines as I think may fairly be equal to the requirements of the traffic above described, treating the rest as indirectly productive.

18 I have also disallowed, in order to meet the part of the traffic "going up and down and round," a proportion of the appellants' claim for maintenance, &c., which in my judgment may fairly compensate for the loss of mileage in gross receipts above described.

19. I have dealt with these various lines and sidings in my interim award and defined them by reference to certain plans produced before me. The award and plans are to be referred to as if they were part of this case.

20. There are in the parish certain signal boxes containing numerous signals. These are all on the interlocking system respectively, and all points working and controlling the communications between all the lines in the parish for whatsoever purpose used, as well as the distant signals, are worked from these boxes, which are covered erections protecting the men working as well as the signals from the weather. The signal levers are connected with rods passing along the line of railway and at the other end bolted to the points or to the signals and serve no purpose but to enable the railway lines to be worked at all which without them would be impossible whatever may have been the case in former days when such apparatus was very imperfect and different in its nature, and when the companies could please themselves as to what appliances should be used and as to their nature, which might or might not be even a mere hand lever. As the present appliances are compulsory on the company and are so completely an integral part of the running lines I should have held that they should be included as part of the running line, were it not that in the case of *Midland Railway Company* v. *Pontefract Union* (84 L. T. Rep. 536; (1901) 2 K. B. 189), though the levers had not been rated, but only the boxes, Lord Alverstone, C.J. expressed himself very strongly as regards signals also. I have included, therefore, in deference to that opinion, a sum for signals, as well as signal boxes, in the not directly productive portion of my findings; I have, however, allowed a sum for the cost of maintenance of signals as well as boxes.

21. If I am right in principle in the above findings, my award is to stand. If the court is of opinion that I am wrong in principle, the award is to be referred back to me to vary the figures in accordance with the judgment and order of the court. And I further order and direct that as regards the costs of and relating to the hearing of this appeal up to the making of my interim award that each party do bear and pay their own costs so far as the same relate to the matters dealt with in that award, and that each party do bear and pay one-half of the costs and charges of the said award. And as regards the costs other than those arising in relation to the said award, I order and direct that the respondents do pay the appellants their costs of the appeal and arbitration and of this award.

The following is the arbitrator's interim award, dated the 4th Aug. 1904 with regard to the parish of Hornsey, which was to be referred to as part of this case:

The arbitrator having been requested by both parties to consider and determine for their guidance in the further conduct of the arbitration *ad interim* whether certain lines of railway of the appellants, more particularly delineated and described on the plan R. L. H. 7, and on a certain other plan marked R. L. H. 8, and thereon consecutively numbered, are directly or indirectly productive, I do hereby find, award, and determine that the lines which are respectively numbered 1, 2, and 3 upon the plan are directly productive, and that the lines numbered 4, 5, 6, and 7 on the plan R. L. H. 7 are indirectly productive, and, as regards the lines on the plan

or diagram R. L. H. 8, I find and award that the lines numbered 8, 9, 10, 11, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 up to 41 inclusive, 72, 73, 74, 75, 76, 77, 78, 79, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 111A, 125, 126, 128, 131, 132, 133, 134, 135, 136, 147, 153, 154, 155, 156, 158, 159, 161, 162, and 163 upon the diagram or plan are directly productive, and that all the other lines numbered on the plan are indirectly productive, and I reserve all other questions whatsoever in the appeal for further hearing and determination, including all questions of costs, after I shall have heard counsel and witnesses thereon.

It was admitted that the down and up lines should be treated upon the same principle.

Macmorran, K.C. and *C. A. Russell*, K.C. (*R. Cunningham Glen* with them) for the Edmonton Union.—In the rating of a railway line, it is necessary to bear in mind the distinction between property that is "directly productive" and that which is "indirectly productive." The line itself, as earning the profits, is directly productive; but, in addition, there are stations, goods yards, sidings, and so on, which do not directly contribute to the profits, but are really a source of expense to the company. These are indirectly productive, and are rated locally in the parishes in which they happen to be. For instance, a station is indirectly productive, and is rated locally in the parish in which it is. Therefore, in so far as it is held that property is directly, as distinguished from indirectly, productive, it affects the parishes in two ways. First, they are deprived of the benefit of the local rating of that directly productive property in their parish; and, secondly, in estimating for purposes of assessment, the profits of the railway in that parish, the cost of the maintenance of that directly productive property has to be deducted, and comes off the parish, so that the parish lose in two ways. Hornsey parish is a good illustration of this. The railway runs through it from south to north, and there are certain lines which are conceded to be running lines, and therefore directly productive. There are also nests of sidings, and lines which run into the goods station. Up to the date of these proceedings only those lines running through had been dealt with as directly productive; but the company have raised the question whether the lines coloured red are not also directly productive, on the authority of certain decisions. What the respondents contend is that those lines are not to be treated as directly productive at all, but as indirectly productive. They are not necessary for the carrying of the traffic from one end of Hornsey to the other, but, although they are used for the relief, to a certain extent, of the running lines, they are also used for the reception, standing, and marshalling of trains which come in from the north to London, or *vice versâ*. The importance to Hornsey is this, that whereas according to the former system the red and blue lines were all treated as in the local rating of Hornsey, if they are to be rated as part of the line and as directly productive, then they not only go out of that category as rateable in Hornsey, but their maintenance would have to be deducted in estimating the profits of the line in Hornsey. It was admitted by the company that the blue lines and some of the red lines on the plan were indirectly productive, and as to these there was no dispute. These disputed lines may be necessary to the traffic of the line as a system; but the benefit to the company would be just the same whether they were north or south of Hornsey, and they do not benefit Hornsey at all, and they should not be treated as part of the running line in Hornsey. The arbitrator has decided that the lines into the goods station were directly productive. It is submitted that he was wrong in that view. The exact principle for which the respondents are contending, and which is applicable to all these cases, was laid down by the Railway Commissioners in *London and North-Western Railway Company* v. *Wigan Union* (2 R. & C. Tr. Cas. 240), where it was held that in the rating of stations all sidings should be included as part of the station and as locally rateable. Therefore these sidings should be described as indirectly productive, and ought to be rated accordingly. There are two other important cases on the point. The case of *Great Eastern Railway Company* v. *Overseers of Fletton* (Boyle on Rating, p. 1063), as to the rating of railway lines passing through Peterborough Station, has really no application to the present case. It decides no more than this: that, where there is a necessity for more than a double line of rails for accommodating the through traffic out of the through lines to the additional lines, then those are to be treated as additional lines and rated as part of the line. The principle there may be fully accepted, but it is entirely different from that applicable here. There the sidings were used for through traffic; it is not so here, where the lines are used for station purposes, for the ordinary shunting, marshalling, and ordering of the traffic. The other case which will be relied upon by the company is *Stockport Union* (*Assessment Committee*) v. *London and North-Western Railway Company* (77 L. T. Rep. 244; 78 L. T. Rep. 180), as to the rating of lines in Stockport Station. That case does not go beyond the *Fletton* case (*ubi sup.*). The lines there in question were the same as in the *Fletton* case—that is, they were used in the same way for the purpose of taking traffic through. Then as to the lines into the goods yard, the arbitrator has substantially found that all these lines were to be treated as running lines. He was wrong in that; they ought to be treated as sidings, and the mere fact that they may take goods to and from the warehouses does not make them directly productive lines. It is really a station service, and the goods yard is exactly similar to the platforms in the station. The same principles apply to the waiting lines as to the other lines; they are sidings used for station services and are indirectly productive. Then, with regard to the signal boxes and signals, they ought to be taken as indirectly productive:

Midland Railway Company v. *Pontefract Union*, 84 L. T. Rep. 536; (1901) 2 K. B. 189.

Balfour Browne, K.C. and *Lush*, K.C. (Sir *Edward Boyle*, K.C. and *W. J. Noble* with them) for the railway company.—First, with regard to the signals and signal boxes, it is admitted on both sides that the signal boxes are in the not directly productive portion. With regard to the signals, we contended before the arbitrator that the signals were part of the main running line, where they were connected with the main running line, as the trains could not be run without these signals. We admitted that the *Pontefract* case (*ubi sup.*) was against us with regard to the boxes,

and we treated that as a building and as indirectly productive. It has never been decided that the signals are not part of the running line, but the quarter sessions in London have held that they are: (see Ryde on Rating). The arbitrator has decided that against the company on the authority of Lord Alverstone, C.J. in the *Pontefract* case (*ubi sup.*). It is submitted he was wrong in that. The decision of the Railway Commissioners in *London and North-Western Railway Company* v. *Wigan Union* (*ubi sup.*) has been relied upon, and it was contended that the idea there was that if traffic is carried by a certain number of lines outside the station, then that number only are to be allowed as running lines inside the station, although the lines may be duplicated inside. That case is completely gone, both according to the *Fletton* case and according to the *Stockport* case. That was found to be far too general, because, if there were loop lines shut off from the station to enable express trains to get through, according to that it might be said that those were not running lines. Dealing with the station at Hornsey, and the groups of lines that take goods to the goods stations and yards, the case as to this stands upon exactly the same basis as the *Stockport* case. The principle laid down in the *Stockport* case was to find out what was the primary use of the lines, and the primary use is a very important criterion in this matter. Applying that to this case, the arbitrator has found as a fact that the primary use of these lines was to carry traffic into and from the warehouses, goods yards, and so on. The respondents concede that some of these lines—the yellow lines running into the goods sheds—are running lines; but the green lines, which they dispute, are used for precisely the same purpose as the yellow lines, except that the goods (such as bricks) carried on the green lines do not require to be loaded and unloaded under cover, and if the one set are, as they are conceded to be, running lines, so are the others. The mere fact of doing a little shunting on a main line does not turn the main line into a siding; the primary use is everything, and here the primary use is for running, and the journey is not complete till the train has got to its destination. The principle is exceedingly well put by Chitty, L.J. in that case: "But there is a station there, and it appears to me that these are not sidings, but that the purpose for which they were constructed and the use to which they have been put is for getting passenger and goods traffic to or through the station." So here it is to or from the station that the company want to get this traffic; and the principle that ought to be adopted is that these lines to the goods stations are not auxiliary to the station, but are auxiliary to the traffic which comes into or passes through the station, and the arbitrator has taken, and was right in so taking, an average point in the parish to which the goods go. Next, with regard to the nests of sidings or what may be called "relief lines." With regard to these, the primary purpose is, and in fact the arbitrator has so found, merely to carry the traffic through. These nests of lines are in a sense relief lines at both ends, so that a train can be run through, and that is the ordinary idea of a relief siding. A train is run in there pending the time that it is necessary to keep it off the main line, as, for instance, to allow an express train to get through. The arbitrator has put these into two classes. All the red lines he has disallowed to us, as being lines on which shunting, &c., is done; all the lines that are green he has allowed as running lines, as he has found that that was their primary use. That was within his province. The purpose of these lines was exactly the same as in the *Fletton* case. If trains had to wait on these lines merely to allow another train to pass, the case would be clear; it is equally clear when the trains have to wait upon them till the signals are put right for the trains to go on to the Metropolitan line; the trains are still on their journey, and are only waiting till the Metropolitan Railway opens its doors to let them pass on. The delay on these lines is caused not by any difficulties arising in Hornsey itself, but from difficulties arising outside of Hornsey, and, upon the authority of the *Stockport* case and the *Fletton* case, these are running lines.

C. A. Russell, K.C. in reply.

March 2.—CHANNELL, J.—This case presents a great many difficulties, and I cannot help thinking that some of them arise from a difficulty in understanding the exact meaning of the arbitrator in reference to some of the phrases that he has used, particularly in par. 2, which was the subject of an application to the Divisional Court. But the whole subject is extremely complicated; and amongst other complications there is, of course, the difficulty of separating things that are questions of law and things that are questions of fact. So far as the matters that arise in reference to rating are questions of fact, of course there is no power to state a special case upon them; a special case can only be stated upon matters of law. Therefore, if one comes to the conclusion that any particular findings of the arbitrator are findings of fact, there is an end to the question so far as any appellate tribunal is concerned. Then, again, there have been difficulties raised recently by two decisions in the House of Lords certainly, and by the observations of the Lord Chancellor, as to whether certain principles that have been adopted in rating cases were to be treated as law or as fact. Provided that the appellate tribunal has got jurisdiction in the matter by a special case stated which they have power to consider, I do not think that that makes very much difference, because I think that anybody who has to decide questions of fact judicially ought to follow previous cases. Whether he would be bound by our rules as to following previous cases as precedents in matters of law or not, I think he would be bound to follow, when he decides a case judicially, the rules that have been laid down by other judges before coming to conclusions of fact, just as much as he ought to follow their decisions upon strict points of law. Therefore where rules have been laid down in cases, or have been followed in cases—which is perhaps the more accurate way of stating it—in reference to the way in which a railway company should be rated, I think those rules ought to be followed by any judge before whom the matter comes, whether they are strictly speaking questions of law or questions of fact. After what has been said in the House of Lords in these cases, I have some doubts whether the rule about dividing the railway and its accessories into the parts that are directly pro-

ductive and the parts that are indirectly productive is a principle of law, or whether it is not rather a way of arriving at a conclusion of fact—the conclusion of fact to be arrived at, after all, being the value of a rateable hereditament. But in either case I think it would be the duty of the judge to follow the previous decision, whether it is strictly law or whether it is not. The result of that seems to me to be that I, and I think probably Sir Ralph Littler, the legal arbitrator chosen in this case, would be perfectly right to follow the decision in any case, whether it was referred to as the *Fletton* case (*ubi sup.*), or the *Stockport* case (*ubi sup.*); although I am inclined to think, from the light thrown on these questions recently, that they are really modes of arriving at decisions of fact, rather than enunciations of principles of law. I proceed, therefore, to deal with this case upon the assumption that I am bound by the cases, and that if the arbitrator has so found the facts as to bring the matter upon which he finds within the principle of the cases, I am bound to apply it, and ought to follow it, whether it is law or whether it is fact. Now, the way in which the rateable value of the portion of a railway that is in a particular parish has been usually arrived at is by dividing, as I have said, the portion within the parish into the part that is directly productive and the part that is indirectly productive. When we have arrived at the fact that a certain portion of the hereditament is directly productive, then we arrive at the value of that by finding the earnings —I am not now dealing with the particular deductions that are made from them—of the undertaking generally, and then taking the proportion of those earnings which we find to be earned within the particular parish. Then, that being done, there are two propositions to be considered in reference to the portion that has been so dealt with. The first is, whether the use of the particular portion of land is such a use as to bring it within the category of that which is directly productive, or that which is indirectly productive; and when we have arrived at the conclusion that it is a part that is directly productive, then we have another matter to turn our attention to—namely, to find out the proportion of the total earnings of the undertaking which should be attributed to that particular bit of land in the parish that is so used. In this particular case I have to deal with those questions in reference to groups of lines which seem to me—and they seem to have been so dealt with by the arbitrator—to be divided into two classes. I will first deal with what the arbitrator deals with first—namely, the lines into the goods station. Those lines are used mainly at any rate, possibly entirely—I will say how I deal with this presently—for the purpose of sending goods away from Hornsey to various places on the line, and bringing goods from various places on the line to Hornsey; and they are different, therefore, from the other portions of the case in that respect which deal with the lines used for traffic going through. Now, as to those lines into the goods station, the first question is, whether or not the arbitrator has been right in treating, or whether I can interfere with his decision in treating, those lines into the goods station as being a portion of the land in the parish which is used for purposes directly productive. As to that, it seems to me that, even if I did differ from the arbitrator, I should have no power to review his decision; because I think that there he has distinctly found, as a question of fact, that the primary and principal object of these lines was to carry traffic into and from the warehouses and goods yards. He has clearly brought that—apart from cases, I think, if he found cases—within the category of the directly productive part of the land. But at any rate it is distinctly within the decision in the *Stockport* case (unless there is some difference by reason of the fact that in the *Stockport* case the decision only related to one line into the goods station, whereas this is as to several), because in the *Stockport* case, as here, there were in fact several lines into the goods station. But it appears that those other lines were not considered by the court; certainly the decision of the court was not that one line into the goods station may be directly productive and that the others would not be. The only reason why those lines were not considered in the *Stockport* case was, that no question was in fact stated about them; the parties had agreed not to claim them. But there was some indication in some of the judgments that, if they had been claimed, they would have been in the same category. At any rate, it seems to me that I cannot interfere with the decision of the arbitrator holding that these lines into the goods station, which he has found to be directly productive, were in fact so, and must be treated as being in that category. Then arises the next question, which is the difficult one with reference to this part of the case as to the lines into the goods station; and that is whether, assuming that those lines are to be rated by giving to this parish a proportionate part of the earnings of the whole undertaking, the parish have got their proper proportionate part. Now, the way of arriving at the proportional part of the earnings of the entire undertaking which is due to the part of the undertaking in the particular parish and the way in which that has been arrived at in other cases is by taking the length of the lines in that particular parish, and the length of the entire journey that the particular parcel of goods or the passenger has made. Then you lump everything together, and necessarily take the average in making a calculation of that kind, and it could not be done otherwise, but you take the proportion which the linear distance travelled in the parish bears to the entire linear distance travelled. In some cases that may be perfectly fair. In other cases it seems to me quite clear that it is not, but it has in point of fact been adopted. And I have a difficulty in saying that I would not follow such a rule as that. I think it is quite a difficult question whether one ought to follow it or not; because if you come to the conclusion that these rules are merely rules of practice showing the way in which you ought to arrive at it in order to form your opinion upon a question of fact, or value, I think it is rather doubtful how far one ought blindly to follow a rule of that kind in cases where one has a clear opinion that it is not applicable and does not give the fair proportion; but, at the same time, it has been acted upon in cases where it certainly does not give the exact proportion. The *Stockport* case (*ubi sup.*) is an illustration of it, and I think the *Peter-*

borough case (*ubi sup.*) also. So it comes to a question of degree; and I am not prepared, therefore, to say that in this case, with reference to these lines into the goods station, it is not right to take the lineal proportion which the journey in this parish bears to the whole journey, and to take that as being a proper way of ascertaining the proportion of the gross earnings that this parish ought to have. But I feel very great doubt, upon the findings of this case, whether that has been done. I quite see Mr. Balfour Browne's answer to the suggestion of Mr. Macmorran and Mr. Russell on the other side; and if his answer is borne out by the facts of this case, and by the findings of the arbitrator in the matters which the arbitrator really means to find, I think he has answered it, because I think it is perfectly clear that if we adopt a rule of that sort, and there are several places within a parish to which goods go, it is impracticable to go into the question which of the places within the parish the particular parcel of goods goes to, and that the only practicable way of dealing with such a question as that would be to take a central point, or perhaps, more accurately speaking, an average point, and although the parish would not get the exact mileage, if it may be called so, to the central point in other cases, they would get what is corresponding to it, mileage up to the central point in reference to goods that had not gone as far as the central point. If that is what has been done in this case, the parishes have had that which they ought to have in reference to the length of line that goes into this goods station. But it is suggested that that is not what has been done; and I must say that the case is so stated in reference to the introduction of things about group rates—which seem to me to have little or nothing to do with the matter—that I am not at all certain as to what has been done in reference to it. Therefore I think that, if the parties desire it, the case ought to go back to the arbitrator, in order to ascertain whether the true meaning of his findings is that which Mr. Balfour Browne says it is—namely, that, although the mileage distances into the goods station to the buffers of these particular lines have not been directly and specifically allowed in the parish, yet they have been allowed to some average point, giving them the distances to which, on the average, the goods to and from Hornsey go. If they have been allowed to a point which is an average point to which the goods to and from Hornsey go, that is quite right; but, if they have not, it seems to me that the parish have not had the fair proportion of the earnings of the entire undertaking that they ought to have in reference to the portion of it which is in this parish. As far as I can judge, knowing that the arbitrator would understand the matter, I think that Mr. Balfour Browne must be right. I think the arbitrator must have held that, but I am not certain as to that by reason of the way the case has been stated; and therefore, if the parties desire it, the case can go back to him to see whether, in point of fact, it has been dealt with in the way suggested by Mr. Browne. I now pass to the next question, which is the more important one, and that is in reference to the lines which are found to be directly productive, and which are the lines where the through traffic is detained on its journey to London. It is detained there and certain operations go on there; and, in reference to that, I do not find so distinct a finding in the case as there is in reference to the lines into the goods station. It does appear from par. 17 of the case that the arbitrator has allowed (and from his interim award, which is made part of the case, it does appear that the arbitrator has treated) as directly productive a portion only of the various lines which exist in Hornsey. What he has said is that he has allowed as directly productive so many of the lines which are there as he thinks "may fairly be equal to the requirements of the traffic above described"; and the "traffic above described" is the traffic which appears to be through traffic destined from stations beyond Hornsey, but which is detained at Hornsey under the circumstances stated in pars. 11, 12, 13, and 14. But it is said that those lines are in the same position as the lines which were dealt with in the *Fletton* case (*ubi sup.*) and in the *Stockport* case (*ubi sup.*); and what we find in those cases is this: I think Mr. Balfour Browne used a very convenient and intelligible expression with reference to these lines when he said they were "relief lines"—additional lines for the purpose of through traffic and for the purpose of the general traffic on the line, but additional lines required to meet difficulties which arose in dealing with that through traffic and dealing with those cases, to enable that traffic to get through Peterborough Station and Stockport Station. Those cases seem to establish that where there is the ordinary case of double lines beginning a little distance outside the station and passing into the station and a double line farther on where the line has passed through the station, the fact that duplicate lines, possible triplicate lines too—because in the *Stockport* case there were certainly more than duplicate lines—that those duplicated or additional lines are required for the through traffic does not prevent their being lines which are to be treated as directly productive lines and part of the running lines, as distinguished from things that are indirectly productive. Those two cases—the *Peterborough* case (*ubi sup.*) and the *Stockport* case (*ubi sup.*)—together do, I think, clearly establish that proposition—that duplicate lines or relief lines required in order to get traffic through, but required for the purpose of facilitating that through traffic, may be treated, and, I suppose I must say, must be treated, as running lines and directly productive, and that they are not the less so because, while the trains are on them incidentally, it not being the primary object of the construction of the lines, some other things go on them. Then if the arbitrator had found the facts to be identical with those cases, which it is possible he has meant to do, though he has not done so in such express terms as he has with regard to lines into the goods station, I certainly think I could not have interfered with his finding in any way. I am not at all sure, however, that he has done anything of the kind, and, further, when we consider the difference between dealing with a thing as being in a class indirectly productive, and in the class directly productive, he seems to me to have shown upon his findings a practical and real distinction between this present case and the *Stockport* and *Peterborough* cases. In those cases the relief lines or additional lines were required to meet local circumstances. The argument was

ductive and the parts that are indirectly productive is a principle of law, or whether it is not rather a way of arriving at a conclusion of fact—the conclusion of fact to be arrived at, after all, being the value of a rateable hereditament. But in either case I think it would be the duty of the judge to follow the previous decision, whether it is strictly law or whether it is not. The result of that seems to me to be that I, and I think probably Sir Ralph Littler, the legal arbitrator chosen in this case, would be perfectly right to follow the decision in any case, whether it was referred to as the *Fletton* case (*ubi sup.*), or the *Stockport* case (*ubi sup.*); although I am inclined to think, from the light thrown on these questions recently, that they are really modes of arriving at decisions of fact, rather than enunciations of principles of law. I proceed, therefore, to deal with this case upon the assumption that I am bound by the cases, and that if the arbitrator has so found the facts as to bring the matter upon which he finds within the principle of the cases, I am bound to apply it, and ought to follow it, whether it is law or whether it is fact. Now, the way in which the rateable value of the portion of a railway that is in a particular parish has been usually arrived at is by dividing, as I have said, the portion within the parish into the part that is directly productive and the part that is indirectly productive. When we have arrived at the fact that a certain portion of the hereditament is directly productive, then we arrive at the value of that by finding the earnings —I am not now dealing with the particular deductions that are made from them—of the undertaking generally, and then taking the proportion of those earnings which we find to be earned within the particular parish. Then, that being done, there are two propositions to be considered in reference to the portion that has been so dealt with. The first is, whether the use of the particular portion of land is such a use as to bring it within the category of that which is directly productive, or that which is indirectly productive; and when we have arrived at the conclusion that it is a part that is directly productive, then we have another matter to turn our attention to—namely, to find out the proportion of the total earnings of the undertaking which should be attributed to that particular bit of land in the parish that is so used. In this particular case I have to deal with those questions in reference to groups of lines which seem to me—and they seem to have been so dealt with by the arbitrator—to be divided into two classes. I will first deal with what the arbitrator deals with first—namely, the lines into the goods station. Those lines are used mainly at any rate, possibly entirely—I will say how I deal with this presently—for the purpose of sending goods away from Hornsey to various places on the line, and bringing goods from various places on the line to Hornsey; and they are different, therefore, from the other portions of the case in that respect which deal with the lines used for traffic going through. Now, as to those lines into the goods station, the first question is, whether or not the arbitrator has been right in treating, or whether I can interfere with his decision in treating, those lines into the goods station as being a portion of the land in the parish which is used for purposes directly productive. As to that, it seems to me that, even if I did differ from the arbitrator, I should have no power to review his decision; because I think that there he has distinctly found, as a question of fact, that the primary and principal object of these lines was to carry traffic into and from the warehouses and goods yards. He has clearly brought that—apart from cases, I think, if he found cases—within the category of the directly productive part of the land. But at any rate it is distinctly within the decision in the *Stockport* case (unless there is some difference by reason of the fact that in the *Stockport* case the decision only related to one line into the goods station, whereas this is as to several), because in the *Stockport* case, as here, there were in fact several lines into the goods station. But it appears that those other lines were not considered by the court; certainly the decision of the court was not that one line into the goods station may be directly productive and that the others would not be. The only reason why those lines were not considered in the *Stockport* case was, that no question was in fact stated about them; the parties had agreed not to claim them. But there was some indication in some of the judgments that, if they had been claimed, they would have been in the same category. At any rate, it seems to me that I cannot interfere with the decision of the arbitrator holding that these lines into the goods station, which he has found to be directly productive, were in fact so, and must be treated as being in that category. Then arises the next question, which is the difficult one with reference to this part of the case as to the lines into the goods station; and that is whether, assuming that those lines are to be rated by giving to this parish a proportionate part of the earnings of the whole undertaking, the parish have got their proper proportionate part. Now, the way of arriving at the proportional part of the earnings of the entire undertaking which is due to the part of the undertaking in the particular parish and the way in which that has been arrived at in other cases is by taking the length of the lines in that particular parish, and the length of the entire journey that the particular parcel of goods or the passenger has made. Then you lump everything together, and necessarily take the average in making a calculation of that kind, and it could not be done otherwise, but you take the proportion which the linear distance travelled in the parish bears to the entire linear distance travelled. In some cases that may be perfectly fair. In other cases it seems to me quite clear that it is not, but it has in point of fact been adopted. And I have a difficulty in saying that I would not follow such a rule as that. I think it is quite a difficult question whether one ought to follow it or not; because if you come to the conclusion that these rules are merely rules of practice showing the way in which you ought to arrive at it in order to form your opinion upon a question of fact, or value, I think it is rather doubtful how far one ought blindly to follow a rule of that kind in cases where one has a clear opinion that it is not applicable and does not give the fair proportion; but, at the same time, it has been acted upon in cases where it certainly does not give the exact proportion. The *Stockport* case (*ubi sup.*) is an illustration of it, and I think the *Peter-*

borough case (*ubi sup.*) also. So it comes to a question of degree; and I am not prepared, therefore, to say that in this case, with reference to these lines into the goods station, it is not right to take the lineal proportion which the journey in this parish bears to the whole journey, and to take that as being a proper way of ascertaining the proportion of the gross earnings that this parish ought to have. But I feel very great doubt, upon the findings of this case, whether that has been done. I quite see Mr. Balfour Browne's answer to the suggestion of Mr. Macmorran and Mr. Russell on the other side; and if his answer is borne out by the facts of this case, and by the findings of the arbitrator in the matters which the arbitrator really means to find, I think he has answered it, because I think it is perfectly clear that if we adopt a rule of that sort, and there are several places within a parish to which goods go, it is impracticable to go into the question which of the places within the parish the particular parcel of goods goes to, and that the only practicable way of dealing with such a question as that would be to take a central point, or perhaps, more accurately speaking, an average point, and although the parish would not get the exact mileage, if it may be called so, to the central point in other cases, they would get what is corresponding to it, mileage up to the central point in reference to goods that had not gone as far as the central point. If that is what has been done in this case, the parishes have had that which they ought to have in reference to the length of line that goes into this goods station. But it is suggested that that is not what has been done; and I must say that the case is so stated in reference to the introduction of things about group rates—which seem to me to have little or nothing to do with the matter—that I am not at all certain as to what has been done in reference to it. Therefore I think that, if the parties desire it, the case ought to go back to the arbitrator, in order to ascertain whether the true meaning of his findings is that which Mr. Balfour Browne says it is—namely, that, although the mileage distances into the goods station to the buffers of these particular lines have not been directly and specifically allowed in the parish, yet they have been allowed to some average point, giving them the distances to which, on the average, the goods to and from Hornsey go. If they have been allowed to a point which is an average point to which the goods to and from Hornsey go, that is quite right; but, if they have not, it seems to me that the parish have not had the fair proportion of the earnings of the entire undertaking that they ought to have in reference to the portion of it which is in this parish. As far as I can judge, knowing that the arbitrator would understand the matter, I think that Mr. Balfour Browne must be right. I think the arbitrator must have held that, but I am not certain as to that by reason of the way the case has been stated; and therefore, if the parties desire it, the case can go back to him to see whether, in point of fact, it has been dealt with in the way suggested by Mr. Browne. I now pass to the next question, which is the more important one, and that is in reference to the lines which are found to be directly productive, and which are the lines where the through traffic is detained on its journey to London. It is detained there and certain operations go on there; and, in reference to that, I do not find so distinct a finding in the case as there is in reference to the lines into the goods station. It does appear from par. 17 of the case that the arbitrator has allowed (and from his interim award, which is made part of the case, it does appear that the arbitrator has treated) as directly productive a portion only of the various lines which exist in Hornsey. What he has said is that he has allowed as directly productive so many of the lines which are there as he thinks "may fairly be equal to the requirements of the traffic above described"; and the "traffic above described" is the traffic which appears to be through traffic destined from stations beyond Hornsey, but which is detained at Hornsey under the circumstances stated in pars. 11, 12, 13, and 14. But it is said that those lines are in the same position as the lines which were dealt with in the *Fletton* case (*ubi sup.*) and in the *Stockport* case (*ubi sup.*); and what we find in those cases is this: I think Mr. Balfour Browne used a very convenient and intelligible expression with reference to these lines when he said they were "relief lines"—additional lines for the purpose of through traffic and for the purpose of the general traffic on the line, but additional lines required to meet difficulties which arose in dealing with that through traffic and dealing with those cases, to enable that traffic to get through Peterborough Station and Stockport Station. Those cases seem to establish that where there is the ordinary case of double lines beginning a little distance outside the station and passing into the station and a double line farther on where the line has passed through the station, the fact that duplicate lines, possible triplicate lines too—because in the *Stockport* case there were certainly more than duplicate lines—that those duplicated or additional lines are required for the through traffic does not prevent their being lines which are to be treated as directly productive lines and part of the running lines, as distinguished from things that are indirectly productive. Those two cases—the *Peterborough* case (*ubi sup.*) and the *Stockport* case (*ubi sup.*)—together do, I think, clearly establish that proposition—that duplicate lines or relief lines required in order to get traffic through, but required for the purpose of facilitating that through traffic, may be treated, and, I suppose I must say, must be treated, as running lines and directly productive, and that they are not the less so because, while the trains are on them incidentally, it not being the primary object of the construction of the lines, some other things go on them. Then if the arbitrator had found the facts to be identical with those cases, which it is possible he has meant to do, though he has not done so in such express terms as he has with regard to lines into the goods station, I certainly think I could not have interfered with his finding in any way. I am not at all sure, however, that he has done anything of the kind, and, further, when we consider the difference between dealing with a thing as being in a class indirectly productive, and in the class directly productive, he seems to me to have shown upon his findings a practical and real distinction between this present case and the *Stockport* and *Peterborough* cases. In those cases the relief lines or additional lines were required to meet local circumstances. The argument was

that if there had been no station there those lines would not have been duplicated, and the answer was: No doubt that is so, but it is just the difficulties of that station that make it necessary to duplicate them, and make it necessary to have four running lines instead of two in order to have effective running lines. That does not make them the less running lines. That is what that decision seems to me to come to. But here the circumstances seem to be different in this way. The obstruction to the traffic here does not arise in Hornsey. The obstruction to the traffic arises from the proximity to the metropolis, from the special conditions of the metropolitan lines over which the traffic has to pass after it passes through Hornsey, and the special conditions of those metropolitan lines in reference to passengers make it impossible for goods to travel over those lines with the regularity and at all times with the continuity that the goods can travel over other lines. Practically the goods have to wait and come at times when there are few passengers—at night, I suppose, because probably few goods trains go over the Metropolitan line at other times. That is a difficulty connected with the line as a whole, and not particularly relating to Hornsey, and it is a difficulty for which the railway company have to provide. It seems to me that if they provide for all the difficulties by putting somewhere or another something in the nature of a sorting station and a waiting station where they will keep their trains waiting for a substantial and considerable time, and use the waiting time to re-sort the trains, and put the trucks that are going one way together and the trucks that are going another way together, and so on, they are doing something very different from that which was done at Stockport, and in particular when we come to consider that the whole point of this distinction "directly productive" and "indirectly productive" is to divide the value of the entire railway between different parishes, it seems to me that so far as regards the rating of the entirety of the railway it ought not to make any difference at all. I do not say that in fact it does, but I strongly suspect that if anyone were to add together the rating in the different parishes through which a railway passes, he would find that it came to an amount substantially greater than anyone would rate the whole undertaking at if it were all in one parish. I should think there is no possible doubt that that is so as a matter of fact, but in theory this question about the indirectly productive and the directly productive proportions really only affect the way in which the rating of the entire undertaking is to be divided between the different parishes; and, that being so, if, for considerations quite apart from anything which arises in the particular parish in which the railway company will take thirty or forty acres of land for the purpose of performing on the land operations that I have described as a sorting station and a waiting station, they select a particular parish for doing that, by reason of the requirements of their traffic outside the parish and without any local considerations making it necessary to take that parish, it seems to me that that does not at all come within the principle upon which the lines have been treated, or the portion has been treated, as directly productive. It is far more analogous, in fact it is quite analogous, to the reasons for which the passenger stations and other stations are treated as being indirectly productive and not directly productive. The difficulty I have on this part of the case is in seeing whether this is a question of fact or a question of principle, and whether or not, assuming it to be a question of fact, the arbitrator has found this in such a way as to prevent my acting on my own opinion with reference to the matter. I have very considerable doubt about it, but, inasmuch as I think these rules should not be acted upon in a case where nobody would dream of applying them in the first instance—and that is what this comes to—I ought to hold that this does not come within the principle of the *Stockport* case (*ubi sup.*), I mean in reference to the lines that are used for the purpose of what appears to me to be a sorting station, where the traffic that is going through beyond the station is stopped in Hornsey and dealt with in a particular way not relating to Hornsey itself, but in a way for enabling it to go on to a further part. I therefore think that this place in Hornsey is practically a sorting station which ought to be dealt with as such and as indirectly productive, just the same as a goods station or any other one. That is my own view about this matter, though, as I have said, I have had considerable doubt as to what it is that the arbitrator really means to find with reference to it. I think this case ought to go back to the arbitrator upon that point, and be dealt with upon the principle that only so many of these duplicated or multiplied lines in Hornsey ought to be dealt with as directly productive as are required for the purpose of meeting the difficulties which arise in Hornsey—the same as in Stockport. I am not sure whether the arbitrator may not eventually say that he has selected out of 163 only so many as comply with that, and, if that is his view, then, of course, his figures would stand, but if he has applied "directly productive" on the view that the *Stockport* case (*ubi sup.*) covers any amount of duplicated lines or multiplied lines, provided only that the traffic goes through upon them somehow or other, then I think that is wrong, and that in all probability he has put somewhat too many into the directly productive lines. I am not confident that he has, because I have not quite clearly followed his finding, but I think that the case must go back to him upon that point also. I do not know that I can put that into clearer language to make it more in the form of an order.

Case remitted to the arbitrator for further findings.

The following was the arbitrator's report to the court, dated the 18th April 1905:—

In reply to the questions upon which I am directed to give further information to the court, I say:

1. As regards the signals and signal boxes, I have, in accordance with the ruling of the court in the case of *Midland Railway Company* v. *Pontefract Union* (*ubi sup.*), valued them as indirectly productive in every respect in the way usually adopted with regard to indirectly productive hereditaments.

2. As regards the other questions, by consent of the parties, the whole of the evidence may, if this honourable court should deem it convenient, be referred to; I have, however, stated the substance of some specific questions and referred to them by number.

3. As to traffic generally: In each parish the traffic has been taken in the usual way between each pair of

points for each description of traffic, and, where it is local to the Great Northern, the gross receipts—mileage and terminals—have been miled between the two points on the distance employed in the ordinary clearing-house divisions. Where the traffic originates or terminates on the line of another company, then, the division having previously been made in the Clearing House as between the other company and the Great Northern Company, the Great Northern Company's proportion has been taken for this purpose, and miled between the point of junction and the terminus: (Grinling, 3490).

4. In Hornsey the passenger train miles were given as 267,122, and receipts 76,919*l.*; the goods mileage was 100,117, receipts 28,375*l.*: (Grinling, 2502).

5. No question now arises as to passenger traffic, either as regards mileage or receipts.

6. The company have adopted precisely the same principle in arriving at the train miles for the parishes as they do in arriving at the train miles that they print half-yearly, so that the comparison may be exact in basing any calculation on that: (Grinling, 3605).

7. The train miles are made up on the principle of the one train arriving from the north up to the point where the average is taken, and where the train is split up, three trains departing for the south, one mile in the one case, and three miles in the other: (Grinling, 3611).

8. In calculating the train miles, no engine, time, or distance is included in the calculation of these train miles.

9. As regards traffic arising or terminating at Hornsey: There are several points partly to the north and partly to the south of the centre of the Hornsey passenger station where the traffic is delivered in both directions, but in varying proportions.

10. The evidence as to how the calculation of mileage of this traffic was made was as follows (the evidence being that of the rating surveyor of the appellants, who stated he had got out the gross earnings): As regards passengers, we have taken them to the centre of the passenger station in accordance with the rules adopted by railway companies; if from a terminal station from the buffer stops, otherwise from the same place. As regards the goods, where the goods yard is less than a quarter of a mile from the passenger station, as it is in this case, the receipts are miled to the centre of the passenger station. If it is more, they would be taken to the centre of the goods yard, and that is a mileage including terminals. When the traffic is not terminal, and more than a quarter of a mile from the passenger station, and if there is a terminal to the end of the goods yard and the terminal, it is miled in the receipts. —Q. Is that the same method that you adopt all over the line?—That is the method I have always understood is adopted, and it is the one we have always adopted. It is the method by which the railway companies measure for the parishes. That is the method universally adopted for the rating of the lines: (1010-1017, Brickwell).

11. The appellants' figures as to mileage and receipts were unchallenged, and their figures were taken as the basis on which the respondents' valuers founded their calculations: (see Ryan, 5922, 5987, 6273; Barker, 6413; see also Valuation, p. 310, where the receipts and mileage were accepted).

12. It is the fact that some of the up traffic is carried, by reason of the necessities of working, a considerable distance beyond Hornsey Station to the south, and then back northward to the goods yard. Some of it is carried short of Hornsey Station. So also some of the down traffic comes into the Hornsey yard south of the passenger station, and some to sidings north of that station. The extra running entailed by the exigencies of working beyond the station and back is a source of expense and not of profit to the appellants.

13. It is contended by the company that detours may and do take place at other stations either of origin or on the journey; that those are not taken into account, but that, if they were, the mileage would be so watered that Hornsey would lose rather than gain by the process.

14. I find that the appellants' method is, on the evidence, a not unreasonable method of calculation, and approximates fairly to the distances to which, on the average, the goods from and to Hornsey go; and, moreover, as the mileage was not disputed, I had no means of making any calculation based on any different method or figures.

15. It is contended by the respondents that a method of calculation by actual and not average mileage is still open to them. If so, it is admitted that the case must come back to be considered on fresh measurements and mileage.

As regards traffic destined for King's Cross, the North London, the Metropolitan, and railways beyond:—

16. I have allowed certain lines additional to the number further north on the system as running lines, as over them the through goods traffic is almost entirely diverted from end to end of the parish of Hornsey. This traffic is so diverted in order to relieve that former number of lines, and to enable the passenger traffic to pass freely and effectually, not merely to and from places north and south, but also to and from Hornsey and Harringay Stations in the parish.

17. Without those "relief" lines it would be impossible to carry on the passenger traffic, in all of which Hornsey has its mileage share.

18. Were they treated as sidings or marshalling ground, the respondents would largely lose the goods mileage in the parish.

19. As regards the lines whereon the trains which require to be split up are dealt with, I have regarded as wholly indirectly productive so many lines as in my judgment would be necessary for merely shunting and marshalling purposes, were nothing more needed to be done than to remarshal and forward the trains without the delay arising from the conditions already described attaching to this particular traffic.

20. So many lines as are in my judgment in fact necessary for the standing in waiting (after shunting and marshalling) of this traffic and its subsequent transit to its destination, I have treated as running lines. First, because those particular lines appear to me to be analogous to relief loops or refuge sidings on the roadside which facilitate traffic and enable the railway company to earn for its own benefit, and thus that of the parish, a much larger mileage on the relieved lines than would be otherwise practicable, and are in my view in the same position as running lines; and, secondly, because when three trains are run in place of one, either in going south or north, the distance then traversed is miled out in the ratio of three miles (that is, for three trains) to one mile (that is, where one long train only was running instead of three): (Grinling, 3611).

21. It being impossible without this provision (which must necessarily be as far south as possible for the sake of economy in working), which is to the advantage of Hornsey as well as other parishes, to have earned anything like as much mileage in Hornsey parish, I have regarded it as being in that sense a dealing relating to Hornsey itself.

22. Were the sorting, or whatever it is called, not done on the sidings which I have allowed as such, and as indirectly productive in Hornsey, but at some place further south, Hornsey would receive a mileage as of one mile only instead of three as at present is the case in respect of these trains.

23. These lines are primarily used for these purposes to meet difficulties which arise in Hornsey, though doubtless to enable traffic arising and terminating beyond Hornsey to be efficiently dealt with.

24. I have only allowed so many duplicated lines as are in my judgment necessary for this purpose, and

have excluded lines on which traffic may go through somehow or other.

25. The only distinction to be found, in fact, between this case and the *Fletton* case (*ubi sup.*) is that, though both were cases of relief of through traffic, in the *Fletton* case the traffic appears to usually travel from end to end of the parish without stop; the traffic here, from the necessities of the case, does, after being marshalled on some of the lines (of which I have allowed a sufficient proportional part), stand awaiting the time when it will be free to proceed to its destination.

July 1.—After further argument, the following judgment was given:—

CHANNELL, J.—This is a case of considerable importance, and, on the whole, I think it is better for the parties that I should give my judgment now and set them on their way to getting the decision of a higher tribunal rather than take time to consider it, and possibly having to postpone it for a considerable time in consequence of my being on circuit. I need not go into this matter in any considerable detail, because I have already given judgment upon it; and I may refer to that judgment as to the principal matters here. The first point that I asked for further information from the arbitrator was in reference to a doubt as to the findings in his original award about the mode in which the goods traffic to or from a point had been dealt with. It was suggested by counsel for the railway company that the findings meant that an average point had been taken, and that some of the traffic had gone beyond that average point, and that some had been taken to some other point short of it, and that, it being impracticable (as it obviously would be) to go into the question of the particular place to which each parcel of goods had gone, that was the proper way of dealing with the question, which, of course, is a question of apportioning, as between Hornsey and the other parishes, the proportion which they ought to have in respect of the traffic to and from Hornsey. That is a matter for the arbitrator. As I said before, it is quite clear that there must be adopted some rough-and-ready way of getting at the thing, because we could not go into it in detail; and the arbitrator has been good enough to add to the reasons he gave. He gives some additional reasons to show that that rough-and-ready way he adopted is a fair one. It seems to me he has, in fact, answered that question by saying: "I have, to the best of my ability, taken an average point, and I think it works out fairly." That being so, although I have a little doubt as to whether he has quite given full effect to the fact that this traffic has in many cases to go a long way round to get into the goods station, or whether he has taken full account of that, yet it is a question of fact, and I am quite sure he must have appreciated my difficulty upon it, with regard to which he has, in substance, said he has arrived at what he considers a fair average. As to that question of fact, I am clear, therefore, that, although I may think I should possibly not have taken quite the same point, it is a matter that I cannot interfere with, and his award must stand with regard to that matter. Then we come to a matter of no doubt greater difficulty, and that is as to the lines that have been classed as blue and red, or green and red (I do not know which they are supposed to be), as to which I had a difficulty before. The rules that have been adopted about dividing the lines and the railway buildings and apparatus into (1) the portions that are directly profitable—that go to make up the sum that has to be divided between the various parishes—and (2) the portions that are dealt with as indirectly profitable only, are no doubt a little difficult to follow. They have been adopted as rules which will work out fairly well under ordinary circumstances, but this case, as it seems to me, illustrates the difficulty of applying them. Now, it seems to me that if the Great Northern Company, having difficulty with reference to the Metropolitan Railway traffic—difficulty as to sending their goods traffic through on to the Metropolitan system by reason of the necessity of keeping the Metropolitan lines clear for passenger traffic during the daytime, so that they can be used for goods traffic during the night time only—have met that difficulty by making, in a particular parish what practically may be called an exchange station, or a waiting station, or something in the nature of a station, to deal with that difficulty, then that station comes within the category which any other station does, of something beyond all doubt producing traffic (because all stations must be supposed to produce traffic, otherwise the company would not have them at all), but that it does so indirectly rather than directly. Otherwise, as it seems to me, the company could altogether affect the position as between different parishes by choosing to make their exchange station, or waiting station, or whatever it may properly be called, in one parish rather than another. I think now, as I thought when I gave my former judgment, that if in Hornsey additional lines were made for the purpose of there dealing with a difficulty which arose outside Hornsey, that would come within the category of the things that should be treated as indirectly producing profit rather than of those directly productive. That may be right or it may be wrong, and it will be considered by another court, no doubt, whether this is right or wrong. I asked the learned arbitrator to tell me how he had dealt with these lines, and he assisted me considerably by what he has said; but at the same time I am not quite clear whether I fully understand his view about it. He has said that he has divided the lines that are in question, and that make up the vast bulk of the aggregation of lines within the parish of Hornsey, into two classes, and that he has treated a certain number of them as being what would be required if there were only the shunting and the sorting out and no waiting done upon them, and that, as to those lines, he has treated them as being lines that are indirectly profitable. That is quite clearly right. I do not think anybody doubts that, and so far, therefore, he has assisted me, because that did not quite appear on the first award. Then he goes on to say: "I have allowed certain lines additional to the number further north on the system as running lines, as over them the through goods traffic is almost entirely diverted from end to end of the parish of Hornsey." I do not think it can be doubted that he is right in allowing some lines; all the circumstances in reference to Hornsey Station lead one to think there would be some further lines additional that would be required in the parish which would be running lines—that is to say, that some additional running

lines would be required in the parish. There can be no doubt about that, I should think; and the arbitrator tells us he has allowed certain lines of that kind. Then in par. 20 he says: "So many lines as are in my judgment in fact necessary for standing in waiting (after shunting and marshalling) of this traffic, and its subsequent transit to its destination, I have treated as running lines." He goes on to give his reasons for doing that. One is an argumentative reason: "Because these particular lines appear to me to be analogous to relief loops or refuge sidings on the road side, which facilitate traffic and enable the railway company to earn for its own benefit, and thus that of the parish, a much larger mileage on the relieved lines than would be otherwise practicable, and are, in my view, in the same position as running lines." That is not asked in any way. I think it means: "Because I think they are governed by the cases that have been quoted—the *Stockport* case (*ubi sup.*) and the *Fletton* case (*ubi sup.*)." Then he goes on to add another reason, which the counsel on both sides in this case have said they do not very fully understand, and I do not. They say it is correct in point of fact, but they do not see the applicability of it. Now, the point seems to me to be whether that is right. I have already said that in my view it is not. If the company make lines for the standing and waiting in this parish of the trains which are delayed from getting on to the Metropolitan system by the exigencies of that system, so far as I can form a judgment on the matter, that comes within the category of things that are treated as indirectly profitable rather than directly profitable. There is no additional toll or additional rate earned by that, so far as I can see. It is quite true, no doubt, that the total traffic is increased by it. If something of the kind were not done, the other railway companies would probably compete on better terms. That must be the case with a very large portion of the works treated as being indirectly profitable. If they did not increase the total traffic in some way, they would not exist. The stations even would not exist if they did not increase the traffic, and there would be no stations at all. Therefore it seems to me that that test does not really apply. The best judgment I can form on the subject is, that so many of the lines as are necessitated by the fact that the trains have to wait in order to get on to the Metropolitan system, that so many of the lines as have been put in Hornsey for that purpose, ought to be treated as portions of the indirectly profitable, and not of the directly profitable. I may be right as to that or not, but that is the view I entertain, and I ought to give judgment to that effect. I suppose that involves the case going back to the arbitrator for him to decide how much, but I do hope that the parties will find it convenient, before going to that further expense, to take the opinion of the Court of Appeal, as I suppose they desire to do, on several points in the case. In point of form, perhaps, I ought to say that so much as the arbitrator may find to come within my decision is to come off. The signals and signal-box point there is no judgment on. My judgment goes similarly to the converse case of the down sidings, as I understand those were to be on the same footing.

Judgment accordingly.

The order of the court (as appeared from the arbitrator's final award, dated the 11th Aug.) was drawn up in the following form:—

"This court is of opinion that the determinations of the said arbitrator in his said award are correct, except in so far that they are that lines of the appellants' railway in the parish of Hornsey other than those necessitated by difficulties arising in the said parish which are in the judgment of the arbitrator in fact necessary for the standing in waiting (after shunting and marshalling)—such standing in waiting being necessary through difficulties arising outside the said parish—of through goods traffic destined for King's Cross, the North London Railway, the Metropolitan and railways beyond, are runninglines.

"And this court doth order that the said award be remitted to the said arbitrator with the opinion of the court that such lines of railway ought not to be treated by him in determining the rateable value of the portion of the appellants' railway undertaking in the parish of Hornsey as running lines, but ought to be treated by him and dealt with, in determining such rateable value, as being part of the indirectly profitable portion of the said undertaking.

"And this court doth order that the said arbitrator do amend his said award in accordance with the opinion aforesaid.

"And it is further ordered, that, subject to the said award being amended as aforesaid, judgment be entered on the said special case for the said railway company, and that the said railway company do pay to the said assessment committee and the said overseers half the amount of the costs of this hearing, such costs to be taxed by one of the taxing masters."

When the parties appeared before the arbitrator it was agreed between them that the gross estimated rental of 6314*l.* should be increased to 7574*l.*, and that the rateable value of 5262*l.* should be increased to 6312*l.*, and the arbitrator awarded accordingly, and made an order as to costs.

Solicitor for the railway company, *R. Hill Dawe.*

Solicitor for the respondents, *Francis Shelton.*

Wednesday, Aug. 2, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

BRIDGETT (app.) *v.* MAYOR, &c., OF WANDSWORTH (resps.). (*a*)

Metropolis—Paving new street—"Intersection"—Metropolis Local Management Act 1862 (25 & 26 *Vict. c.* 102), *s.* 77.

At the junction of two streets, B.-walk and W.-road, was a granite crossing which was on the soil of W.-road, and it connected the footpath on the side of W.-road at the junction with B.-walk.

Held, that this granite crossing was "paving at the points of the intersection" of the streets within sect. 77 *of the Metropolis Local Management Act* 1862, *and rightly charged on the frontagers of B.-walk when that street was being paved.*

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

CASE stated on a summons preferred by the respondents against the appellant to recover the balance of a sum apportioned in respect of premises owned by the appellant payable towards the expense of paving a new street called Briar-walk under the provisions of the Metropolis Local Management Act 1862.

At the hearing of the summons the following facts were proved or admitted:—

The appellant was at the time of the making of the apportionment hereinafter mentioned the owner of one of the houses forming Briar-walk, Putney, which is a new street in the borough of Wandsworth, and is situate between the north side of Woodborough-road and the Upper Richmond-road. Briar-walk is not continued beyond the north side of Woodborough-road as a carriage-way but as a footway only, and the continuation as a footway was not included in the resolution by which the respondents resolved to pave Briar-walk as a new street.

Woodborough-road has not been paved as a new street by respondents, but was laid out as a street at the same time as Briar-walk.

On the 1st April 1903 the respondents by resolution decided to pave as a new street Briar-walk throughout the whole breadth of the carriage-way and footpaths thereof as provided by the Metropolis Management Act 1855, and the several Acts amending the same, at an estimated cost of 1211*l.* 18*s.* 6*d.*, such costs to be apportioned amongst and charged upon the several owners of the houses forming and the land bounding or abutting on Briar-walk as set out in the apportionment then before the respondents.

The respondents executed the works in respect of which they had made the estimates. Included in the works was a granite crossing at the junction of Briar-walk and Woodborough-road. The crossing is on the soil of Woodborough-road and connects the footpaths on the north side of Woodborough-road at the junction of Briar-walk and Woodborough-road, and the southern edge of the granite crossing is in line with the kerb on the said side of Woodborough-road. The cost of the crossing was 48*l.* 13*s.*

On the completion of the works the respondents ascertained that the actual expense of the paving was less than the amount of the estimate, and claimed the sum of 63*l.* 13*s.* 2*d.* as the amount due from the appellant in respect of the works.

The appellant contended that the cost of the granite crossing ought not to have been included in the cost of paving Briar-walk, and paid the sum of 62*l.* 5*s.* only.

The amount of 1*l.* 8*s.* 2*d.* claimed by the respondents is the difference between the 63*l.* 13*s.* 2*d.* and the amount paid by appellant. If the cost of the crossing was not properly chargeable as part of the cost of paving Briar-walk, the sum of 1*l.* 8*s.* 2*d.* was not due from the appellant.

It was proved by the respondents' surveyor, and not seriously challenged by the appellant, that the phrase "points of intersection" is a well recognised geometrical expression, and as applied to intersecting streets denotes the triangular space contained between two right lines drawn from the centre of the intersected street to the extreme ends of the boundary line of the intersecting street at the place of mutual junction and that itself as a base line. The magistrate accordingly so found as a fact.

In accordance with the usual practice in these cases and the terms of the resolution the levels of Briar-walk and Woodborough-road were adjusted at their point of junction, and it was necessary in order to properly complete and make safe for traffic the paving of the carriage-way and footways of Briar-walk, to make the granite crossing at the junction of Briar-walk with Woodborough-road. These operations were carried out mainly in the interest of Briar-walk.

On behalf of the appellant it was contended that he was only liable for the cost of paving Briar-walk, and that the granite crossing was situate in Woodborough-road and did not form part of Briar-walk, and that the cost of the granite crossing was not part of the cost of paving Briar-walk, and that the cost of the crossing was improperly charged as a part of the cost of paving Briar-walk; that Briar-walk and Woodborough-road did not intersect, and that the respondents were not entitled to include the cost of making the granite crossing in the cost of paving Briar-walk, as the cost of paving at a point of intersection of Briar-walk and Woodborough-road; and that intersection, within the meaning of sect. 77 of the Metropolis Management Amendment Act 1862, meant the cutting or crossing of at least two streets, each by the other, each street continuing its course from each end of the intersection, so as to constitute in effect four streets running into each other, and form an area described (by the appellant) as "a no man's land," a state of things which had created difficulty in ascertaining the parties chargeable with the cost of paving such areas, and led to the new legislation contained in sect. 77, which latter, therefore, only applied where the foregoing circumstances so existed. No confirmation, either from historical or legal sources was forthcoming in support of this argument.

On behalf of the respondents it was contended that the crossing was at a junction or "point of intersection" of Briar-walk with Woodborough-road, within the meaning of sect. 77, the Metropolis Local Management Act 1862, and as provided by the section the cost of the crossing was properly apportioned amongst and charged upon the owners of the houses forming and of the land bounding or abutting on Briar-walk.

The magistrate was of opinion that the word "intersection" in sect. 77 of the 1862 Act is used in its colloquial metaphorical sense to the exclusion of any such physical conception, as when, *e.g.*, a bridge crosses a street or river; thus it would simply mean that the relative positions of (in the present case) Briar-walk and Woolborough-road are such that the traffic from the former can pass straight over the latter from the one side of it to the other—that is, cross it, as when one talks of crossing the street. Moreover, as by far the largest of London streets are obviously found to be subject to precisely the same conditions as have raised the present question, to hold differently would very greatly narrow the application of sect. 77 without much apparent reason. He accordingly made an order on the appellant for payment of the sum claimed.

Macmorran, K.C. (*R. Cunningham Glen* and *Bethune* with him) for the appellant.—This question arises on the construction of sect. 77 of the Metropolis Management Act 1862. Briar-walk has

been made up as a new street, and the frontagers have been properly charged with making it up, but in making it up and in charging the frontagers the respondents have included in the cost of paving, the expense of making the crossing in Woodborough-road. This is not an intersection within sect. 77 of the Act of 1862, because the granite crossing is in Woodborough-road, and it is the continuation of the pavement in that road. It would be there if Briar-walk did not exist, and it forms no part of Briar-walk. Two streets intersect when they cross one another, but they do not intersect at all when they merely go into one another. If Woodborough-road were being made up, this crossing would be paved in the making up of that road, for the crossing is on the soil of Woodborough-road, and the crossing between two pavements is always regarded as part of the street in which it happens to be.

Avory, K.C. (*Richards* with him), for the respondents, were not called upon to argue.

Lord ALVERSTONE, C.J.—I think the magistrate has come to a perfectly right conclusion in this case. We have not got to construe any strict legal term or any term of art. The words of the section are: "And any such costs or expenses, including the cost of paving at the points of the intersection of streets." What does "intersection of streets" mean? I think it may have a very different meaning according to the exact subject-matter you are discussing. I can well understand a person saying he was using Woodborough-road when he was walking on the granite crossing if he was describing that he met a person there or that some accident happened there. I can equally understand a person saying he was in Briar-walk it he happened to be coming up Briar-walk and had reached the granite crossing. If he saw a cart at the end of Briar-walk he would say it was in Briar-walk just where it joined Woodborough-road. I am of opinion that this matter cannot be decided on the strict consideration of whether the soil in this particular place belonged to Woodborough-road. I do not understand quite what that means, but I suppose if it was a question of ownership of the soil, the soil would be in Woodborough-road. Paving at the points of the intersection of streets seems to me to be a practical question, and I should think that it was not very outrageous to say that this constituted a paving at the intersection of streets, and to that extent the facts stated in the case are not material for the purpose of increasing the geographical area in respect of which the Briar-walk frontagers can be charged, or for the purpose of putting a practical limit as to what are the particular costs and expenses, including the cost of paving, at the point of intersection. I think the view taken by the learned magistrate was quite right, and I think his reference in the case shows that he had appreciated what the crossing was. I therefore think that this appeal must be dismissed.

LAWRANCE, J.—I agree.

RIDLEY, J.—I agree.

Appeal dismissed.

Solicitors: *Russell, Cooke*, and *Co.*; *W. W. Young, Son*, and *Ward*.

Wednesday, Aug. 2, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

WORTHINGTON (app.) *v.* KYME (resp.). (*a*)

Food and drugs—Adulteration—Proceedings instituted by inspector of nuisances of non-quarter sessions borough—Right to institute.

An inspector of nuisances of a non-quarter sessions borough under the direction of the town council of the borough bought a sample of milk from the respondent, and, in consequence of the analysis made by the county analyst, on the instructions of the town council preferred an information under sect. 6 *of the Sale of Food and Drugs Act* 1875.

Held, that the proceedings were rightly taken by the inspector of nuisances.

CASE stated on an information preferred by the appellant under sect. 6 of the Sale of Food and Drugs Act 1875 against the respondent for selling milk not of the nature, substance, and quality demanded.

The following facts were admitted:—

The appellant is an inspector of nuisances for the borough of Bridlington, duly appointed by the town council of the borough.

The appellant, under the direction and at the cost of the town council of the borough of Bridlington, had taken a sample of milk from (amongst other persons) the respondent.

He had, in further pursuance of such directions and at such cost, caused such a sample to be analysed by the public analyst appointed by the county council for the administrative county of the East Riding of Yorkshire.

Bridlington is a small incorporated borough not having a separate court of quarter sessions or a separate police establishment.

The town council had no power to appoint an analyst for the purpose of the Sale of Food and Drugs Acts, and no such analyst was appointed.

In consequence of the result of the analysis, the appellant had been instructed by the sanitary committee or town council of the borough to prosecute the respondent.

The town clerk of the borough appeared on behalf of the town council to conduct the prosecution.

The justices asked the town clerk whether the town council of the borough was a local authority within the meaning of the Sale of Food and Drugs Acts for the purpose of enforcing such Acts and directing its officers to take samples of food and submit the same to be analysed, and to proceed as in this case.

The town clerk contended that the town council was a local authority within the meaning of the Sale of Food and Drugs Acts for the purpose of taking proceedings under the Sale of Food and Drugs Act 1875, and, having power to appoint an inspector of nuisances, could as such authority direct such officer at its cost to procure samples of food and submit the same for analysis, and subsequently institute and carry out prosecutions and pay all costs incidental thereto; and that sect. 25 of the Sale of Food and Drugs Act of 1899, which defines "local authority" as meaning any local authority authorised to appoint an

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

analyst for the purpose of the Sale of Food and Drugs Acts, did not apply to the Sale of Food and Drugs Act of 1875 so as to affect the power of the town council as the authority appointing the inspector of nuisances at its cost to direct the taking of the sample of food and the analysis thereof and to prosecute these proceedings.

The attention of the justices was called to the following sections of the following Acts: Sale of Food and Drugs Act 1875, ss. 10, 11, 12, 13, 20, and 26; Sale of Food and Drugs Act 1899, ss. 3, 25, and 28; Local Government Act 1888, s. 39; and the charter of incorporation of the borough.

The justices were of opinion and found as a fact that the proceedings were taken throughout under the direction and at the cost of the town council of the borough, and that such council was, by the appellant, the prosecutor; that the council not being one of the authorities referred to in sect. 10 of the Sale of Food and Drugs Act 1875, and the charter of incorporation of the borough providing as follows: "The council of the borough shall not exercise any of the powers or duties or be subject to the liabilities under any of the Acts relating to the police force or other matters mentioned in sect. 39 of the Local Government Act 1888, but all the powers, duties, and liabilities in respect of such matters shall be exercised by and attached to the county council of the administrative county of the East Riding of Yorkshire, and the area of the said borough shall for all purposes of the Acts relating to the county police force or other matters mentioned in the said section form part of the county in like manner as if it were not a borough," such council was not a local authority authorised to appoint an analyst for the Sale of Food and Drugs Acts, and consequently not a local authority as defined by sect. 25 of the Sale of Food and Drugs Act 1899; that the town council was not a local authority intrusted with the execution of the laws relating to the sale of food and drugs, and that it was not the duty of such council to put such Acts into force and to direct its officers to procure samples as provided by sect. 3 of the Sale of Food and Drugs Act 1899 and pay the costs thereof and of analysis; that, the town council not being such a local authority as aforesaid, the appellant could not under the direction and at the cost of the town council procure such sample of food and submit the same to be analysed, and subsequently under such directions and at such cost and on behalf of the council institute the proceedings; and that, the town council, not being a local authority within the meaning of the Sale of Food and Drugs Act 1899 could not cause to be instituted and prosecute the before-mentioned proceedings against the respondent and pay the costs incidental thereto.

They therefore refused to hear and determine the information, and dismissed the summons.

Macmorran, K.C. (*Bonsey* with him) for the appellant.—The point raised by the case is whether an inspector of nuisances appointed by an ordinary urban sanitary authority or borough not having quarter sessions can take proceedings for the infringement of the Sale of Food and Drugs Act 1875, the suggestion being that no inspector of nuisances or other officer, except the officer of a borough having a court of quarter sessions or of a county council, can take such proceedings. The inspector here was an inspector of nuisances of a borough not having quarter sessions. He referred to

Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), ss. 10, 12, 13, 14, 17, 20;
Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), ss. 2, 3 (1), 25, 28.

It is suggested that because of the Act of 1899 the meaning of the words "local authority" in the Act of 1875 has been cut down, and that only an inspector of nuisances appointed by a local authority having power to appoint an analyst can take proceedings, and so the only person who could take proceedings is an officer of the county council. In this case the appellant was an inspector of nuisances duly appointed by the local authority; he took a sample and had it analysed by the county analyst, who was the proper person. Even if he were not an officer he was a purchaser, and could have taken proceedings as a private person.

Avory, K.C. (*E. W. Walker* and *J. E. King* with him) for the respondent.—The point here is not whether the appellant as an individual can take proceedings, but whether he, on behalf of the borough, can take proceedings. The importance of the point lies in sect. 26 of the Sale of Food and Drugs Act 1875, because the magistrates by their order have to decide where the penalties have to go. In this case the individual was claiming to take proceedings on behalf of the borough as a local authority, and if that were right and he were really taking them, and was authorised to take them, on behalf of the borough, then the justices were bound under sect. 26 to order the penalty to go to the borough. The magistrates cannot proceed to hear and determine these complaints without adjudicating where the penalty is to go, otherwise their order would be bad. They cannot adjudicate as to where the penalty is to go without deciding whether the inspector who is taking the proceedings is an officer of the authority mentioned in the section. If he is not an officer of an authority who appoints an analyst, he is not entitled to have the penalty go to the borough, but in this case the appellant claims to be the officer of a borough that has authority for this purpose to take proceedings, and the whole point is whether the borough had authority to take these proceedings as distinct from the county. If the magistrates were right in deciding that the borough is not the authority that can appoint an analyst, then it follows that the borough cannot take proceedings, and their officer or servant cannot on its behalf take proceedings. The county are the authority who ought to execute this act within the borough. [LAWRANCE, J.—What meaning do you give to the words "any other prosecution" in sect. 26? The fine goes in a certain way in one case, and "in any other prosecution" in another.] That means the prosecution by an individual.

Lord ALVERSTONE, C.J.—I am unable to understand the reason which prompted some ingenious person to take this point, and still less how it could appeal to the magistrates. There are two sets of clauses, one protecting people who are to be proceeded against, and the other protecting the people whose food is

supposed to be adulterated. With regard to people against whom proceedings are taken, there are provisions providing analysts and enabling people to go to those analysts and get things analysed, and there is a protection to the seller by requiring portions of the sample to be kept, and other matters which we have had to consider in connection with beer cases and other cases as to the sufficiency of the analysis; and there are certain other provisions making it compulsory upon certain local authorities to appoint analysts. That is a general statement of the group of sections for the protection of people against whom proceedings are going to be taken. For the protection of the public any person is entitled to have an analysis. Any medical officer of health, any inspector of nuisances, inspector of weights and measures, and other people are entitled to take samples and entitled to have them analysed, and the people who may take samples may take proceedings when the result of the analysis is arrived at. It is said that the jurisdiction of the magistrates to hear and determine an information alleged by an inspector of nuisances who has got a sample and has had it analysed, and has done everything, depends upon whether he was appointed under such circumstances that the authority for whom he was inspector of nuisances could take proceedings. It is said that, not being able to appoint an analyst, they could not take proceedings themselves, and that therefore their inspector of nuisances could not take proceedings. I am quite unable to follow that. I believe—but I do not like to say this too confidently, in case the point should come up again—that the only distinction is where the penalty would go when the proceedings are taken; and if sect. 26 is relied upon, as my brother Lawrance pointed out, if Mr. Avory is right in saying that the borough of Bridlington will not get the penalty, then it seems to me that it is provided for by the second limb of the section. I attach less importance to that, because it seems to me, from the point of view of jurisdiction, it has nothing to do with it. It may be a question where the penalty is going. I will assume that in Mr. Avory's favour, but the jurisdiction is given to the magistrates, and the duty is imposed upon them to hear and determine the question as to the sale of some article which is said not to have been sold according to the statute, when proceedings are brought by the inspector of nuisances, who has himself bought a sample and obtained the analysis. I do not understand at all why the personal element was not sufficient. I am quite clear in my own mind that the magistrates had no right to decline to hear the case, and therefore the appeal must be allowed, and an order made on them to hear and determine the case.

Lawrance, J.—I agree.

Ridley, J.—I agree. *Appeal allowed.*

Solicitors: *Neve, Beck,* and *Kirby,* for *A. E. Matthewman,* Bridlington, Yorks; *Bocket, Stunt,* and *Nash,* for *Procter,* Beverley.

Aug. 2 *and* 3, 1905.

(Before Lord Alverstone, C.J., Lawrance and Ridley, JJ.)

Wood Green Urban District Council (apps.) v. Joseph (resp.). (a)

Public Health—Sewer—"Single private drain"—Single private drain running into sewer—Liability to abate nuisance in sewer—Notice of nuisance by inspector of local authority—Sufficiency—Public Health Act 1875 (38 & 39 *Vict. c.* 55), *s.* 41—*Public Health Acts Amendment Act* 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

The respondent was the owner of six houses in a row of sixteen houses, the other houses belonging to different owners. All the houses in the row were drained in pairs, each pair being drained by a separate pipe into a pipe common to both houses, and each of such common pipes discharged into a line of pipes (called the alleged single private drain) laid in private ground behind the row of houses and parallel thereto, and the drainage of all the houses was thence conveyed to a public sewer. The drainage of the respondent's houses was conveyed (as in the case of all the houses) to the alleged single private drain, first by pipes which were not common, and then by pipes which were common, to each pair. Several of the other houses belonging to different owners, being at the upper end of the row of houses, were also drained into the alleged single private drain before it received the drainage of the respondent's houses. It was admitted that the pipes which were common to each pair of the respondent's houses were "sewers" within the meaning of the Public Health Acts. A nuisance existed in the alleged single private drain behind the respondent's houses, and the question was whether the respondent was liable to bear the cost of abating the the same.

Held, that, inasmuch as the portion of the alleged single private drain behind the respondent's houses would, if it had received only the drainage of the respondent's houses, have been a sewer, to which sect. 19 *of the Public Health Acts Amendment Act* 1890 *would not have applied, it was not brought within the operation of sect.* 19, *and did not become a single private drain, to which that section was applicable, because in addition it also received the drainage of several of the other houses belonging to different owners, and that therefore the respondent was not liable to pay for abating the nuisance.*

Thompson *v.* Eccles Corporation (91 *L. T. Rep.* 750; (1905) 1 *K. B.* 110) *and* Jackson *v.* Wimbledon Urban District Council (92 *L. T. Rep.* 553; (1905) 2 *K. B.* 27) *considered and distinguished.*

The written application to a local authority under sect. 41 *of the Public Health Act* 1875, *which is necessary to found the jurisdiction of the local authority to proceed under that section and which is to state that a drain is a nuisance or injurious to health, may be sent to the local authority by the local authority's own surveyor or inspector of nuisances, and upon the receipt of such notice the local authority may empower him to put in force the provisions of the section.*

Case stated on a complaint preferred by the urban district council of Wood Green (herein

(a) Reported by W. W. Orr, Esq., Barrister-at-Law.

called "the council") against Louis Joseph, of St. Mary's-road, Highbury, N. (herein called "the respondent"), for the recovery from the respondent as the owner of six houses in a street in the council's district, called Parkhurst-road, of the sum of 49*l.* 16*s.*, and interest thereon from the 26th Feb. 1904, which the council claimed as due to them from the respondent under sect. 41 of the Public Heath Act 1875 and sect. 19 of the Public Health Acts Amendment Act 1890, in respect of drainage works executed by the council as hereinafter stated. On the hearing of the complaint the facts hereinafter stated were proved or admitted.

The Public Health Acts Amendment Act 1890 was at all material times in force in the council's district.

Parkhurst-road runs north and south, and on the east side thereof was a row of sixteen houses, numbered consecutively two to thirty-two (even numbers). The respondent was at all material times the owner of six of the houses—namely, Nos. 18, 20, 22, 24, 26, and 28—the remaining ten houses belonging to other owners.

The drainage of this row of sixteen houses was at all material times conveyed to a public sewer in Marquis-road (a road entering Parkhurst-road at the north end of the houses) by means of a system of pipes arranged as follows: The houses were drained in pairs. Each pair of houses was drained by a separate pipe into a pipe common to both houses, and each of such common pipes discharged into a line of pipes (hereinafter called "the alleged single private drain") which was laid in private ground behind —that is to say, on the east of the row of houses, and parallel thereto. The drainage of the six houses of which the respondent was owner was therefore conveyed to the alleged single private drain first by pipes which were not, and then by pipes which were, common to each pair of such houses, and it was admitted by the council that the pipes which were common to each pair were "sewers" within the meaning of the Public Health Acts; and that, inasmuch as the houses they served belonged to the same owner, such common pipes did not come within the operation of sect. 19 of the Public Health Acts Amendment Act 1890.

On the 29th Oct. 1902 a printed notice was sent to the council by Mr. Albert Edward Adams, the council's inspector of nuisances, stating that "a drain belonging to the premises" 2 to 32, Parkhurst-road, "or to some one or more of the said premises" was "a nuisance." The notice was as follows:

To the Urban District Council of the district of Wood Green, in the county of Middlesex.—Gentlemen,—I beg to inform you that a drain belonging to the premises 2, Parkhurst-road, 4, Parkhurst-road, 6, Parkhurst-road, and 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, and 32, Parkhurst-road, within your district, or to some one or more of the said premises, is a nuisance, and I hereby request you, in pursuance of the provisions of the Public Health Acts in that behalf, to empower your surveyor or inspector of nuisances to enter the premises to which the said drain belongs with or without assistants, and to cause the ground to be opened, and to examine the said drain. —(Signed) A. E. Adams, Inspector of Nuisances.

On the 29th Oct. 1902 the council empowered Albert Edward Adams, after notice to the occupiers of the houses, to enter the premises to which the drain described as aforesaid belonged, and to cause the ground to be opened, and to examine the drain.

Pursuant to the authority given by the council, their inspector, Mr. Adams, after due notice to the occupiers, inspected the drains belonging to the premises. Upon such inspection the drains were found to be throughout in bad order and condition, and to require alteration and amendment, and the inspector reported to the council to that effect.

Acting upon the report of the inspector (Mr. Adams), the council required certain work to be done to the drains separately draining the respondent's six houses, and the respondent executed such work. The council did the work necessary to put the common pipes into proper repair, and themselves defrayed the cost. On the 11th Feb. 1903 the council, acting upon the same report, gave notice to the owners of the houses comprised in the row, including the respondent, to do certain specified works to the alleged single private drain, such works being necessary to put the alleged single private drain into proper repair. The notice was not complied with. The council then caused the works specified in the notice to be done by persons in their employment.

The cost of the works executed by the council as aforesaid to the alleged single private drain was 132*l.* 16*s.*, and the surveyor to the council, in pursuance of sect. 19 of the Public Health Acts Amendment Act 1890, apportioned the cost between the owners of the several houses in the row of sixteen houses. The sum so apportioned on the respondent in respect of the six houses whereof he was owner was the sum of 49*l.* 16*s.* Notice of the apportionment was duly served, and on the 26th Feb. 1904 the sum of 49*l.* 16*s.* was duly demanded of the respondent.

It was contended for the respondent that the written application necessary to found the jurisdiction of a local authority under sect. 41 of the Public Health Act 1875 must proceed from some person other than the surveyor or inspector of nuisances of the local authority seeking to enforce such section, and that, therefore, the council's proceedings in the present case being based on a notice from their own inspector the requirements of sect. 41 of the Public Health Act 1875 had not been complied with, and the respondent was not liable. The justices decided this point in favour of the council.

It was further contended for the respondent that the alleged single private drain was not a "single private drain" within sect. 19 of the Public Health Acts Amendment Act 1890, and that even if it was a single private drain within that section (which the respondent did not admit) yet, since drainage was discharged into it by means of a series of pipes which were admitted by the council to be, for part of their length, "sewers" within the meaning of the Public Health Acts, the respondent's houses were not "connected with" the public sewer in Marquis-road "by" such single private drain. In support of this contention it was argued that "connected by" in the section meant "connected by that by which the section stipulated that the connection should be made"—namely, by "a single private drain," and not by other things which were not single private drains,

and that as, in the present case, there were lengths of admitted sewer between the alleged single private drain and the house drains, the respondent's houses were not "connected with a public sewer by" the alleged single private drain.

On this point the justices were of opinion that, had it not been for the intervention of the common pipes the council would have been entitled to their judgment, but the common pipes being "sewers" repairable solely by the council and intervening between the respondent's house drains and the alleged single private drain, they could not agree and accordingly dismissed the complaint.

The questions for the opinion of the court were: 1. Were the justices right in deciding against the respondent's first contention? 2. Did the facts stated herein show that the respondent's six houses were "connected with a public sewer by a single private drain" (namely the alleged single private drain) within sect. 19 of the Public Health Acts Amendment Act 1890?

The plan annexed to the case showed how the houses were drained into the alleged single private drain. Each pair of houses was drained in common. A single drain ran from behind each of the pair of houses in a direction inclined towards each other, and joined at a point behind the houses, in the form of a Y, the stem or "leg" of the Y (as it was called) thus taking the drainage of the pair of houses, and this common pipe representing the stem of the Y, emptied into the alleged single private drain, which ran behind the whole row of houses and thence into a public sewer under the roadway. The upper end of the alleged single private drain began behind the house No. 2 and ended behind the house No. 32. Eight of the houses (Nos. 2 to 16 inclusive) were drained into the alleged single private drain in pairs as above described, and then came the respondent's six houses, and finally Nos. 30 and 32, which were drained together, so that before the alleged single private drain received the drainage from the respondent's six houses, it had already received the drainage of the eight houses belonging to different owners at the upper end of the row of houses. On the plan A was the point where the first common pipe, and B was the point where the last common pipe, from the respondent's houses entered the alleged single private drain, and the pipe A B was that portion of the alleged single private drain behind the respondent's houses which lay between A and B. The alleged single private drain entered the roadway (Marquis-road) at the point K, and emptied into the public sewer under that road at the point F. It was the stems of the Y's from the respondent's houses which were admitted by the council to be "sewers."

Sect. 41 of the Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

On the written application of any person to a local authority, stating that any drain, water-closet, earth-closet, privy, ashpit, or cesspool on or belonging to any premises within their district is a nuisance or injurious to health (but not otherwise), the local authority may, by writing, empower their surveyor or inspector of nuisances, after twenty-four hours' written notice to the occupier of such premises, or in case of emergency without notice, to enter such premises, with or without assistants, and cause the ground to be opened, and examine such drain, water-closet, . . . If the drain, . . . on examination is found to be in a proper condition, he shall cause the ground to be closed, and any damage done to be made good as soon as can be, and the expenses of the works shall be defrayed by the local authority. If the drain, . . . on examination shall appear to be in bad condition, or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring him forthwith or within a reasonable time therein specified to do the necessary works; and if such notice is not complied with, the person to whom it is given shall be liable to a penalty not exceeding ten shillings for every day during which he continues to make default, and the local authority may, if they think fit, execute such works, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses.

Sect. 19 of the Public Health Acts Amendment Act 1890 (53 & 54 Vict. c. 59) provides:

(1) Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section forty-one of the Public Health Act 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor, or (in case of dispute) by a court of summary jurisdiction. (2) Such expenses may be recovered summarily, or may be declared by the urban authority to be private improvement expenses under the Public Health Acts, and may be recovered accordingly. (3) For the purposes of this section the expression "drain" includes a drain used for the drainage of more than one building.

Macmorran, K.C. (*A. F. Jenkin* with him) for the appellants.—It is submitted that the drain in question is a single private drain, to which sect. 19 of the Public Health Act 1890 applies. It is conceded on behalf of the appellants that the three common pipes from the respondent's six houses emptying into this drain were sewers, and if this drain now in question had taken merely the drainage from the houses of the respondent alone, then it would have been a drain to which sect. 19 of the Act of 1890 would not have applied; but, in addition to the drainage from the respondent's houses, it also receives the drainage from other houses belonging to different owners, and that brings it within the operation of sect. 19, and that section consequently applies to this case. There are three cases which entirely support this contention—namely:

Bradford v. *Eastbourne Corporation*, 74 L. T. Rep. 762; (1896) 2 Q. B. 205;
Thompson v. *Eccles Corporation*, 91 L. T. Rep. 750; (1905) 1 K. B. 110;
Jackson v. *Wimbledon Urban District Council*, 92 L. T. Rep. 553; (1905) 2 K. B. 27.

If these houses, instead of being drained in pairs into this pipe, had been drained singly into the pipe, then the conditions would have been exactly the same as those under which the pipe in the *Eastbourne* case (*ubi sup.*) was laid, and on the authority of that case this pipe would have been a single private drain to which sect. 19 would have applied. The question, therefore, is whether the fact that the common pipes from each pair of houses—that is, the stems of the Y's—must be admitted to be sewers not coming within the

operation of sect. 19 can make any difference, or can prevent a pipe, which would otherwise be a single private drain to which sect. 19 applies, from still being a single private drain. It is submitted, on the authority of *Thompson* v. *Eccles Corporation* (*ubi sup.*) and *Jackson* v. *Wimbledon Urban District Council* (*ubi sup.*), which really conclude this case in the appellants' favour, that that can make no difference. What is meant by a single private drain in this section is well explained by Wills, J. in *Bradford* v. *Eastbourne Corporation* (74 L. T. Rep., at p. 766; (1896) 2 Q. B., at p. 215), and he says that there is no reason in the nature of things why the owners of houses so drained should, by reason of the mere fact that two or more of them use the same private drain, escape the burden which would fall upon them if each house ran its drain direct into the public sewer. The piece of pipe in this case behind the respondent's houses, from A to B, cannot be distinguished from the pipe which in that case was held to be a single private drain to which sect. 19 applied. A construction may be a single private drain, notwithstanding that a sewer discharges into it. That clearly appears from *Jackson* v. *Wimbledon Urban District Council* (a plan in respect of which is given in 90 L. T. Rep. at p. 419, and in (1904) 2 K. B. at p. 360), and *Thompson* v. *Eccles Corporation* (*ubi sup.*), is even stronger in favour of the appellants' contention. Assuming that sect. 19 of the Act of 1890 applies, that section incorporates sect. 41 of the Public Health Act 1875, and by sect. 41, on the written application "of any person" to a local authority, stating that a drain is a nuisance or injurious to health, then the local authority may put in force the provisions of that section. It has been suggested that under sect. 41 there must be a complaint or application by some person who is not an official of the local authority, and that, therefore, the complaint of the council's own inspector was not a proper complaint; but there is no reason for so limiting the application of sect. 41, and that point was decided by the justices in the appellants' favour.

Danckwerts, K.C. and *Randolph Glen* for the respondent.—The main point raised in this case is entirely different from that raised in the cases cited for the appellants. Here the point which was conceded in *Jackson* v. *Wimbledon Urban District Council* (*ubi sup.*) has to be decided, and the fact that it was so conceded in that case should not influence the decision in this case. The point raised here is the converse. In the *Wimbledon* case (*ubi sup.*) the question was whether a pipe which drained into a single private drain could itself be a sewer, while here the question is whether a pipe which received drainage from a sewer, or rather several sewers, can itself be a single private drain. It is submitted that it would be contrary to natural justice to hold that a pipe which received drainage from a sewer was private; for if it were so held, the contents of a sewer being vested in the local authority (*Ferrand* v. *Hallas Land and Building Company*, 69 L. T. Rep. 8; (1893) 2 Q. B. 135), the pipe would convey matter for which the local authority were responsible, and yet be repairable at the expense of private persons. The Legislature must have intended the single drain at the back of a row of houses to be repairable by the owners only when it was private, and that it was to be repairable by the local authority if there were any publicity about it, and here the publicity is the presence in it of sewage vested in the local authority. In none of the cases cited does it appear that there were sewers above the pipes which were held to be single private drains, and and they are, therefore, all distinguishable on that ground. With regard to the second point, it is submitted that, allowing a local authority to enter private land to search for a nuisance upon the application of one of their own officials, under sect. 41, is taking away the protection of the nuisance clauses of the Public Health Act 1875, and particularly of sect. 102; under this section entry cannot be obtained against the wish of the owner, unless the local authority first prove to to the satisfaction of justices *primâ facie* ground for supposing that a nuisance exists on the premises. If the application under sect. 41 must be made by some person independently of the local authority, that affords the *primâ facie* evidence of there being a nuisance on the premises and protects the owner from capricious entry on the part of the local authority. They also referred to

Woodford Urban District Council v. *Stark*, 86 L. T. Rep. 685.

Macmorran, K.C. in reply.—The reason I cited the case of *Jackson* v. *Wimbledon Urban District Council* (*ubi sup.*) was to show that there might be a private drain, notwithstanding the fact that a sewer discharged into it. With respect to sect. 19, it has sometimes been assumed that that section changes that which is a sewer into a single private drain. That is not so: the section only enables a construction which may be a sewer to be dealt with as a drain, and it deals with that which is a sewer as a private drain for that one purpose only—namely, for the purposes of that section. It merely enables the local authority to deal with what would otherwise be a sewer as a single private drain for the purposes of that section, but it does not take away their power to treat it as a sewer for other purposes: (see the judgment of Wright, J. in *Reg.* v. *Hastings Corporation*, 75 L. T. Rep. 377; (1897) 1 Q. B. 46).

Lord Alverstone, C.J.—I am afraid that it is no good my pointing out again what I have pointed out three or four times in these cases, that it is almost essential in the interest of stopping litigation and putting local authorities into a position of knowing what their position is that there should be an amending Act with regard to this section—sect. 19 of the Act of 1890. The state of the authorities is such that it is quite impossible either to reconcile them or to attempt to deduce a logical rule from them. I will not state, except in one sentence, a point which has always pressed me throughout these cases, and which is fully recognised by many other learned judges, that, as Wills, J. has pointed out in *Bradford* v. *Eastbourne Corporation* (*ubi sup.*) it is perfectly ridiculous that, if a pipe which receives the drainage of two houses which belong to one individual is a sewer, it should cease to be a sewer because it also receives the drainage from the house of another owner. As Wills, J. says, there is no reason either in justice or policy which can be urged in support of such a distinction between them. I have come to the conclusion that we

ought to hold that the piece of pipe from A to B in the plan, and I suppose there is no distinction down to K, is a sewer. I will give my reasons very briefly for this decision. I almost prefer to say that if I am taking a wrong view and am to be overruled, I would rather take this view, and leave the responsibility to some higher court to say that it is not a sewer than to give a judgment merely following what is supposed to be an authority without seeing any reason which enables me to apply the principle of that authority. We have, from the six houses which belong to the respondent, what are undoubtedly admitted by everybody to be three sewers. They are the three pieces of pipe that I have called the "legs of the Y's," which receive the drainage from each pair of houses and take it down to the pipe A to B. The argument on both sides in this case has proceeded on the hypothesis that those are sewers, and I do not think it could have proceeded otherwise, because the Public Health Act is too plain to admit of any other construction. Those three sewers connect with a pipe, which is the alleged single private drain in question. It is said that, while that pipe would have been a sewer if it had simply taken away the drainage of these six houses belonging to the same owner, it is a single private drain because it takes in the drainage of the houses Nos. 2 to 18 belonging to different owners. If that piece of pipe from A to B is to be held to be a single private drain because of its receiving the drainage from the other houses belonging to different owners, it is such a strong illustration of the absurdity of the decision that I really prefer—if I am not bound by the judgment of the Court of Appeal (and if thought I were bound I should, of course, loyally obey the decision)—to decide in accordance with what I think is common sense—namely, that the pipe from A to B has not lost its character of a sewer because it has received this drainage of the upper eight houses. Now, with regard to the case of *Jackson* v. *Wimbledon Urban District Council* (*ubi sup.*), I entirely agree with what counsel for the appellants has said, and, although I have not lost sight of the respondent's contention, I think there is really no dispute about the matter. In the case of *Jackson* v. *Wimbledon Urban District Council* (*ubi sup.*) that which we thought was a sewer communicated with what was admitted to be a single private drain. It does not in the least matter for this purpose whether that admission was wrong or right. It was accepted as the basis of the judgment in this court and in the Court of Appeal that the line in which the sewer ran—the piece of pipe from B to A on the plan in *Jackson's* case (*ubi sup.*) was a single private drain. It was strenuously contended by counsel in that case that, because it was a single private drain, the pipe that ran into it must also be a single private drain. That contention, which, no doubt, has a good deal of common sense in it, would have been a perfectly good contention if we were starting entirely anew without other legislation; but it was inconsistent with the interpretation of the Public Health Act 1875. We held that the pipe, which in that case ran from B to C, and drained—if I remember aright—a number of houses belonging to the same owner, and which was therefore a sewer, did not cease to be a sewer because it ran into a single private drain; and this finding was upheld by the Court of Appeal. Counsel for the appellants in this case therefore very naturally contends that the fact that there is a sewer running into it is not sufficient to prevent the piece of pipe from A to B in this case from being a single private drain; and I agree with him that, so far as the decision goes, that is not sufficient by itself. But all that the decisions of this court and the Court of Appeal in *Jackson* v *Wimbledon Urban District Council* (*ubi sup.*) say is, that that which was admitted to be a sewer did not cease to be a sewer because it ran into a single private drain. That case is not an authority upon this point either directly or even incidentally. But then it is said there are two cases—*Bradford* v. *Eastbourne Corporation* (*ubi sup.*) and *Thompson* v. *Eccles Corporation* (*ubi sup.*)—which are binding upon this court; and I always endeavour to follow the Court of Appeal fully. If I think its judgment is, even impliedly only, involved in the decision, I feel it my duty to follow it. It is contended that these cases decide that a drain, under circumstances such as the drain from A to B or K in this case, is a single private drain. If I thought that were so, I should have, of course, followed it, whatever might have been my own view as to how far the decision was in accordance with what I may call reason; but I think that counsel for the respondent has pointed out a substantial difference, and a difference which, to my mind, is a difference which makes the decision in *Bradford* v. *Eastbourne Corporation* (*ubi sup.*) and the decision of the Court of Appeal in *Thompson* v. *Eccles Corporation* (*ubi sup.*) really in accordance with what I may call either the common sense view or the right view of this legislation. It is not stated in *Bradford* v. *Eastbourne Corporation* (*ubi sup.*), which was the earlier case, whether each of the six houses was drained by a separate drain into that which was held to be a single private drain. I have a strong impression that that must have been so—that is, that each was drained by a separate drain into the single private drain. I think the language of Wills, J. in that case would have been different if there had been a sewer in between the houses and the single private drain. Again, in *Thompson* v. *Eccles Corporation* (*ubi sup.*), it does not appear whether the houses were drained singly or in pairs, or in more than pairs into the single private drain; and all the guidance we receive from the Master of the Rolls' judgment, who always gives us as much assistance as any judge in the Court of Appeal, is that he thinks the conduit is within the case of *Bradford* v. *Eastbourne Corporation* (*ubi sup.*), and that he cannot give any better reasons than were given by Lord Russell of Killowen, C.J. and Wills, J. in that case. I think it is probable, though, again, the report unfortunately does not state it, that each house was drained by a separate drain into the single private drain. I say so because I think, as my brother Lawrance has pointed out, it is spoken of as a pipe running under the cellars, or a drain running under the cellars of the houses; and I think from its position in all probability each house must have been drained by a separate drain. If that be so, there is this distinction, which for the purposes of this case enables me to say that neither the case of *Bradford* v. *Eastbourne Corporation* (*ubi sup.*) nor the case of *Thompson* v. *Eccles Corporation* (*ubi sup.*) is an

authority against the view that I am now taking; because in this case the structure, at whatever time it was first sanctioned, has allowed sewers to be connected with pairs of houses, Nos. 2 to 28, and has allowed each of those pairs of houses to be drained by means of a sewer communicating with a pipe; and it seems to me that when we get sewers communicating with a pipe, or, in other words, a pipe receiving the drainage of several sewers, it does require some good reason or legal ground for saying that the pipe which the sewers go into is not itself a sewer. Therefore it seems to me that in that state of circumstances there is no decision which says that that which would be *primâ facie* a sewer ceases to be a sewer because it receives the drainage of another sewer. I am well aware that I have said it, and I am afraid I shall have to repeat it again, if these cases come up, that there is no judgment which any court can give that is satisfactory, or could be said to reconcile these various views; but, for the reasons I have given, I think it is in accordance with common sense to hold that the pipe from A to B or A to K is a sewer, and I do not consider that any of the decisions which have been cited direct me to hold otherwise. With regard to the second point, I can see no reason why a local authority taking action under sect. 41 should not act upon the representation made to them by their own local inspector. I therefore think that this appeal must be dismissed.

LAWRANCE, J.—I am entirely of the same opinion. I only desire to say this, that so far as I am concerned I have found it absolutely impossible to reconcile the different judgments to which our attention has been called, and I am very glad that my Lord has found out some way of dealing with this matter which, to my mind, is more consonant with common sense, and especially with what counsel for the respondent so often referred to, natural justice. It seems to me, therefore, that this appeal must be dismissed.

RIDLEY, J.—I agree entirely with the judgment of my Lord, and I think I cannot usefully add anything.

Appeal dismissed.

Solicitors for the appellants, *Croft* and *Mortimer*.

Solicitors for the respondent, *Miles* and *Hair*.

Thursday, Aug. 3, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

LONDON COUNTY COUNCIL (apps.) *v.* SHEINMAN (resp.). (*a*)

Metropolis — Building — Dangerous structure — Party wall—Party wall in dangerous state—Inspection by district surveyor—Right of council to two sets of fees for inspection — London Building Act 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 113, *sched.* 3, *part* 2.

A party wall separating the premises of two adjoining owners became dangerous, and the steps prescribed by the "dangerous structures" provisions of the London Building Act 1894 *were duly taken with regard to it, and an inspection of the party wall was made by the district surveyor. The county council paid to the district surveyor two sets of fees in respect of his inspection of the party wall, which was the dangerous structure in question, and claimed to recover the two sets of fees from the owners. They had already recovered one set of fees from one of the owners. Held, that the party wall was only one dangerous structure within the meaning of the Act, and that the county council were entitled to recover only one set of fees in respect of the surveyor's inspection of the same.*

CASE stated by the metropolitan police magistrate at Worship-street Police-court.

1. On the 3rd Nov. 1904 the respondent (Barnet Sheinman) appeared before the magistrate at the Worship-street Police-court to answer a complaint by which the appellants sought to recover from the respondent the sum of 3*l.* 3*s.* 4*d.* for expenses incurred by the appellants—the London County Council—in carrying into force the provisions of the London Building Act 1894 with respect to a structure at the rear of No. 2, Black Lion-yard, in the borough of Stepney.

2. 2*l.* 5*s.* of that sum of 3*l.* 3*s.* 4*d.* was for district surveyor's fees paid by the appellants for surveys, inspections, and reports as to the premises. The magistrate made an order against the respondent for the balance, but refused to include the above sum of 2*l.* 5*s.* in such order, subject to the following case.

3. The respondent was the owner of premises at the rear of No. 2, Black Lion-yard, in the borough of Stepney; Messrs. Webster were the owners of stables in Great Garden-street in the same borough, the stables adjoining the respondent's premises. The wall between the building formerly standing on the respondent's premises and Messrs. Webster's stables was a party wall. Shortly before the taking of the steps hereinafter referred to, the respondent's building, with the exception of the party wall, had been taken down with a view to rebuilding it, and he was about to commence such rebuilding.

4. The party wall having become dangerous, the steps prescribed by the dangerous structures provisions of the London Building Act 1894 were duly taken with regard to it. These steps were: (*a*) Under sect. 103, requirement of survey by the district surveyor. (*b*) Under sect. 105, certificate of the district surveyor. (*c*) Under sect. 106, notice to the owner and occupier to take down or secure the dangerous structure. (*d*) Inspection by district surveyor and report by him as to the progress of the works. (*e*) Under sect. 107, complaint by the appellants to the magistrate and summons thereon. (*f*) Order by the magistrate upon such complaint ordering the owner to take down or secure the dangerous structure within six weeks. (*g*, *h*, *i*, *j*.) Further inspections by the district surveyor, and reports by him as to the progress of the works. Copies of the above documents relating to the respondent's ownership of the wall were annexed to the case. The steps taken in respect of Messrs. Webster's ownership, and the documents relating to those steps, were *mutatis mutandis* the same.

5. Subsequent to the magistrate's separate orders upon the respondent and Messrs. Webster to remedy the defects, the wall was reinstated and the danger put an end to.

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

6. The appellants paid to the district surveyor in respect of the respondent's ownership of the wall the fees amounting to the sum of 2*l.* 5*s.*, specified in the account, whereof a copy was annexed to and formed part of this case. The appellants also paid to the district surveyor similar fees amounting to the sum of 2*l.* 5*s.* in respect of Messrs. Webster's ownership of the wall.

7. The appellants demanded and received from Messrs. Webster payment of the last-mentioned sum of 2*l.* 5*s.* The appellants also demanded from the respondent the first-mentioned sum of 2*l.* 5*s.*, but he failed and refused to pay the same or any part thereof.

8. In order to make the survey required by sect. 103, and to make his subsequent inspections, it was generally necessary for the district surveyor upon each occasion to go on to the respondent's premises, so as to view one side of the party wall, and then off the respondent's premises into the street and thence on to the premises of Messrs. Webster, so as to view the other side of the party wall, or *vice versâ*.

9. By sect. 113 of the London Building Act 1894 (57 & 58 Vict. c. ccxiii.) it is provided as follows:

Sect. 113 (1). There shall be paid to the district surveyor, in respect of his services under this part of this Act in relation to any dangerous structures, the fees specified in part 2 of the 3rd schedule to this Act. (2) Provided that if any special service is required to be performed by the district surveyor under this part of this Act, for which no fee is specified in the said schedule, the council may order such fee to be paid for that service as they think fit. (3) All fees paid to any surveyor by virtue of this section shall be deemed to be expenses incurred by the council in the matter of the dangerous structure in respect of which such fees are paid, and shall be recoverable by them from the owner accordingly.

Sect. 166. All offences, penalties, costs, and expenses under this Act, or any by-law made under this Act, directed to be prosecuted or recovered in a summary manner, or the prosecution or recovery of which is not otherwise provided for, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts.

The 3rd schedule deals with fees payable to district surveyors, and part 2 of the 3rd schedule to the Act is as follows:

On Dangerous Structures.—On each dangerous structure, where there are not more than four adjoining or nearly contiguous structures in the same ownership: (1) For making a survey of the structure reported as dangerous, and certifying opinion thereon, &c. [The fees for the different services rendered follow, but as there was no dispute as to the amount charged, but only as to whether there could be two separate sets of charges, it is unnecessary further to set them out.]

10. The appellants contended that two sets of steps had properly been taken in respect of the party wall; that it was, so far as the respondent was concerned, either the remainder of his old building or the commencement of his new building; and that the fees in question had been properly paid by them to the district surveyor, and were recoverable from the respondent.

11. The magistrate made an order upon the respondent to pay to the appellants the fees which he held to be due to them under part 4 of the 3rd schedule for preparation and service of notices, &c., for the purpose of bringing home to the respondent his responsibility as part owner of the party wall; but he held that, as there was only one dangerous structure in question, namely, the party wall, and as the fees under Part 2 of the 3rd schedule were payable only upon "each" dangerous structure, he would have been wrong—one set of fees having already been paid by Messrs. Webster—to have awarded a second set of fees for the performance of one set of duties upon one dangerous structure.

He was of opinion that both sets of owners of the party wall were jointly and severally liable to the appellants for one set of fees, but not for two, for one dangerous structure. Messrs. Webster would have a right of action against the respondent for the fees they had paid if the default was totally his, or a proportion in the case of partial default.

It was a fallacy, to his mind, to say that there should be as many sets of fees as there happened to be sets of owners of one dangerous structure. There was no difference in principle whether persons were jointly owners of the whole fabric of a dangerous structure or, as in this case, of a party wall of one side *ad medium filum*. He quite appreciated that one side of a party wall might be an independent dangerous structure, as when bricks were dangerously loose on one side, and he had so dealt with a party wall; but in this case all through the party wall had been treated as a whole, and no distinction had been made with regard to the different sides.

He thought, too, it was an equal fallacy suggested in par. 8, that because "it was necessary for the district surveyor upon each occasion to go on to the respondent's premises so as to view one side of the party wall, and then off the respondent's premises into the street and thence on to the premises of Messrs. Webster, so as to view the other side of the party wall, or *vice versâ*," two sets of fees were payable for the district surveyor's services. If this argument could be accepted, and a dangerous structure was so large or awkwardly situated that it abutted upon twelve different tenements, and an inspection from each was necessary, the district surveyor would be entitled to twelve sets of fees instead of one. According to the schedule, the amount of the fees was to be determined, not by the number of points of view from which the district surveyor might inspect, or the number of owners who might be made responsible, but by the number of squares in area and the number of stories.

So far as the appellants' contention in par. 10 was concerned, he was unable to follow it. It was clear that there was no building whatever existent upon the respondent's ground except his part of the party wall, and it seemed to him utterly immaterial whether the party wall was the remainder of an old, or the commencement of a new, building. All through the proceedings the only structure mentioned or brought into question was a "party wall."

12. He accordingly refused to adjudge the respondent to pay the 2*l.* 5*s.* claimed, or any part of it, in respect of the district surveyor's fees.

The question for the opinion of the court was whether the magistrate was right in so refusing. If he was right, this appeal was to be dismissed. If wrong, the case was to be remitted to him in order that he might give effect to the decision of the court.

Daldy for the appellants.—The appellants were entitled to recover the two sets of fees. The section of the London Building Act 1894 which gives the fees to district surveyors in respect of their services as to dangerous structures is sect. 113, and the fees are to be as specified in part 2 of the 3rd schedule. By that schedule the fees are to be in respect of "each dangerous structure" for making a survey of the structure and certifying opinion thereon. Here there were two dangerous structures, and in such case the Act requires two sets of proceedings, notices, and so forth. If there are two adjoining houses belonging to different owners and one party wall between them, the party wall affects both houses; and, if the party wall is itself a dangerous structure, two sets of notices have to be given, and the surveyor has really to inspect each side of the party wall in relation to the two buildings, and there are in fact two dangerous structures to be inspected. The fact that the party wall stands between the stables of one owner and vacant land of another owner can make no difference. The surveyor had to go from one set of premises on to the other set of premises to make his inspection. A dangerous party wall between two structures affects the two structures, and forms two dangerous structures within the meaning of the Act.

Woodfin, for the respondent, was not called upon.

Lord ALVERSTONE, C.J.—In this case the London County Council have paid their surveyor two sets of fees, and they did that, of course, no doubt because they thought he was entitled to have them. Having been paid one set of fees by Messrs. Webster, they are now seeking to recover the other set of fees under sub-sect 3 of sect. 113 of the London Building Act 1894, as being expenses incurred by the council and recoverable from the owner. We have nothing to do with what might have been the rights between the parties as to the half of the fees which were paid by Messrs. Webster. In what I think is a very clearly reasoned judgment, the learned magistrate has pointed out that there might be a right of contribution, or possibly in some circumstances a right even to get them all from one person, but that is not what we have to deal with. The question raised here is, Can the London County Council recover, on the facts of this case, two sets of fees from the owner? Now, counsel for the appellants has argued very clearly and forcibly that, inasmuch as a party wall may affect two structures, the houses on either side, therefore the inspection of the relation of that party wall to each of those structures is in effect the inspection of two dangerous buildings. I do not think I have put his argument unfairly; I think that is substantially what his argument was. Now, it seems to me that we cannot possibly adopt that contention when we are dealing with a party wall. Party walls, of course, are perfectly well-known things; they are walls in which both owners have certain rights; they have certain obligations with regard to interfering with them, and with regard to their thickness, and with regard to other matters. In this case notice was given with reference to a party wall; that was the dangerous structure. The surveyor's fees are for making a survey of the structure reported as dangerous, and certifying opinion thereon. In my opinion no surveyor would do his duty if he only looked at one side of a party wall and did not go round to the other side and see the other side, even from the point of view of dealing with the one owner on the one side. Therefore it seems to me that the statute has contemplated—or rather the framers of it, who, of course, knew perfectly well all about party walls, have contemplated—the structure as such; and if the structure is a party wall, in my opinion, the schedule only contemplated one set of fees for doing what is there required to be done with reference to that party wall. I think, therefore, that the magistrate's decision in this case was perfectly right, and I think his reasons are extremely clear, and therefore there is no ground at all for interfering with his decision.

LAWRANCE, J.—I entirely agree.

RIDLEY, J.—I agree. *Appeal dismissed.*

Solicitor for the appellants, *W. A. Blaxland.*
Solicitor for the respondent, *A. E. Lambert.*

Friday, Aug. 4, 1905.

(Before LAWRANCE and RIDLEY, JJ.)

BATCHELOR (app.) *v.* STUBLEY (resp.). (*a*).

Metropolis—By-law — Litter in streets — Repugnancy to statute.

By a by-law of the London County Council made under sect. 23 of the Municipal Corporations Act 1882 and sect. 16 of the Local Government Act 1888: "No person shall sweep or otherwise remove from any shop, house, or vehicle into any street any waste paper, shavings, or other refuse, or, being a costermonger, newsvendor, or other street trader, throw down and leave in any street any waste paper, shavings, or other refuse. . . . Any person who shall offend against any of these by-laws shall be liable for each offence to a fine not exceeding 40s."

An information was preferred within the metropolis for contravening this by-law, which was dismissed on the ground that the by-law was ultra vires *as dealing with a nuisance already punishable when the by-law was made, under sect. 60 of the Metropolitan Police Act 1839, which imposes a penalty on any person "who in any thoroughfare shall throw or lay . . . any litter or rubbish."*

Held, that the by-law was good.

CASE STATED.

The appellant was a police constable of the metropolitan police force.

On the 15th Aug. 1904 information was laid and a summons applied for by him against the respondent, charging that he on the 10th Aug. 1904, at Nile-street, within the metropolitan district, being a street trader, did unlawfully throw down and leave in the street a quantity of shavings and waste paper, contrary to the by-law of the London County Council, which summons was granted.

On the hearing of the summons on the 23rd Aug. 1904, at the Worship-street Police-court, it

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

was proved that the respondent was a shopkeeper and a street trader who used for the purposes of his trade a street stall standing in the roadway of a certain public street known as Nile-street, Hoxton, in the borough of Shoreditch; that the respondent was so using a street stall in the street on the evening of the 10th Aug. 1904, and at 10.15 p.m. on that evening he threw down and left in the roadway of the street under his stall a quantity—estimated at one bushel or one bushel-and a half—of shavings and waste paper, he having been previously notified by the appellant that to do so was contrary to the above-mentioned by-law, and that the shavings and waste paper remained in the street until 11.30 p.m. on the same evening, when it was removed by the council of the said borough. There was no evidence of there being anything offensive in the condition of the paper and shavings, or that they were in a dirty state when so thrown down and left as above mentioned.

The by-law, so far as it is material to this case, is as follows:

Waste paper, refuse, advertising bills, broken glass, &c. No person shall (1) sweep or remove from any shop, house, or vehicle into any street, any waste paper, shavings, or other refuse, or, being a costermonger, newsvendor, or other trader, throw down and leave in any street any waste paper, shavings, or other refuse. . . . Any person who shall offend against any of these by-laws shall be liable for each offence to a fine not exceeding 40*s*.

The by-law was made on the 12th May 1903 by the London County Council for the good rule and government of the county of London in pursuance of the provisions of sect. 23 of the Municipal Corporations Act 1882 and sect. 16 of the Local Government Act 1888.

It was contended on behalf of the respondent that so much of the by-law as related to throwing down and leaving in any street any waste paper, shavings, or other refuse was *ultra vires* of the London County Council, and that, while the by-law purported to be for the good rule and government of the county of London, it was in fact one dealing with the suppression and prevention of nuisances already punishable in a summary manner by virtue of sub-sect. 3 of sect. 60 of the Metropolitan Police Act 1839, which enacts that "every person who in any thoroughfare shall throw or lay any litter or rubbish shall be liable to a penalty of not more than 40*s*. for every such offence," and that the proceedings against the respondent should have been taken under such last-mentioned statute; that the throwing down of rubbish constituted a nuisance, and was not a question of the good rule and government of the county of London, and that the county council under their admitted power to make by-laws for the good rule and government of the county of London could not make a valid by-law prohibiting a nuisance already punishable as aforesaid.

On behalf of the appellant it was contended that sect. 23 (1) of the Municipal Corporations Act 1888 authorised the making of by-laws for the good rule and government of the county, or for the suppression, &c., of nuisances not already punishable by virtue of any Act in force throughout the borough; that the by-law was solely, as on the face of it it purported to be, one for the good rule and government of the county, and that the said by-law dealt with matters not necessarily falling within the provisions of the Metropolitan Police Act 1839, s. 60 (3), and was not repugnant to any statutory enactment in force in the county of London; that the by-law was good in law; and that upon the facts above mentioned the respondent should be convicted upon the summons.

The magistrate was of opinion that so much of the by-law as related to the subject-matter of the information was *ultra vires* of the London County Council; that the facts as above set forth, if proved, constituted a nuisance punishable by virtue of the Metropolitan Police Act 1839, s. 60 (3), under which proceedings against the respondent should have been taken, and that the by-law dealt with a nuisance—that is, the casting of rubbish in the public street—which was already punishable under the existing law in force in the county of London, and that, this being so, it could not be validly made under the power of the council to make by-laws for the good rule and government of the county of London.

He therefore dismissed the information.

Bodkin for the appellant.

The respondent did not appear.

Lawrance, J.—This by-law is not *ultra vires*, nor is it repugnant to the statute.

Ridley, J.—I agree. *Appeal allowed.*

Solicitor: *W. A. Blaxland.*

Friday, Aug. 4, 1905.

(Before Lord Alverstone, C.J., Lawrance and Ridley, JJ.)

London County Council (apps.) *v.* Schewzik (resp.). (*a*)

Metropolis—Building line—Projection—Structure—Illuminated advertisement—London Building Act 1894 (57 & 58 *Vict. c ccxiii.*).

An iron framework filled in on the front and sides with leaded glass and covered over on the top with zinc, about 10*ft.* 6*in. long and about* 5*ft.* 6*in. high from the bottom to the top of the gable, and coming forward* 4*ft.* 9*in. from the front wall of the building, the bottom being* 11*ft. from the pavement, and illuminated from within and fixed to the wall of the building by bolts and stay-rods, is not a structure erected beyond the general line of buildings within sect.* 22 (1), *nor a projection within sect.* 73 (8) *of the London Building Act* 1894.

Case stated on two informations preferred by the appellants against the respondent (*a*) for that he unlawfully erected a structure beyond the general line of buildings of a street, in contravention of sect. 22 (1) of Part 3 of the London Building Act 1894, without the consent in writing of the appellants; and (*b*) that he unlawfully extended from a building a projection beyond the general line of buildings without the permission of the appellants, contrary to sect. 73 (8) of that Act.

At the hearing of the two informations the following facts were either proved or admitted:—

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

The respondent is the proprietor of certain premises situate at No. 86A, Brick-lane, and known as the Russian Vapour Baths, and he had caused to be placed over the doorway leading to the baths the thing complained of, which is hereinafter referred to as the alleged structure or projection.

The alleged structure or projection consisted of an iron framework filled in on the front and sides with leaded glass and covered over on the top with zinc, and was about 10ft. 6in. long, about 5ft. 6in. high from the bottom to the top of the gable, and came forward about 4ft. 9in. from the front wall of the building, the bottom being about 11ft. above the pavement. There were letters on the glass of the alleged structure or projection forming on the front the words "The Russian Vapour Baths," and on the sides "Vapour Baths," indicating the position of the baths, and these were made visible at night by means of about twenty electric lights arranged inside.

The alleged structure or projection was beyond the general line of buildings as defined by the superintending architect, and was erected without the consent in writing of the appellants.

The alleged structure or projection was fixed to the front wall of the building by means of six bolts at the bottom and two stay-rods at the top, which latter went right through the wall.

The appellants contended that the respondent had erected and brought forward a structure in contravention of the provisions of Part 3 of the London Building Act 1894, and that he had also extended a projection from the building in contravention of sect. 73 (8) of the Act, and they relied upon the cases of *Coburg Hotel* v. *London County Council* (81 L. T. Rep. 450) and *London County Council* v. *Illuminated Advertisements Company* 91 (L. T. Rep. 352; (1904) 2 K. B. 886).

The respondent contended that the alleged structure or projection was neither a structure nor a projection within the meaning of the sections above referred to. He relied upon the cases of *Hull* v. *London County Council* (84 L. T. Rep. 160; (1901) 1 K. B. 580) and *London County Council* v. *Illuminated Advertisements Company*, above cited, and referred to sect. 164 (1) of the London Building Act 1894.

Upon the above facts the magistrate came to the conclusion that the alleged structure or projection was not a structure within the meaning of Part 3 of the London Building Act 1894, nor was it *ejusdem generis* with any of the matters or things described or referred to in Part 3, nor was it a projection within the meaning of sect. 73 (8) of the Act, nor *ejusdem generis* with any of the matters or things described or referred to in any part of that section. He was further of opinion that there was no necessity to strain the wording of the sections above referred to, inasmuch as there was a provision in the Act for dealing with cases of this kind, it being provided by Part 14, sect. 164 (1), that the council might make by-laws with respect to (*inter alia*) "the regulation of lamps, signs, or other structures overhanging the public way."

He therefore dismissed both the informations.

Avory, K.C. and *Daldy* for the appellants.—This iron framework was a structure erected beyond the general line of buildings, and is within sect. 22 (1) of the London Building Act 1894. That question was considered in *Coburg Hotel* v. *London County Council* (81 L. T. Rep. 450), where it was held that an iron and glass portico which projected beyond the general building line, and which was dovetailed into the main wall of the building, was within sect. 22. The magistrate was also wrong in holding that this was not a projection within sect. 73 (8). *Hull* v. *London County Council* (84 L. T. Rep. 160; (1901) 1 K. B. 580), upon which the magistrate decided, was different from this case in its facts, and considerable doubt as to the correctness of that decision was shown in *London County Council* v. *Illuminated Advertisements Company* (91 L. T. Rep. 352; (1904) 2 K. B. 886).

Danckwerts, K.C. and *J. R. Randolph* for the respondent. — Although the facts in *Hull* v. *London County Council* (*sup.*) may not be identical with this case, the reasoning in that case applies to this one. Neither sects. 22 nor 73 apply to a lamp of this description. Both those sections apply to buildings, and the way in which the appellants could deal with this lamp is by making by-laws under sect. 164. As the council can make by-laws for the regulation of lamps of this kind, that power would be useless if they could prohibit them under sects. 22 or 73.

Lord ALVERSTONE, C.J.—I do not withdraw anything which I have said myself, but I only speak for myself in this matter, as to not being satisfied with the decision in *Hull's* case, but it was a considered judgment of two very learned judges, and the reasoning of the case, which I will refer to in a moment, undoubtedly applies to this case. Now, we all are of opinion that this structure (I will refer in a moment to it) was not within sect. 22, and I only refer by way of reference to what I ventured to say in *London County Council* v. *Illuminated Advertisements Company* with regard to the other sections which immediately follow sect. 22 to indicate that I think sect. 22 is a building section, and does not mean to refer to or include things which are added on to buildings. It is not necessary to say more than that, beyond, perhaps, this: that there is no finding which would bring this structure within the case of *Coburg Hotel v. London County Council*. As I understand it (and this bears upon something which I have to say in a moment), it is really a structure which is hung from the wall by two stay-rods, there being six bolts at the bottom which, no doubt, steady it, and I daresay tend to support it. I think the principle of *Hull* v. *London County Council* is this: that sect. 73 forms part of a group of sections which were dealing with the question of the construction of buildings. I do not refer again to all the sub-sections which Mr. Avory and Mr. Danckwerts took us through. I will merely say that it refers to such things as balconies, verandahs, outside steps, large boards, cornices, pipes, shop fronts, copings, and whatever the architectural decorations may be. Therefore I think, looking at the section, it is easy to see that, at any rate, there is ground for contending that the view which was taken by Sir Gainsford Bruce and Phillimore, J. in that case was the right one, although I should have been better pleased had the matter been looked at from rather a broader standpoint. I come clearly to the opinion that this is a projection from the building, and I think that ought to be distinctly stated. I think

no one can look at this thing without seeing that it is a projection from the building. But that will not do. If my brother Bruce is right, a mere projection from the building is not of itself sufficient, and this argument is brought out again in relief, that there are a considerable number of projections from buildings and undoubted projections from buildings which, either adopting the reasoning of my brother Sir Gainsford Bruce, or accepting, I will not say the admissions, because we ought not to rely on the admission of any counsel, do not fall within the section. I particularly call attention to those very heavy lamps which are hung on big brackets let into the wall of the character of those in the photograph which Mr. Danckwerts showed me, which was exactly what I meant to describe when I said that there are a large number of structures in the shape of large lamps as rigidly fixed to the wall as this is which, on the reasoning of my brother Bruce, and possibly on the view taken or presented in argument, do not come within this section. Therefore it does seem to me that there are a considerable number of projections which are open to the same observation as this is which do not come within sect. 73, and, speaking for myself, I do not accept the argument that the London County Council could not deal with them under sect. 164. I quite understand Mr. Avory's point that they can only regulate them, but it seems me that under by-laws it by no means follows that there may not be by-laws as to their structure and method of erection, and how they are to be fastened, and all that, which shall make them subject to the approval of the London County Council. Be that as it may, I do not think the matter has been left absolutely at large by the Legislature. I think there are sections in the Act which apply to it, and I remember that this is *primâ facie* a Building Act; therefore we should expect to find in such sections as sections 22 and 73 provisions with regard to buildings. It seems to me that, looked at fairly, this structure is in the nature of a hanging porch fastened to the wall of a building, and I find, so far as I am concerned, that it undoubtedly projects from the buiding, but that it does not project from the building in the sense of sect. 73 as construed by the Court of Queen's Bench in the case of *Hull*. Although I personally should have been more satisfied had the decision in *Hull's* case dealt with the question on broader lines, as I indicated in *London County Council* v. *Illuminated Advertisements Company*, I cannot see any distinction or ground upon which I ought to distinguish this case from *Hull's* case. I only desire to say, coming to that conclusion, there is an important matter which I have mentioned more than once since I have been sitting in this court, and I refer to it again because of its extreme importance, and that is with regard to the uniformity of decisions in this court. The Court of Appeal have recently recognised that it is desirable in the interests of people, and in order that people may know with certainty where they are, that courts of co-ordinate jurisdiction should follow their own decisions unless they are grave grounds, such as mistake, or something which enables them to say the previous decision ought not to be binding upon them. I have no doubt that the matter can be so arranged that this matter can be reviewed by the Court of Appeal. There is no difficulty about that being done if it is really desired to take the matter further. But, failing that, as I cannot on any ground satisfactory to my own mind, distinguish the principle of this case from the principle of *Hull* v. *London County Council*, and only for myself expressing doubts as to whether it ought to be so decided, because I do think it is a projection from the building, I come to the conclusion this this appeal should be dismissed.

LAWRANCE, J.—I am of the same opinion. I come to the conclusion that the *Hull* case was rightly decided. It seems to me, looking carefully at the Act, that the definition in sect. 73 does not cover the structure, if I may call it so, and as it is called farther on, which we are considering at the present moment. Part 9, sect. 102, contains the true definition of this particular sort of thing affixed to a building. In this case this part of the Act says: "The expression 'structure' includes any building, wall, or other structure"—and it has not appeared anywhere in the Act before sect. 73—"or anything affixed to or projecting from any wall or other structure." That is the very thing described in words, and it is exactly what this is, not a part of the building, but something affixed to and projecting from a building, wall, or other structure. If that language had been used in sect. 73, I should have come to the conclusion that *Hull* v. *London County Council* had been improperly decided. The matter may be dealt with, I think, by sect. 164. How far it may be dealt with by that it is not necessary to decide at the present moment, but power is given to make by-laws for the regulation of lamps, signs, and other structures overhanging the public highway. So that in two parts of the statute you have this very structure itself, this projection, dealt with, and in the important part—viz, in sect. 73—it is not dealt with. That leads me to the conclusion that *Hull's* case was rightly decided, and I am willing to follow it in this decision.

RIDLEY, J.—In this case I agree with the court, but I must say that, speaking personally, I should have come to the conclusion that this structure is a projection extending from the building within the meaning of sect. 73. I do not think it is a building connected with part of the building itself, and therefore it is not within that part of the judgment which I gave in *Coburg Hotel* v. *London County Council*, but I should have thought it was a projection. I agree that according to sect. 73 there has to be something of a permanent character, something permanently attached to the building, something which is not merely to be regarded as temporarily put there, nor of a light character, which, to use the words of *Hull* v. *London County Council*, does not extend over the roadway. But when you get a permanently constructed framework such as the present one attached to the building to which it is attached, I should have thought that it was a projection within the meaning of sect. 73, and that we ought so to regard it. I am hampered, therefore, in the present instance by the previous decision of *Hull* v. *London County Council*. If that case is to be taken to apply to a projection like the present, I think it is wrong. I should certainly have come to the contrary conclusion myself, but I follow what the Lord Chief

Justice says, and I consider myself bound by that. Before, however, I conclude what I have to say, I wish to point out that in that case I cannot help thinking the court was more or less influenced in coming to the conclusion at which they arrived by considering the way in which that sign or wooden box was attached to the wall, and the fact that there was a space between it and the wall, but it did not extend at all over the highway, and generally the small and insignificant character of that which was the subject of the case. If you take the reasoning of Bruce, J., you see that he said this: "A projection from the building means a part of a building projecting or jutting out; it means a prominence extending from the building in the sense of coming out from the building as part of the building. Now, I think this does. I think in the general sense of those words this framework does. If the words are taken in this sense, they fall in with the scope of the section. It is quite clear that the object of the section is to preserve the width of the street and the general line of building frontage in order to maintain architectural uniformity." In the case with which he was dealing, I do not think anyone could have said that the wooden box did interfere with the width of the street, or the general line of building frontage, nor had it anything to do with the maintenance of architectural uniformity; but when you take a framework of this kind, which projects solidly and for a considerable distance over the highway, on which the public are accustomed to walk, it seems to me that, if one is to judge of the proper meaning of this section by considering what the object of it was, this was within the object of the section, while the other was not. It is easy enough when you get a small matter to deal with, such as a lamp might be, or as the box was in the *Hull* case, to deal with that under sect. 164. The power to regulate it is sufficient. But when you have a structure like this, and I do not use the word structure advisedly—I mean a framework of a heavy kind like this—projecting from a building as this was, then it appears to me that a different series of considerations arise. We want more than a regulation; we want a power which will enable one to do that which sect. 73 does enable the London County Council to do with regard to architectural projections. However, although that is my view, I am unable to say that what I have been pointing out as possibly the reason which actuated the court in the case of *Hull* v. *London County Council* is really the distinction between the two. I do not, however, pretend to say that it is. I think I must adopt the reasoning in *Hull* v. *London County Council*, and agree with the rest of the court, but I should if I had been left to myself, and without that decision, have come to the conclusion that it could have been dealt with as a projection under sect. 73.

Appeal dismissed.

Solicitors: *W. A. Blaxland; Pritchard* and *Englefield.*

Monday, Aug. 7, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

PARKINSON (app.) *v.* McNAIR (resp.). (*a*)

Food and drugs—Margarine—"Parcel"—Margarine Act 1887 (50 *&* 51 *Vict. c.* 29), *s.* 6.

Six rounded pieces of margarine placed in the form of a triangle so that three form the base, two being placed upon the three and one upon the two, all touching, sufficiently form one "parcel" within sect. 6 *of the Margarine Act* 1887.

CASE stated on an information preferred under sect. 6 of the Margarine Act 1887 (50 & 51 Vict. c. 29) by the appellant against the respondent for that he the respondent on the 7th Oct. 1904, then being a person dealing in margarine, did expose margarine for sale by retail, and did fail to have attached to each parcel thereof, so exposed and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters not less than one and a half inches square "Margarine."

Upon the hearing of the information the following facts were admitted or proved:—

The respondent exposed for sale in the window of his shop six separate rounded pieces of margarine, ascertained beforehand to weigh one pound each, arranged in the form of a triangle and set one upon the other upright upon a base formed on a flat board, three such pieces of one pound weight each of margarine forming the base of the triangle, and two other similar pieces being placed above the before-mentioned three pieces, and one other similar piece above the two pieces.

Each of the six pieces of margarine was partly covered with paper, but the paper was in each case arranged so as to leave the surface of the margarine uncovered and visible in front, a portion only being covered by such paper.

There was no single wrapper or fastening of any kind common to all the pieces of margarine.

A label marked in printed capital letters one and a half inches square "Margarine" was placed at the foot of the triangular group so as to extend across the whole of the bottom portion of the three lowest pieces of margarine and no other, and no part of that label was covered up.

The appellant thereupon bought from the respondent for the price of 10*d.* the piece of margarine on which a ticket marked "10*d.*" was placed. The respondent lifted the piece from the top of the triangular group using no implement to separate it from the remaining pieces.

The respondent contended that the provision of sect. 6 of the Margarine Act 1887 had been sufficiently complied with for the reason that the piece of margarine in which the ticket marked "10*d.*" was placed was not itself a parcel, and that there was only one parcel, which consisted of the whole of the triangular group built up on the flat board composed of the six separate pieces of margarine, and that to such parcel a label was attached in accordance with the provisions of the section.

The appellant contended that the provisions of the section had not been sufficiently complied with for the reason that the one pound piece of margarine inclosed or wrapped when exposed for sale in which the ticket marked "10*d.*" was placed

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

was a parcel of margarine exposed for sale by retail, and that to such parcel so exposed there was not attached in such manner as to be clearly visible to the purchaser a label as required by the section.

The justices found that the six separate pounds of margarine placed together in the form of a pyramid touched each other and formed one parcel which was sufficiently identified by the label attached thereto.

They therefore dismissed the information.

Douglas Bartley for the appellant.

Avory, K.C. and *H. M. Finch* for the respondent.

Lord ALVERSTONE, C.J.—In this case the six pieces were formed into one triangle, and there was one label across them all. In a case of this kind it all depends upon how the things are arranged. Here the justices have found that the six separate pounds touched and formed one parcel, and we certainly shall not interfere with that finding. The real thing is to protect the purchaser. That is the intention of the Act, and that has been done here. The appeal must be dismissed.

LAWRANCE and RIDLEY, JJ. concurred.

Judgment accordingly.

Solicitors: *Snow, Fox*, and *Higginson*, for *Harcourt E. Clare*, Preston; *Neve, Beck*, and *Kirby*, for *Walmsley P. Kay*, Darwen.

Monday, Aug. 7, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

LONDON COUNTY COUNCIL (apps.) *v.* COLLINS (resp.). (*a*)

Metropolis—Formation of or laying out new street—Conditions of sanction by London County Council—Erection of new building upon either side or upon site abutting upon roadway—London Building Act 1894 (57 & 58 *Vict. c. ccxiii.*).

C. was the owner of a piece of land bounded by two railways, the only approach being through a tunnel under one of the railways. He submitted to the L.C.C. a plan for a proposed road which was to go through the tunnel (which was to be widened) and across the piece of land, and to cross the railway on the other side of the land by a bridge and to run from thence into a highway. The sanction of the L.C.C. to this plan was given on the condition that the road should be clearly defined and thrown open as a highway within a certain time, and that no new building should be commenced to be erected upon either side of such roadway, or upon a site abutting on such roadway, unless such roadway had been defined and thrown open throughout its entire length, and other conditions had been complied with. Owing to the fact that C. had been unable to come to terms with the railway company with regard to the widening of the tunnel and the building of the bridge, he had been unable to comply with the requirements of the L.C.C., but he leased a piece of the land and proceeded to erect thereon a factory and dwelling-house, giving his lessee right of access over the site of the proposed road, which was then a cart trackway, and thence over the intervening piece of land. The nearest point of the plot of land so leased to the site of the proposed roadway was 187*ft. He also proceeded to put fresh clinkers upon the roadway, and extended the sewer up the roadway, with which the drainage of the factory was connected.*

Held, that C. had not commenced to form or lay out the new street or roadway sanctioned by the L.C.C., and that he had not commenced to erect new buildings upon either side of such roadway, or upon a site abutting on such roadway.

CASE stated on an information preferred on behalf of the appellants against the respondent for that he did unlawfully commence to form and lay out a new street otherwise than in accordance with the conditions prescribed by the appellants in giving their sanction to the formation of such street, and so he became liable to the penalties prescribed by sect. 200 (1) of the London Building Act 1894.

At the hearing of the information the following facts were either proved or admitted by both parties:—

The respondent is for the purposes of this case the owner of the fee simple of a triangular piece of land in the borough of Hammersmith, in the county of London, situate in the angle formed by the junction of the West London loop of the London and North-Western Railway with the Mitre Bridge loop of the railway, and bounded on its north-easternmost side by the first mentioned of such loops, and on the southernmost side by the last mentioned of such loops.

The only approach to the piece of land is by means of a cartway from a street, known as the Hythe-road, through a tunnel 16ft. wide constructed under and through the Mitre Bridge loop.

A plan is annexed to this case whereon the piece of land is shown, and whereon the position of each of the loops and of the Hythe-road, and of a street known as Scrubbs-lane (hereinafter referred to), are respectively indicated. Upon the plan is also shown the tunnel under the Mitre Bridge loop and the cartway from Hythe-road by means of which the piece of land is approached from Hythe-road.

There are and have been since the construction of the Mitre Bridge loop, in or about the year 1877, gates across the cartway upon each side of the loop and upon the boundary of the railway company's land, and the railway company had no right to shut them against the respondent or his tenants.

In or about the year 1900 a factory was erected by a company called the Bostwick Grate and Shutter Company Limited upon a portion of the respondent's piece of land, which portion had been leased to the company for that purpose by the respondent.

With the land so leased to the company the respondent granted to the company a right of way for foot passengers and vehicles to and from the factory over the cartway therein referred to as the occupation road and through the tunnel.

Beyond the land leased to the company and about half way across the respondent's piece of land, and in the line in which it was subsequently proposed by the respondent to lay out a new street as hereinafter stated, the respondent permitted, and has since permitted, the Hammersmith Vestry

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

(now the Hammersmith Borough Council) to deposit refuse from the parish (now the borough) of Hammersmith.

For the purpose of providing a means of approach to the factory, and also to enable the carts of the vestry to pass over the respondent's piece of land and deposit such refuse, the respondent made a rough road with clinkers from the tunnel to the point marked R on the plan. The approximate position of the rough road is shown by two dotted lines on the plan.

From the public sewer to the Hythe-road as far as the entrance to the factory (viz., as far as the point marked S on the plan) the respondent constructed in the approach to his piece of land and in the cartway an 18in. sewer, which served for the drainage of the factory, but was, by arrangement with the vestry of Hammersmith, made large enough to serve for the drainage of a street across the respondent's land in continuation of the rough road, should such a street be afterwards formed.

The appellants thereupon took out a summons against the respondent for commencing to form or lay out a new street upon his piece of land.

This summons was heard on the 14th Feb. 1900, and the magistrate dismissed it on the ground that the respondent had not by his aforesaid acts formed or laid out a new street upon his land.

On the 18th July 1903 the respondent submitted for the appellants' approval plans of a new street he proposed to lay out across his piece of land from the tunnel to and over the West London loop so as to communicate between the Hythe-road and Scrubbs-lane. Such last-mentioned plans were accompanied by an application which was in the following terms—viz.:

I now inclose the amended plans showing the bridge under the London and North-Western Railway widened to 40ft., also showing the present arch, which I hope will be satisfactory to your committee. It is proposed to make it a continuation of Hythe-road and to be called by that name. I am the freeholder of the whole length of the road, except where it crosses the railway.

On the 27th July 1903 the appellants, by an order of that date, gave their written sanction to the formation or laying out by the respondent, pursuant to the application, of a new street for carriage traffic to lead from Scrubbs-lane to Hythe-road, Hammersmith. The order was in the following terms—viz.:

Now the council does by this order sanction the formation or laying out of such street subject to the following conditions—that is to say: (1) That within one year from the date of this order the roadway of the proposed street hereby sanctioned shall be clearly defined throughout by posts and rails or so otherwise as the council shall permit, and be thrown open to the public as a highway. (2) That no new building shall be commenced to be erected upon either side of such roadway, or upon a site abutting upon such roadway, unless such roadway shall have been and shall still remain so defined and thrown open throughout its entire length as aforesaid, and unless the roadway shall have been and shall still remain so made throughout, as regards levels, direction, width, and gradients, as to comply with the provisions of any statutes and by-laws in force in London regulating streets and buildings, and unless such roadway shall also have been so made and shall still remain as to accord with the said plan and sections and the particulars which accompanied the application for the sanction contained in this order, and unless the name of the street, to be approved by the council, shall have been affixed and be retained at both ends of the street, and unless the bridge over the West London loop of the London and North-Western Railway shall have been constructed, and the bridge carrying the Mitre Bridge loop of that railway over the new street shall have been reconstructed.

The respondent has not up to the present been able to come to terms with the London and North-Western Railway Company for the widening of the tunnel under the Mitre Bridge loop of its railway, and for the construction of a bridge over the West London loop of its railway, and, being unable to lay out or form the proposed street so as to comply with the requirements of the London Building Act 1894 with respect to the width and construction of new streets, he has been and is still unable to avail himself of the aforesaid sanction of the appellants.

In or about Dec. 1903 terms were agreed upon between the respondent and a company called Campbell Smith and Co. Limited for the grant to such company of a lease for a term of years of a rectangular piece of land, part of the land described above, bounded on the south by the Mitre Bridge loop of the London and North-Western Railway. With the rectangular piece of land the respondent was to grant to Campbell Smith and Co. Limited by the lease a right of way to pass with or without carts, waggons, vans, and carriages of any description along and over the piece of land coloured yellow on the plan drawn in the margin of the said lease to Hythe-road, and also along and over any road leading from Hythe-road to Scrubbs-lane which might thereafter be made and opened for traffic by the lessor, but without the benefit of any other rights or privileges over or in respect of any other adjoining land of the lessor. The terms aforesaid had been reduced into a form of a draft lease, which was produced by the respondent and admitted by the appellants, and at the date of the institution of the present proceedings Campbell Smith and Co. Limited were in occupation of the rectangular piece of land upon which at or about the time charged in the information there were in course of erecting by the respondent a factory and a caretaker's dwelling and office, the positions of which are shown respectively on the plan.

The rectangular piece of land was completely inclosed by fences or walls, the entrance thereto being by means of a gate in the fence or wall on its north side; 187ft. is the distance from the north-western corner of the rectangular piece of land, which corner is the nearest point in such land to the line of the alleged new street.

Subsequently to the dismissal of the summons on the 14th Feb. 1900 hereinbefore referred to, the respondent from time to time placed fresh clinkers upon the rough road, and subsequently to the 14th Feb. 1904 more clinkers were placed upon it, and in this way it became better made up and consolidated. But at the date of the hearing it could be described as only discharging the functions of a rough cart track.

The respondent also in Jan. and Feb. 1904 extended the sewer referred to above for a distance of about 100ft. northwards in the line of the rough road to a manhole, the situation of which is shown on the plan, and constructed and connected with such manhole a 12in. drain or sewer leading to a manhole close to the entrance of the factory, and

also shown in the plan, and with which the drainage of the factory was connected.

Between the land occupied by Campbell Smith and Co. Limited and the rough road the respondent left a plot of land, nearly an acre in extent, expressly in order that another factory might be built thereon, if ever the new street sanctioned by the appellants as aforesaid should be made, and with the intention of not infringing the provisions of the London Building Act 1894 relating to the formation of new streets. The roadway of the proposed new street has not been defined throughout its entire length or thrown open to the public as a highway.

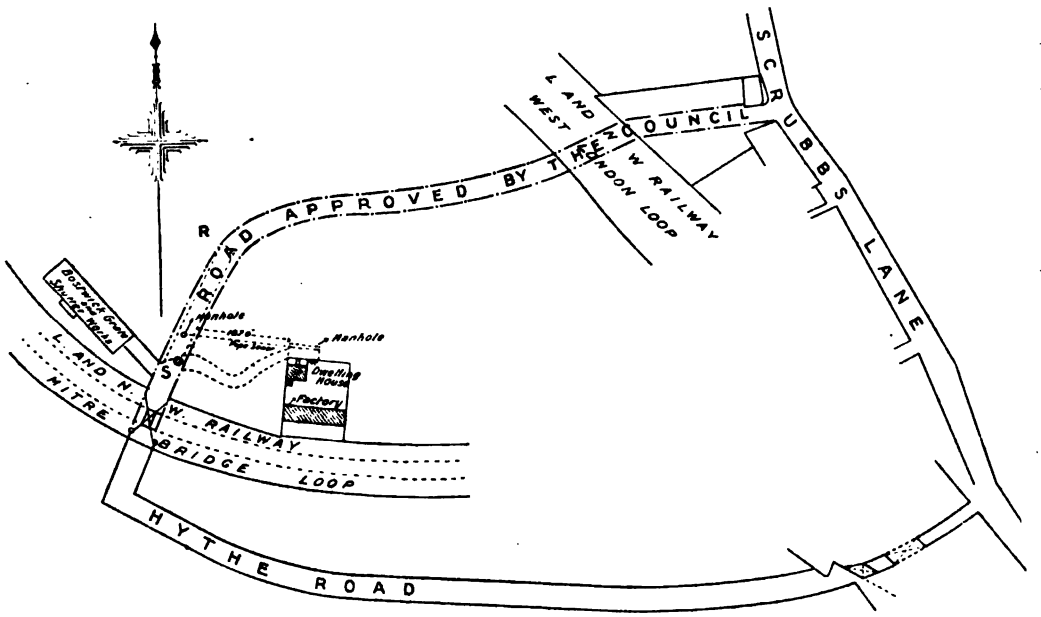
The appellants contended that the buildings above referred to had been erected upon the eastern side of the roadway of the proposed street, and upon a site abutting upon such roadway, in breach of the second condition of the sanction.

The respondent contended that he had not commenced to form or lay out a street, and that the factory and office had not been erected upon either side of the roadway of a new street, or upon a site abutting upon the roadway of a new street, contrary to the condition.

The magistrate found upon the facts hereinbefore stated that the respondent by repairing, strengthening, and draining so much of the rough road as lay between Hythe-road and the manhole had shown an intention to alter its original temporary character and to keep it up for the permanent purposes of the two factories, and so had commenced to form and lay out so much of the proposed new street. The formation and laying out of the remainder thereof still remained merely a question of contingent possibility; that the factory and office had not been erected upon either side of the roadway of the street, or upon a site abutting upon such roadway, and the magistrate therefore held that the respondent had not commenced to form and lay out a street otherwise than in accordance with the conditions prescribed by the London County Council in giving their sanction to the formation of such street, and that no breach of the second condition had been committed, because neither of the buildings abutted upon the roadway, and because the site of such buildings did not abut upon such roadway.

He accordingly dismissed the information.

The questions of law for the opinion of the court are: (1) Whether he was right in holding that upon the facts stated the respondent had commenced to lay out or form a new street upon his piece of land; (2) whether he was right in holding that upon the facts stated the respondent had not commenced to form and lay out a street otherwise than in accordance with the second of the conditions prescribed by the London County Council in giving their sanction to the formation by the respondent of the proposed street.



Avory, K.C. and *Daldy* for the appellants.—The erection of the dwelling-house and factory shown upon the plan are clear breaches of the conditions upon which the sanction of the appellants was given. The site upon which they are placed clearly abuts upon the road, for there is access from the site to the road, and nothing between. They referred to

London School Board v. *St. Mary, Islington*, 33 L. T. Rep. 504; 1 Q. B. Div. 65;

Wakefield Board of Health v. *Lee*, 35 L. T. Rep. 481; 1 Ex. Div. 336.

In the first of those cases the house was 70ft. or 80ft. from the street, and the access to it was by a passage, but it was held to be forming the street within the Metropolis Local Management Act 1855. In the second case a stream was between the premises and the street, but it was held that they fronted, adjoined, or abutted on the street within the Public Health Act 1848. In this case, therefore, the site of these buildings abuts on the roadway. Further, by what the respondent did to the cart track, it is clear that he commenced to form and lay out a new street.

Danckwerts, K.C. and *R. Cunningham Glen* for the respondent.—There was no evidence that the respondent began to form or lay out a new street. All that he did was to strengthen his cart track by the addition of clinkers for the purpose of taking carts on his land. If he had not commenced to form or lay out a new street, the conditions imposed by the council are quite inoperative. Further, the respondent has not commenced to erect a building upon either side of the roadway, or upon a site abutting upon such roadway. In this case the nearest corner of the site is 187ft. from the roadway, and there are intervening sites, and it is quite different from *London School Board* v. *St. Mary, Islington* (*sup.*), where the house was connected with the street by a private passage which had gates opening into the street. All that the factory had here was a right of access, and that right of access cannot make the site abut on the roadway. Again, in *Wakefield Local Board* v. *Lee* (*sup.*) the premise were connected with the street by a bridge. They also referred to

Lightbound v. *Higher Bebington Local Board*, 53 L. T. Rep. 812; 16 Q. B. Div. 577;
Barnett v. *Covell*, 90 L. T. Rep. 29.

Avory, K.C. in reply.

Lord ALVERSTONE, C.J.—I have come to the conclusion that the decision of the magistrate in this case is right. I am not sure that I quite agree with the way in which he has put it, and I think that I should not quite myself be disposed to draw the same inference which he has drawn; still, substantially, the ground of my decision is that he did not rightly find that the respondent had commenced to lay out and form a new street upon this piece of land. At the same time I also say that, upon the facts stated before the magistrate, I should draw a rather different inference, and I am disposed to draw that, having regard to the power that we have, inasmuch as he has stated the facts very fully before us. The difficulty has undoubtedly arisen from the course which has been adopted by the respondent in connection with his application for the sanction for the particular road. There having been previous proceedings in the year 1900, with regard to a suggestion that he was forming a new road north of the railway, which proceedings were decided in his favour, in the year 1903 he sent in a plan which in substance showed what he called, and rightly called from one point of view, a new street all the way from Hythe-road, under the railway, to Scrubbs-lane, and showing a new bridge over the West London loop of the London and North-Western Railway. At that time—it has been very frankly and properly admitted by Mr. Avory—there was in fact a road of some kind under the arch, and proceeding a short distance on the north side of the railway; but I think that the respondent was quite right to treat the whole road as a new road, for the purpose of a new street, and that has a bearing upon the view I take with regard to the finding of the magistrate. Why I think it right that it should be so described was that he proposed to widen the railway bridge, if he could make an arrangement with the company, and make a much broader road beneath the railway, so that it would be in fact a continuous road of one width all the way from Hythe-road to Scrubbs-lane. At the time he made that application he submitted to a condition—first, that the road should be closed in and fenced in within a year; and, secondly, that no new building should be commenced to be erected upon either side of such roadway, or upon a site abutting on such roadway, unless such roadway shall have been and shall still remain so defined and thrown open throughout its entire length as aforesaid, and unless such roadway shall have been and shall still remain so made throughout, as regards levels, direction, width, and gradients, as to comply with the provisions of any statute and by-laws in force in London, and to remain in accord with the said plan and sections, and the particulars which accompanied the application for the sanction. At the time that the council imposed that condition they stated that "the imposition of the condition is to secure the formation or laying out of the street thereby sanctioned as a street for carriage traffic in exact accordance with the plans, sections, and particulars submitted with the application for the council's sanction thereto." Whatever may be the true view of the effect of that condition, it is quite obvious that it was not imposed in any way with reference to back land properly so called. It was imposed with reference to the street, and if it had been intended to say that there should be no building anywhere within the distance of the road right and left, I must say I think different words ought to have been used. It is unfortunate, in view of what has happened, that the respondent accepted that condition without any appeal, or without getting a clear definition of what he was to be restricted from doing. But if I had thought that there was evidence on which the magistrate had come to the conclusion, or could have come to the conclusion, that he was making or had commenced to make this road contemplated by this plan, I think, speaking for myself, much more difficulty would have arisen, though I will indicate that upon that point also I am not prepared to overrule the magistrate's decision. Under this state of circumstances, in July 1904 he got an extension for another year and a half—that is to say, at the time these proceedings were taken he undoubtedly had got certain powers and privileges—that is to say, he had the sanction of the London County Council to his road. Now I come to the statement which seems to me to point out that there was no evidence on which the magistrate could properly find that he had commenced to lay out this road contrary to the conditions that had been imposed upon him. He states: "The respondent has not up to the present been able to come to terms with the London and North-Western Railway Company for the widening of the said tunnel under the Mitre Bridge loop of its railway, and for the construction of a bridge over the West London loop of its railway, and, being unable to lay out or form the proposed street so as to comply with the requirements of the London Building Act 1894 with respect to the width and construction of new streets, he has been and is still unable to avail himself of the aforesaid sanction of the appellants." I read that, taken by itself, to be a finding that he was not in fact doing anything which could be said to be only the carrying out of the formation of the proposed street. He obviously could not get the sanction unless he could get the bridge widened, and I think it does almost amount to a clear

finding that the scheme had become abortive, 'or at any rate, was not in effective operation at the time the proceedings were taken. That would have been a clear answer to this case but for what is subsequently stated in the case. But what has created the difficulty is that, having stated that he had placed fresh clinkers on the rough road, and subsequently, after the 14th Feb. 1904, placed more clinkers, and he had also extended the sewer a distance of, I think, 100ft., the magistrate said: "I found upon the facts hereinbefore stated that the respondent, by repairing, strengthening, and draining so much of the said rough road as lay between Hythe-road and the manhole, had shown an intention to alter its original temporary character and to keep it up for the permanent purposes of two factories, and so had commenced to form and lay out so much of the said proposed new street." If that was meant to be a finding that he meant to lay this out as a street, and he had been summoned for laying it out as a street without getting any consent of the local authority, I could have understood it, but it seems to me we ought not to construe, and the magistrate ought not to hold, that in doing what he did, having regard to the fact that he says that he is unable to carry out the original intention, he was attempting to form or commencing to form the street which had been the subject of the authority given by the London County Council. That being so, What is the proper inference to draw from what has been done? It seems to me, for the purpose of these proceedings you cannot shut your eyes to the fact that there was co-existent with the right to form a new street, a right of access—either a public or private right to access, I do not know which—to the north side of the railway as far as the point S, and that the position of things stated by the magistrate is that, before these proceedings were taken, there was this sort of road going up as far as S which was originally designed for the purpose of giving access to Bostwick factory, and then what has happened afterwards has been an exercise of the rights which the respondent undoubtedly had to build a factory on the right-hand side in the position it was built, and to allow an access from that point S to the factory; that is confirmed by the form of the lease, which gives the lessee a right of way along the yellow strip which is what I may call a portion of the site forming a right of way to the site of the new road, and then along a portion of the site and then under the arch, but it is obviously with an additional right over the new street when made. It is not what I should call consistent only with the new street being formed. That is the state of things, and one now has to say, Ought what he has done to be held to be a breach of the condition? I am not sure that Mr. Danckwerts' criticism is not right. I am not satisfied that it is to be construed altogether as an undertaking. I think it is a condition of a provision, but still, if I thought what had been done came within the words of that undertaking or condition, I should be bound to give effect to it. Construing that condition as nearly as I can, I think it is a condition with reference to the new street and to the buildings and sites which would interfere with the margin of the new street, with possibly the frontage line a certain distance from the new street, or a certain distance from the centre line of the new street, and a variety of matters of that kind. In my opinion, it is not a condition that can fairly be construed to refer to the back land. I think that, taking the words, "upon either side of such roadway, or upon a site abutting upon such roadway," they ought to be construed not in the extended sense, but in the sense of dealing with such sites as will have an operation and effect upon the roadway as such, or, in other words, to take their reasons, "shall not prevent the road being constructed in accordance with the plans, sections, and particulars submitted to the county council." I desire to say that upon the question of whether or not this factory may be held to abut upon the street, still more, whether it may be held to front, adjoin, or abut upon the street, I express no opinion. I must not be thought to have decided for the purposes of sect. 150, or for the purpose of any other section, that for some purpose this site may not be held to abut on the street. My present opinion is that that must be decided by reference to the actual facts as they exist at the time, and the words of the particular section under which the chargeability or under which the obligation is sought to be imposed; but, taking this particular condition, in my opinion this site did not abut upon the street within the meaning of that condition. I only repeat that this not to be considered that I am expressing any opinion as to what ought to be the construction of the word "abutting" or the effect of any sentence in which "abutting" is used for other purposes, but I come to the conclusion that this gentleman was exercising rights that he could exercise which did not depend upon the formation of the new street; that there is nothing in the condition to prevent his exercising these rights, it being conceded that he has done nothing which would prevent everything which the council required in connection with the new street being carried into effect, if that new street ever had been made. I think, therefore, the council in attempting to restrain the use of this back land under the circumstances are going beyond their powers, and that the view taken by the magistrate is the correct view. I have also indicated incidentally that I think that, if the finding of the magistrate that he was commencing to form a new street means commencing to form the new street, I think there was no evidence in support of that finding. In all probability the finding of the magistrate was more with reference to the actual act done as having relation to some street rather than having relation to the particular street which was the subject-matter. I think, therefore, the appeal must be dismissed.

LAWRANCE, J.—I am of the same opinion. I quite agree that there is difficulty, and, I may say, considerable difficulty, in reconciling the two findings of the learned magistrate. It seems to me that the second finding is conclusive of this case, and therefore I pass over the first without any remark, as being what my Lord has said with regard to it. It seems to me that the state of things was this, that the respondent was anxious to get this new road over this property; for that purpose he had to make arrangements with two railway companies to get a tunnel widened and a bridge over their line, and for that purpose he entered into a bargain, I may call it, with the

London County Council that he should have a year for the purpose of carrying that out. That was afterwards increased to two and a half years, and during that time one of the conditions on which he agreed to do that was that he should not build any house or other building abutting upon what might be, and would be if he could make arrangements with the railway company, a new road over his property. The inference I draw from what has been done is this, that when he built these new works he had in his mind the difficulty that would arise if he broke the conditions, and that he purposely avoided doing so, and that he ultimately carried out the condition he had made with the London County Council by not building something abutting. I agree with the learned magistrate there that he was right, and I am bound by his finding on that, that the building did not abut on the roadway, and that was purposely done in order to prevent him breaking a condition he had made. I think that was done in this way. He said: "If I do not get the road, if the railway companies will not help me to make the bridge and increase the tunnel at the other end, then I shall have a building there which has still got a right of way out from my land under the Mitre Bridge loop, as it is called, on the London and North-Western Railway, and in doing that I am not infringing any conditions I have made." Under those circumstances, that seems to me the proper inference to be drawn. With regard to what the learned magistrate meant by the first finding I am not quite sure, but by the second finding he has found that the site of the buildings does not abut upon the proposed new road, and therefore there was no breach of the condition of the London County Council. I cannot see myself—it may be my fault—how the London County Council should have been damnified in the slightest degree by what had been done in this case, and why they should think it necessary to fight this case.

Ridley, J.—I agree with the judgments which have been given, but I wish to add a few words. It appears to me that unless the respondent commenced to form and lay out a street otherwise than in accordance with the conditions which had been prescribed by the appellants, he could not have been convicted on these proceedings. I do not regard it as a breach of a contract or a breach of a bargain that had been entered into between him and the London County Council. I regard it as a question whether or not he had done a thing which amounted to an offence within the London Building Act 1894, s. 200: Had he commenced to form or lay out a street otherwise than in accordance with the condition prescribed? The condition which is prescribed, which is in controversy here, is that no new building shall be commenced to be erected upon either side of such roadway, or upon the site abutting upon such roadway, unless he had laid out the street. With regard to the first finding of the learned magistrate, he says that he thinks there may have been a commencement to form and lay out a street, because the respondent had, if I may put it exactly as it is found in the case, "placed fresh clinkers upon the certain rough road" which existed on the portion marked S for a certain distance up the road, because he had placed fresh clinkers upon that rough road, and, subsequently, on the 14th Feb. 1904 put on more clinkers, and in this way it became better made up and consolidated, but at the date of the hearing it could be described as only discharging the functions of a rough cart track. From that state of facts it is alleged that he commenced to form and lay out a new street. It seems to me, under the circumstances as they were then, that he had not got an access to the new street at either end, and the proper inference has been put on these facts by my Lord and by my brother Lawrance. I agree with them in thinking it is not the right finding. What was really being done was to utilise a portion of the back land by putting these clinkers on the rough road, and by providing an access which would start from that road and go along the land which was ultimately actually to adjoin the street if it ever should be made. Under those circumstances I do not think he did commence to form and lay out a street. I agree that the case is open to some difficulty, but still that is the conclusion at which I have arrived. On the other point, whether this is a site abutting on the street in question, whether it was a case in which he had laid out the street, whether it was a case in which a building had been commenced to be erected "upon either side of such roadway, or upon the site abutting upon such roadway," I think (although I agree that this is a matter of some nicety), first, that it was not upon either side of the roadway; and, secondly, I am inclined to think that it was not on a site that abutted upon that roadway. It is true, indeed, that Mr. Avory has succeeded in showing that we are not to read that word "abut" in a narrow sense as it might be and would be used, I think necessarily, if it was a matter of pure conveyancing, and that you have to look at the general objects and circumstances of the Act of Parliament which is dealing with this matter, before you interpret the word which is used. But, although that is so, I must say that I should not, even using the word in a wider sense, be prepared to say (speaking for myself) that where there is a site, as this one was, a square site marked round by black lines, with a mode of access provided as this one was on the side of a different site and another piece of land, that that site does abut on the street at all. It is quite true that when you come to look at the authorities which were quoted, the first one—viz., *School Board for London* v. *Vestry of St. Mary, Islington*, 33 L. T. Rep. 504; 1 Q. B. 65) decided under sect. 105 of the Metropolis Local Management Act—you find that the words which are contained in that section—viz., "fronting and forming the street"—are read as including houses which do not actually adjoin the street; and also in *Wakefield Local Board* v. *Lee*, decided on the Public Health Act 1848, s. 69, which section contained words precisely similar, I think, to those in sect. 150 of the Public Health Act 1875, "premises fronting, adjoining, or abutting," Grove and Field, JJ. both said that the premises in question were really fronting, adjoining, or abutting, one or the other. That is what was said by Grove, J., and Field, J. appears to have concurred in the judgment which he gave. It is true that they came to that conclusion, but, speaking personally, to my own thinking, the reasoning of Cleasby, B. upon the word "abutting" is the more convincing and the more accurate. There was, in that case, merely a small stream between the premises in question and the

land upon which it was said to abut, and there were three bridges across it. He said that in his view the premises did not, under those circumstances, abut upon the land; they adjoined it. I think you can use the word "adjoining" as meaning that it would include such a case as that, but abutting I should have thought you could not, and I find there is good authority for the distinction in the judgment of Bowen, L.J. in the case of *Lightbound* v. *Higher Bebington Local Board* (53 L. T. Rep. 812; 16 Q. B. Div. 577). I think, therefore, if this question should arise again upon what is to be the proper meaning of the words "abutting upon," there will be some reason for reconsidering the decisions of the past, and perhaps some difficulty in arriving at the proper interpretation which is to be put upon the words. I should rather not express a final opinion upon that point, because I think it must depend upon the circumstances of each particular case, at all events in a large proportion of cases. I think that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *W. A. Blaxland*; *Collins* and *Cook*.

Thursday, Aug. 10, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

BULLEN (app.) *v.* WARD (resp.). (*a*)

Sunday observance—Carrying on ordinary business on Sunday—Cooking and selling of food to poor persons — "Cookshop" — Exemption — Sunday Observance Act 1677 (29 *Car.* 2, *c.* 7), *ss.* 1, 3.

The appellant, a chipped potato dealer, in his business cooked potatoes, sometimes alone and sometimes with fried fish, and these articles were a popular food with working people. The fried potatoes and fish were served on the appellant's premises as well as off the premises, and were always sold warm. Customers sometimes ate the food on the premises and sometimes took it away in bags and sometimes ate it in the street near the shop. Upon an information under sect. 1 *of the Sunday Observance Act* 1677, *the appellant was convicted of the offence of carrying on his ordinary business on a Sunday.*

Held, quashing the conviction, that the appellant's shop was a cookshop, and came within the exemption in sect. 3 *of "dressing and selling of meat in cooks' shops or victualling houses for such as cannot otherwise be provided," and that the appellant had therefore committed no offence under sect.* 1.

Rex *v.* Cox (2 *Burr.* 785) *and* Rex *v.* Younger (5 *T. R.* 449) *followed.*

CASE stated on an information preferred on the 25th Jan. 1905, by Richard Ward, of the county borough of Blackburn, chipped potato dealer (the respondent), under sect. 1 of 29 Car. 2, c. 7, called the Sunday Observance Act 1677 (which information was instituted with the consent of two of His Majesty's justices of the peace of the borough), against William Bullen, of Blackburn aforesaid, chipped potato dealer (the appellant), for that he, the appellant, on the 22nd Jan. 1905, at the county borough, the same being the Lord's day, commonly called Sunday, and the appellant being then a chipped potato dealer and above the age of fourteen years, did unlawfully do and exercise certain worldly labour, business, and work in his ordinary calling of chipped potato dealer aforesaid upon the Lord's day, the same not being a work of necessity or charity.

Upon the hearing of the information the following facts were admitted or proved in evidence before the justices: (*a*) That the appellant was a chipped potato dealer carrying on business at 3, Greaves-street, Blackburn, and was over fourteen years of age; (*b*) that in his business of chipped potato dealer the appellant cut up and cooked or fried potatoes, sometimes alone and sometimes with fried fish, and that these articles had become a popular food with the working class people; (*c*) that the fried potatoes and fish together or separately were served on the appellant's premises as well as off the premises, and always sold "warm," the customers when supplied off the premises often bringing their own plates or dishes for the same, and sometimes being supplied in paper bags furnished by the appellant; (*d*) that there was a very large number of other chipped potato dealers in the borough of Blackburn who carried on exactly the same business as the appellant; (*e*) that on Sunday, the 22nd Jan., the appellant was carrying on at his premises and shop at Greaves-street, Blackburn, his usual business of a chipped potato dealer, there being customers both upon his premises eating the chipped potatoes and others who purchased articles of food and took them away in bags or basins, and some ate the same in the street near the appellant's shop; (*f*) that the appellant's premises were not licensed as a refreshment house under the Refreshment Houses Act 1860 (23 & 24 Vict. c. 27); (*g*) the respondent contended that the appellant had unlawfully carried on and exercised his business and work in his ordinary calling of a chipped potato dealer on Sunday, the 22nd Jan., contrary to the provisions of the statute, and that such business was not a work of necessity or charity; (*h*) the appellant contended that the business as carried on by him on Sunday, the 22nd Jan. 1905, came within the exception named in sect. 3 of the Act 29 Car. 2, c. 7, and that his business was a cookshop within the meaning of that section, and that his customers were such as could not otherwise be provided, and in aid of his contention the following cases were quoted: *Rex* v. *Cox* (2 Burr., at p. 787), *Rex* v. *Younger* (5 T. R. 449), and *Crepps* v. *Durden* (2 Cowp. 640; 1 Sm. L. C., 11th edit., 651).

The justices were of opinion from the facts proved or admitted that the appellant had unlawfully carried on his business of a chipped potato dealer upon Sunday, the 22nd Jan. 1905; that his premises were not a cookshop within the meaning of sect. 3, and that his customers were not persons such as could not otherwise be provided; that the business as carried on by him did not come within the exceptions named in sect. 3 of the Act, and that his business of chipped potato dealer was not a work of necessity or charity within the meaning of sect. 1 of the Act, and that the appellant was guilty of an offence under the Act.

(*a*) Reported by W. W. Oak, Esq., Barrister-at-Law.

The Sunday Observance Act 1677 (29 Car. 2, c. 7) provides:

Sect. 1. For the better observation and keeping holy the Lord's day, commonly called Sunday: Be it enacted, that all the laws enacted and in force concerning the observation of the Lord's day, and repairing to the church thereon, be carefully put in execution; and that all and every person and persons whatsoever shall on every Lord's day apply themselves to the observation of the same, by exercising themselves thereon in the duties of piety and true religion, publicly and privately; and that no tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day, or any part thereof (works of necessity and charity only excepted); and that every person being of the age of fourteen years or upwards offending in the premises shall for every such offence forfeit the sum of five shillings; and that no person or persons whatsoever shall publicly cry, show forth, or expose to sale any wares, merchandises, fruit, herbs, goods, or chattels whatsoever upon the Lord's day, or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried, or showed forth, or exposed to sale.

Sect. 3. Provided, that nothing in this Act contained shall extend to the prohibiting of dressing of meat in families, or dressing or selling of meat in inns, cooks' shops, or victualling houses, for such as otherwise cannot be provided, nor to the crying or selling of milk before nine of the clock in the morning or after four of the clock in the afternoon.

S. Joyce Thomas for the appellant.—The conviction of the appellant was wrong upon the grounds that this shop was a "cookshop" within the meaning of sect. 3 of the Act, and the business carried on in the shop was a work of necessity within sect. 1. Sect. 1 exempts from the operation of the section acts which are "works of necessity and charity," and sect. 3 exempts "the dressing or selling of meat in cooks' shops for such as otherwise cannot be provided." There is no definition of "cookshop" in the Act, so that it is open to argument as to what a cookshop as intended by the Act is, and evidently the cookshop then existing was very different from the cookshop as it exists at present. A cookshop is a place where food of all kinds cooked on the premises could be obtained by the poor, and in *Rex* v. *Cox* (2 Burr. 785) it was held that baking provisions, such as pies, puddings, and meat, on the Sunday was not an offence within the Act, and it was said that this work was "particularly within the equity of the exception of cooks' shops." In *Rex* v. *Younger* (5 T. R. 449) it was held that the Act does not prohibit a baker from baking dinners for his customers on a Sunday. Lord Kenyon, C.J. there says: "Thirty-four years have nearly passed since the decision of the case of *Rex* v. *Cox* (*ubi sup.*), which informed the public that all bakers have a right to do what is imputed to this defendant as an offence. . . . With regard to the Act of Parliament on which this conviction is founded, I think we should construe it equitably, so that it may answer the purposes of public convenience, taking care at the same time that Sunday should not be profaned. . . . But must the laborious part of the community, who are entitled to some indulgence for the labours of the past week, fare harder on that than on any other day? They must be fed on that day; many of them have not the means of dressing their dinners at home; and those who have will, if this defendant be convicted, be prevented observing the Sabbath. That day will, I think, be better observed if the construction put upon this law in *Rex* v. *Cox* (*ubi sup.*) be now adopted, than if we overrule that determination and adjudge this to be an offence." The judgments of Ashurst, Buller, and Grose, JJ. are to the same effect, and it is there pointed out that the case of *Crepps* v. *Durden* (2 Cowp. 640; 1 Smith L. C. 651) was clearly distinguishable, and did not apply to such a case, and it clearly has no application here. There has been no case on the point since *Rex* v. *Younger* (*ubi sup.*), and it is submitted that that case is an absolute authority in favour of the appellant.

J. R. Randolph for the respondent.—The conviction of the appellant under this Act was right. He was exercising his ordinary calling on the Sunday. The business of his ordinary calling was that of a chipped potato dealer, and he was carrying on that business on the Sunday, the thing which is forbidden by the statute. It was not a work of necessity or charity within the exception in sect. 1, and it comes within the Act unless this can be shown to be a cookshop within sect. 3. It was not a cookshop. The case of *Rex* v. *Cox* (*ubi sup.*) is distinguishable on the ground that the baker was not there charged with baking bread, which was his ordinary calling, but he was charged with "baking pies, puddings, and meat for dinner"; and Lord Mansfield expressly points out that the defendant was not charged with "baking in general on a Sunday, but baking pies, puddings, and meat for dinner, not saying a word about 'bread,' which is the business of a baker's ordinary calling." That case proceeds upon the ground that the baker was baking pies, not rolls, which was his ordinary calling. Then the words "dressing of meat," in sect. 3, cannot be held to apply to the dressing of fish and potatoes in the shop, as "meat" does not include fish. The case of *Rex* v. *Younger* (*ubi sup.*) merely follows *Rex* v. *Cox* (*ubi sup.*), and is distinguishable on the same ground. In *Crepps* v. *Durden* (*ubi sup.*) it was held that the case was within the statute, but that the defendant could not be convicted four times for an offence on the same day. On those cases the question is in each case a question of fact for the justices. Here it cannot be said that it was a work of necessity, and the justices find that it was not a work of necessity, and that the shop was not a cookshop within the meaning of sect. 3. The question was for them, and it cannot be said that there was no evidence upon which they could come to that conclusion. As long as the Act is in force, there is the distinct provision that a person is not to exercise his ordinary calling on the Sunday, unless it is a work of necessity or charity. [Lord ALVERSTONE, C.J.—The facts in this case are very like the facts in *Rex* v. *Cox* (*ubi sup.*).]

Lord ALVERSTONE, C.J.—I entirely agree with what counsel for the respondent has said that we have only to interpret this statute. Of course, as long as it remains in force we are bound to give it the fullest meaning that the words compel us to do; but when the language is couched in such general terms, then the courts are entitled to give such decisions upon it as the words admit of without imposing consequences which would be very serious. I should require very strong words

to lead me to the conclusion that the appellant has committed any offence within this Act having regard to the protection given by sect. 3 to "cooks' shops, or victualling houses, for such as otherwise cannot be provided." I think there was no evidence upon which the magistrates could come to the conclusion other than that this was a "cookshop" within sect. 3. I say that because, after the words "cooks' shops, or victualling houses," there are the words "for such as cannot otherwise be provided," as to which Buller, J. in *Rex* v. *Younger* (5 T. R., at p. 452), said that they were loose expressions, and they cannot possibly be said to give a definite and precise meaning beyond this that they indicate the intention of the Legislature as to the class of cooking to be provided — namely, for those who cannot do it for themselves. While I do not think that the appellant's business can be strictly put as a work of "necessity or charity" within sect. 1, yet these words cannot be overlooked in regarding the intention of the statute. Here it is found that the appellant's customers were the poorer classes, who fetched the food in dishes, always warm, some of the people eating the food in the shop and some in the street. It cannot be said to be wrong merely because some of the people ate the food on their way home. In *Rex* v. *Cox* (*ubi sup.*) and in *Rex* v. *Younger* (*ubi sup.*) we have an enunciation of the law that this statute did not mean to prohibit the cooking of meat in a shop for poor people. Counsel for the respondent has pressed us to say that we must construe meat as meaning flesh. That is not so. It would be ridiculous to say that although you may cook mutton you may not cook an eel pie. I think that the only evidence in this case brought the appellant's trade within the protection of sect. 3 of the Act. The conviction therefore was wrong and must be quashed.

LAWRANCE, J.—I agree.

RIDLEY, J.—I agree.

Appeal allowed. Conviction quashed.

Solicitors for the appellant, *Thairlwall* and *Son*, for *Read* and *Eastwood*, Blackburn.

Solicitors for the respondent, *Rawle, Johnstone*, and *Co.*, for *Carter* and *Crellin*, Blackburn.

Wednesday, Aug. 2, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

GILBERT (app.) *v.* JONES (resp.). (*a*)

Common lodging-house—Charitable institution—No payment for admission—Liability for keeping without licence—Common Lodging Houses Act 1851 (14 *&* 15 *Vict. c.* 28).

A house to which destitute persons of the very poorest class are admitted, and where those admitted are treated and dealt with in a manner similar to the frequenters of common lodging-houses, being provided with supper and breakfast in common rooms and with bunks in open dormitories, is none the less a common lodging-house within the Common Lodging Houses Act 1851 *and the London County Council (General Powers) Act* 1902, *Part* 9, *because no payment of any kind is made by or on behalf of the persons admitted.*

CASE stated on two informations preferred by the respondent against the appellant (*a*) for that he, being the person having the care or management of a house as a common lodging-house, did, contrary to the provisions of the Common Lodging Houses Act 1851, when required by an officer of the local authority under that Act, refused to give him free access to the house or any part thereof; and (*b*) for that he kept the same house as a common lodging-house, and received lodgers therein, without having applied for and obtained a licence under Part 9 of the London County Council (General Powers) Act 1902.

The following facts were proved or admitted at the trial:—

The appellant kept the house.

An officer of the London County Council, under the Common Lodging Houses Act 1851, was refused access to the house by the appellant on the 1st Nov. 1904.

The appellant had not applied for or obtained a licence in respect of the house under Part 9 of the London County Council (General Powers) Act 1902.

The persons admitted to the house were destitute and of the very poorest class, but in other respects did not differ from the class who habitually frequent the cheapest common lodging-houses.

The persons admitted to the house were, while they were in the house, treated and dealt with in a manner similar to that in which the habitual frequenters of common lodging-houses are dealt with and treated; and on the night of the 1st Nov. 1904 about 150 men and seventy women slept in the house.

The persons admitted slept in bunks placed in open dormitories, each dormitory containing about seventy persons, and separate dormitories were provided for men and women.

Each person admitted to the house was provided with supper and breakfast, and the meals were taken by such persons together in common rooms.

The house was clean, well kept, and well conducted.

The house was known as the Dormitory among those admitted to it and others of the same class, to distinguish it from the ordinary houses used by frequenters of common lodging-houses.

No payment of any kind, direct or indirect, was made by or on behalf of any of the persons admitted.

It was contended on behalf of the appellant that the case was distinguishable from the cases of *Logsdon* v. *Booth* (81 L. T. Rep. 602; (1900) 1 Q. B. 401) and *Logsdon* v. *Trotter* (82 L. T. Rep. 151; (1900) 1 Q. B. 617), upon the ground that those cases did not decide that a house where no payment was made was a lodging-house, but only that the particular lodging-houses in question in those cases were common lodging-houses; that the expression "common lodging-house" meant no more than a lodging with an adjective attached expressive of the kind of person admitted, and the kind of business done therein, and that the meaning of the word "lodging-house" in plain English (as the words public lodging-house, which are defined in the Towns

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

Improvement Clauses Act 1847, s. 116, and the City of London Sewers Acts 1848, s. 91, and 1851, s. 10), necessarily implied the lettering and hiring of lodgings for payment, and necessarily excluded the present case, where there was no payment.

It was contended on behalf of the respondent that the cases of *Logsdon* v. *Booth* (81 L. T. Rep. 602; (1900) 1 Q. B. 401) and *Logsdon* v. *Trotter* (82 L. T. Rep. 151; (1900) 1 Q. B. 617) governed the present case, and that the Acts being sanitary Acts, the words common lodging-house must in the public interest include the present case, which was within the meaning of those Acts.

The magistrate decided that the case was within the cases of *Logsdon* v. *Booth* (81 L. T. Rep. 602; (1900) 1 Q. B. 401) and *Logsdon* v. *Trotter* (82 L. T. Rep. 151; (1900) 1 Q. B. 617), and he therefore held that the house in question was a common lodging-house within the meaning of the London County Council (General Powers) Act 1902 and the Common Lodging-Houses Act 1851, and he accordingly convicted the appellant.

G. W. Ricketts for the appellant.—This house was not a common lodging-house. No payment of any kind, direct or indirect, was made, and that distinguishes this case from *Logsdon* v. *Booth* (81 L. T. Rep. 602; (1900) 1 Q. B. 401) and *Logsdon* v. *Trotter* (82 L. T. Rep. 151; (1900) 1 Q. B. 617). In each of these cases the inmates were charged for the accommodation, and it was there held that it made no difference that no profit resulted from the charges, and that the places were kept for charitable and religious objects. Here no payment of any kind was made. He referred to

Murray's Dictionary;
Webster's Dictionary;
Towns Improvement Clauses Act 1847, s. 116;
City of London Sewers Act 1848, s. 91;
City of London Sewers Act 1851, s. 10.

Avory, K.C. and *Ryde* were not called upon to argue.

Lord ALVERSTONE, C.J.—Mr. Ricketts has very ably and strenuously contended that we ought to draw a distinction or corollary or deduction from the decision in those two cases of *Logsden* v. *Booth* and *Logsden* v. *Trotter*, and say that, if, as a matter of fact, no payment was made by any one of the guests, none of the provisions of the Common Lodging House Act apply, and that therefore we have nothing to do with these cases. But it seems to me that we must look at those cases, and that we ought not to fritter away the previous decisions. There had been a previous decision before by Lord Coleridge, C.J. and Mathew, J. in *Booth* v. *Ferrett* (25 Q. B. Div. 87) to the effect that if the undertaking was not carried on for gain it was not a common lodging-house, and therefore was not subject to the provisions of the Act. That decision, however, which would materially have assisted Mr. Ricketts' argument, was considered later by Lord Russell, C.J. and the other judges who were parties to the decision in *Logsden* v. *Booth*, and they came to the conclusion that the fact that the institution was a charitable one, and was carried on for religious and charitable motives and with no object of gain, was not sufficient to differentiate it from the case of lodging houses which were exempted from the provisions of the law. That was a strong case, because they felt in that case that they were justified in overruling the previous case. That was also further considered in the case of *Logsden* v. *Trotter* before Channell, J. and Bucknill, J., which Mr. Ricketts called our attention to. Now if the question of gain had been thought to be a material distinction, then, of course, it would have been an amply sufficient authority for Mr. Ricketts' contention. Once you get, however charitable, that the question of gain has nothing to do with it, I cannot see any distinction in principle between a charitable house which is carried on for a very small payment, it may be for the purpose of getting some check on the people who came in, but not a payment which is to go into the pockets of the people by way of letting lodgings, and a house where no payment is made. Now, these are Sanitary Acts, and I am quite sure that there will not be the slightest attempt to interfere with the excellent work which is being done by this institution; but, from the point of view of the Sanitary Acts, I cannot myself think that we have any reason to differentiate this case from the two previous decisions, notwithstanding the laudable nature of the institution in question. I think the cases are identical, and that the learned magistrate was right in saying that these cases were binding on him. I think, therefore, that this appeal cannot be entertained.

LAWRANCE and RIDLEY, JJ. concurred.

Appeal dismissed.

Solicitors: *Bellord* and *Coveney*; *W. A. Blaxland.*

Supreme Court of Judicature.

COURT OF APPEAL.

Oct. 24, 25, 30, *and Nov.* 1, 1905.

(Before VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

PARKER v. TALBOT. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Common lodging-house—Charitable institution—No payment for admission—Registration—Liability for keeping without licence—Common Lodging Houses Act 1851 (14 *&* 15 *Vict. c.* 28)—*Common Lodging Houses Act* 1853 (16 *&* 17 *Vict. c.* 41)—*London County Council (General Powers) Act* 1902 (2 *Edw.* 7, *c. clxxiii.*), *Part* 9—*Common Lodging Houses Act (Ireland)* 1860 (23 *Vict. c.* 26), *ss.* 2, 3.

The definition of the term "common lodging-house" in the Common Lodging Houses Act (Ireland) 1860, *as a house in which persons are lodged for hire, applies to the Common Lodging Houses Acts* 1851 *and* 1853.

The fact that the Act of 1860 *has been repealed makes no difference in this respect.*

Therefore a house used for the purpose of a charitable institution to which destitute persons of the very poorest class are admitted, and where those admitted are treated and dealt with in a manner similar to the frequenters of common

(*a*) Reported by W. C. BIGS, Esq., Barrister-at-Law.

lodging-houses, being provided with supper and breakfast in common rooms and with bunks in open dormitories, no payment of any kind being made by or on behalf of the persons admitted, is not a common lodging-house within the Common Lodging Houses Acts 1851 *and* 1853 *and the London County Council (General Powers) Act* 1902, *Part* 9.

Gilbert *v.* Jones (ante, *p.* 421; (1905) 2 *K. B.* 691) *overruled.*

APPEAL from the decision of Kekewich, J. as to the meaning of the term "common lodging-house" in the Common Lodging Houses Acts 1851 and 1853.

The point was raised on a motion in an action brought by a subscriber to the Providence-row Night Refuge and Home on behalf of himself and all other subscribers to the charity other than the defendants for an injunction to restrain the defendants (who were the trustees) from using the premises known as the Providence-row Night Refuge and Home, Crispin-street and Raven-row, Bishopsgate-street Without, as a common lodging-house without registering the same pursuant to the Common Lodging Houses Act 1851 and obtaining a licence under the London County Council (General Powers) Act 1902, and from otherwise using the premises for any unlawful purpose, and from employing the funds of the subscribers for any such purpose.

The home was founded under a charitable trust, the object being to provide food and shelter for the deserving destitute poor and to help those in need or distress. A large sum was also collected every year for its support by voluntary subscriptions.

The secretary of the charity had been convicted at Worship-street Police-court of keeping the premises as a common lodging-house without a licence, and upon an appeal to the Divisional Court (Lord Alverstone, C.J., Lawrance and Ridley, JJ.) this conviction was affirmed: (see *Gilbert* v. *Jones* (*ante*, p. 421; (1905) 2 K. B. 691). As no further appeal from the decision of the Divisional Court was possible, the present action was commenced for the purpose of obtaining the opinion of the Court of Appeal, and, if necessary, of the House of Lords, upon the question whether these premises were to be regarded as a common lodging-house within the Acts of 1851 and 1853.

The persons admitted to the house were destitute and of the very poorest class, but in other respects did not differ from the class who habitually frequent the cheapest common lodging-houses. While they were in the house they were treated and dealt with in a manner similar to that in which the habitual frequenters of common lodging-houses are dealt with and treated; and on the night of the 1st Nov. 1904 about 150 men and seventy women slept in the house. They slept in bunks placed in open dormitories, each dormitory containing about seventy persons, and separate dormitories were provided for men and women. Each person admitted to the house was provided with supper and breakfast, and the meals were taken by such persons together in common rooms. The house was clean, well-kept, and well conducted. The house was known as the Dormitory among those admitted to it and others of the same class, to distinguish it from the ordinary houses used by frequenters of common lodging-houses. No payment of any kind, direct or indirect, was made by or on behalf of any of the persons admitted.

No licence had been applied for or obtained in respect of the house under Part 9 of the London County Council (General Powers) Act 1902, and on the 1st Nov. 1904 an officer of the London County Council, under the Common Lodging Houses Act 1851, was refused access to the house.

The motion was heard by Kekewich, J. on the 10th Aug. 1905, when his Lordship, feeling himself bound by the decision in *Gilbert* v. *Jones* (*ubi sup.*), granted an injunction.

The defendants appealed.

Acland, K.C. and *Ricketts* for the appellants.—The decision in *Gilbert* v. *Jones* (*ubi sup.*) is wrong, and should be overruled. The shelters which were the subjects of the cases of *Logsdon* v. *Booth* (81 L. T. Rep. 602; (1900) 1 Q. B. 401) and *Logsdon* v. *Trotter* (82 L. T. Rep. 151; (1900) 1 Q. B. 617) were not carried on under quite the same regulations as this refuge. Those cases are distinguishable on the ground that they only decided that the particular lodging-houses in question were common lodging-houses. In those cases a charge was made, though the manager had in certain cases a discretion to reduce it or remit it altogether; and anyone, so long as he behaved himself, could come in on payment and go when he liked. Those shelters were really admitted to be lodging-houses, and the question was whether they were common lodging-houses within the Acts. Here no charge is made of any sort or kind; the cases are inquired into, and the persons who are admitted are assisted to get situations. This is not a lodging-house at all. It is a different kind of institution altogether. *Booth* v. *Ferrett* (63 L. T. Rep. 348; 25 Q. B. Div. 87) is in favour of the appellants. That case was not followed in *Logsdon* v. *Booth* (*ubi sup.*), but, if necessary, it must be contended that *Logsdon* v. *Booth* was wrongly decided so far as it was contrary to the former case. No definition of a common lodging-house is contained either in the Common Lodging Houses Acts of 1851 or 1853 or the London County Council (General Powers) Act 1902, so that the only way of ascertaining the sense in which it was used by the Legislature is to see how it was used in other Acts. In the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34), s. 116, it is provided that every house shall be deemed a "public lodging-house" within the meaning of the Act in which "persons are harboured or lodged for hire for a single night, or for less than a week at one time." The words "harboured or lodged for hire" are important here. There are also definitions of a "public lodging-house" in sect. 91 of the City of London Sewers Act 1848 (11 & 12 Vict. c. clxiii.) and in sect. 10 of the City of London Sewers Act 1851 (14 & 15 Vict. c. xci.). In the Act of 1848 the definition is: "Any public lodging-house, not being a licensed victualling house, in which persons are harboured or lodged for hire for a single night or for less than a week at one time, or in which any room is let for hire to be occupied by more than one family at one time." In the Act of 1851, the expression for the purposes of the Act means "Any house,

not being a licensed victualling house, let or any part of which is let at a daily or weekly rent not exceeding the rate of 3*s.* 6*d.* per week, or in which persons are harboured or lodged for hire for a single night or for less than a week at one time, or in which any room let for hire is occupied by more than one family at one time." The description of a common lodging-house given by Sir A. Cockburn and Sir W. Page Wood, when law officers of the Crown (see Glen on Public Health, 12th edit., p. 163; Lumley on Public Health, 5th edit., p. 99), was adopted by the Divisional Court in *Logsdon* v. *Booth* (*ubi sup.*). They advised thus: "It may be difficult to give a precise definition of the term 'common lodging-house'; but, looking to the preamble and general provisions of the Act (14 & 15 Vict. c. 28), it appears to us to have reference to that class of lodging-house in which persons of the poorer class are received for short periods, and, although strangers to one another, are allowed to inhabit one common room. We are of opinion that it does not include hotels, inns, public-houses, or lodgings let to the upper and middle classes." That description has also been adopted by the Local Government Board in certain model lodging-house by-laws issued by them. A "lodging-house" is a place where lodgings are let for hire. The definitions in the dictionaries bear that out: (see Murray, Ogilvie, Webster, Worcester, and Century). "Lodging-house" does not occur in Johnson's Dictionary, but "lodging" is defined as "a temporary habitation; rooms hired in the house of another." In popular language this place is called a "Dormitory." It is said these are sanitary Acts, and therefore an extended meaning ought to be given to the words "common lodging-house"; but the term has never been used in such a wide sense before, and cannot be so construed in these Acts unless the Acts say so. These are penal Acts, and make persons liable to imprisonment, and therefore must be construed strictly. The case does not come within the Act of 1851, and the private Act of the London County Council does not purport to extend that Act in any way. In his judgment in *Logsdon* v. *Trotter* it is admitted by Channell, J. (82 L. T. Rep. 156; (1901) 1 Q. B. 627) that the decision in that case goes a step further than *Logsdon* v. *Booth* (*ubi sup.*), and this is an attempt to carry the matter a step further. If this is a common lodging-house, a benevolent lady who takes in a few convalescent people for a few weeks at her country house could be said to be keeping such a place.

Horace Avory, K.C. and *E. A. Nepean* for the London County Council.—The point is whether this house is within the Common Lodging Houses Acts of 1851 and 1853. It must be admitted that those Acts do not apply to every house in which a person lodges. If anyone stays with a friend he lodges at the house, but the house does not become a lodging-house. The purpose of the house here was to provide lodgings, and therefore it is a lodging-house, and on the facts this is a common lodging-house within the opinion of the law officers of the Crown as stated in *Logsdon* v. *Booth* (*ubi sup.*). The Towns Improvement Clauses Act 1847 has been referred to, but it is not an Act of general application, and only applies when incorporated in a special Act. The City of London Sewers Act 1851 contains no definition of a "common" lodging-house, but a "public" lodging-house is there referred to. The meaning of the words "common lodging-house" in the Common Lodging Houses Act of 1851 is not to be confined by the definition of a "public" lodging-house in the City of London Sewers Act of 1848. The definition in sect. 91 of the City of London Sewers Act 1848 is only for the purposes of that Act. The Acts of 1851 and 1853 are sanitary Acts, and the fact that no payment is made does not prevent a house being a common lodging-house, and it requires as much supervision as a house where payment is made. If this appeal is allowed, both *Logsdon* v. *Booth* (*ubi sup.*) and *Logsdon* v. *Trotter* (*ubi sup.*) will be overruled. A convalescent home is not a common lodging-house because it does not exist for the primary purpose of lodging people.

Acland, K.C. in reply. *Cur. adv. vult.*

Oct. 30.—The case was in the list for the day for judgment, but when it was called on Vaughan Williams, L.J. said that during the argument the attention of the court had not been called to the Common Lodging Houses Act (Ireland) 1860 (23 Vict. c. 26); that he thought counsel should have an opportunity of considering it, and the judgment would therefore be postponed for a short time.(*a*)

Avory, K.C. and *E. A. Nepean* for the plaintiff. —The Act carries the matter no further, because everything in it applies only to the extension of the Acts of 1851 and 1853 to Ireland. This is shown by the title, the preamble, and sect. 2. Sect. 10 says expressly that it shall extend to Ireland only. Sect. 3 cannot, therefore, be treated as amending or explaining the two other Acts relating to England. [VAUGHAN WILLIAMS, L.J. — Sect. 10 only prevents the Act extending to Scotland.] When this Act was passed the attention of the Legislature must have been called to the fact that there was no definition of a "common lodging-house" in the Acts of 1851 and 1853, yet, when a definition was given which

(*a*) 23 Vict. c. 26 is intituled "An Act to remove doubts as to the application of 'The Common Lodging Houses Acts' to Ireland, and to amend the provisions of the same so far as they relate to Ireland." It commences as follows: "Whereas doubts have arisen as to whether the Common Lodging Houses Act 1851 and the Common Lodging Houses Act 1853 extend to Ireland, and difficulties have occurred in the execution of the said Acts herein; and it is expedient that such doubts and difficulties should be removed, and for that purpose that the said Acts should be explained and amended with reference to the execution thereof in Ireland: Be it therefore enacted," &c. Sect. 2 provides that the Acts of 1851 and 1853 shall for the purpose of the execution thereof in Ireland be construed as if they were one Act, and as thereby amended shall be deemed to extend to Ireland. Sect. 3 provides as follows: "For the purpose of the execution of the said recited Acts and of this Act in Ireland, certain words and expressions used in the said Acts are hereby declared and explained to have been intended to bear the following meanings. . . . The term 'common lodging-house' shall mean a house in which persons are harboured or lodged for hire for a single night, or for less than a week at a time, or any part of which is let for any term less than a week." Sect. 10 provided: "This Act shall extend to Ireland only.

was to apply to Ireland, nothing is said about England. There cannot, therefore, have been any intention to extend that definition to England.

Acland, K.C. and *G. W. Ricketts* for the defendants.—The object of the Act of 1860 was to provide that in the Acts of 1851 and 1853 the words "common lodging-house" should have the same meaning in England and Ireland. Sect. 3 declares that in the former Acts certain expressions, of which "common lodging-house" was one, had been intended to bear the meanings thereinafter stated—that is, from the passing of the former Acts.

VAUGHAN WILLIAMS, L.J.—Until our attention was called to the Common Lodging Houses Act (Ireland) 1860, I was disposed—and I think the other members of the court were disposed—to put the construction upon the Act of 1851 which was put upon that Act by Lord Alverstone and his brother judges in the King's Bench Division. In fact, I had come to the conclusion (but with some hesitation) that the reasoning of the King's Bench Division ought to be accepted, and had written a judgment to that effect. But in that judgment I had expressed the grave doubts that had arisen in my mind by reason of the exclusion in the opinion of the law officers given in 1854 of public-houses from the definition of "common lodging-houses." I had doubts whether it was not a fair inference that the law officers of the Crown recognised the description in the Towns Improvement Clauses Act 1847 as applying not only to the Public Health Act of 1848, but to other sanitary legislation. I had that doubt, and I was met by the authority of the King's Bench Division itself, and also by observations of Lord Russell in *Logsdon* v. *Booth* (*ubi sup.*) and Channell, J. in *Logsdon* v. *Trotter* (*ubi sup.*) that it might be that that conclusion of the law officers of the Crown was arrived at because they thought that the sections of the Acts of Parliament of 1851 and 1853 only applied where the main object of keeping the lodging-house was to supply lodgings to the poorer classes, and especially to those poorer classes who want lodgings for a very short time. I thought that the law officers of the Crown might have said to themselves that was not the main object in the case of a public-house; the main object in the case of a public-house being probably the supply of beer, or other things, as the case may be. That was the conclusion at which I, with some hesitation, had arrived, and it was a conclusion which it was satisfactory to me to think would exclude from the operation of the Act institutions like hospitals, convalescent homes, and homes for women servants — young women seeking places in London. But now that my attention has been addressed to this Act of Parliament of 1860, I think it is impossible to doubt but that the words of sect. 3 of that Act are intended to refer to the two Acts of Parliament, the Common Lodging Houses Act of 1851 and the Common Lodging Houses Act of 1853, and to apply to those Acts exclusively. The suggestion on behalf of the respondents really was that they were intended to effectuate the passing of an independent Act which was not either one of those Acts, but was an Act passed for application to Ireland alone. I have no doubt that we must treat the words in the definition clause of this Act of Parliament of 1860 (sect. 3) as applying to the two English Acts. The result is this. It says: "The term 'common lodging-house' shall mean" (not "shall include" but "shall mean") "a house in which persons are harboured or lodged for hire for a single night, or for less than a week at a time, or any part of which is let for any term less than a week." That definition applies to the two English Acts which I have mentioned; and, inasmuch as this Providence-row Night Refuge and Home is an institution in which people are not "harboured or lodged for hire," it follows that this institution is not a common lodging-house, as defined in those Acts, and those Acts do not apply. Of course, it follows, without going in detail through it, that Part 9 of the private Act of the London County Council, called the London County Council (General Powers) Act 1902, which only applies to the same subject-matter as that to which the Common Lodging Houses Acts 1851 and 1853 apply, has no application at all to this institution. I wish to say with regard to the decision of the judges of the King's Bench Division, which does not require any indorsement from me as to the logic and sufficiency of the conclusion which they arrived at, that they arrived at the conclusion which I was prepared to affirm without having this Act of Parliament called to their attention at all; and, although it is part of the duty of a judge to know the common law, there is the old authority of Lord Coke for saying that it is not part of his duty to know the statute law. Lord Coke said that statutes were very frequent in his time, but what he would have said if he had seen the multiplication of statutes in modern times, I really do not know. The result is that, in my judgment, this appeal ought to be allowed.

STIRLING, L.J.—I am of the same opinion. I think that sect. 3 of 23 Vict. c. 26 shows what the Legislature intended should be the meaning of the term "common lodging-house" in the Common Lodging Houses Acts of 1851 and 1853.

COZENS-HARDY, L.J.—I am of the same opinion, and, like my Lord, I had written a judgment at the end of the arguments in this case agreeing with the view taken by the Divisional Court last August; but, our attention having now been called to this Act of 1860, I am driven to the conclusion that we have here that which we could not find before—namely, a definition in the strictest possible sense of the words "common lodging-house" applying to the Common Lodging Houses Acts 1851 and 1853, not merely in Ireland, but in England also. It is a necessary element of a lodging-house within this definition that persons should be lodged for hire. As here everything is gratuitous, I am driven to the conclusion that the view taken by the police magistrate and by the Divisional Court last August—their attention not having been called to this Act—was wrong, and that this appeal must succeed. I should be sorry that it should be thought for a moment that, in allowing this appeal, we are throwing any doubt whatever upon the view taken by the Divisional Court in 1900 that a lodging-house does not cease to be a lodging-house within the meaning of the Acts if it is carried on for charity and not for purposes of gain. Not one word that has fallen from us—I think I may say for my colleagues and

certainly for myself—is intended to throw the smallest doubt upon that proposition; but I should just like, not at all by way of definition, but by way of illustration, to give some instances in which I think charitable institutions making a charge may or may not fall within the Act. In the first place, I think the persons receiving the benefit of the charity must be of the very poor and humble class whose sanitary condition calls for special attention. That was the view taken by the law officers to which my Lord has referred, and that has been throughout the view of those in charge. In the next place, I think the sleeping of members not of the same family in cubicles or beds in a common room and having meals in a common room does not constitute a common lodging-house, unless such reception and accommodation can be deemed the substantial and main purpose of the charity. For example, a hospital or convalescent home is really established for other purposes, and, although the patients sleep in wards that is a mere incident, and does not suffice to constitute a common lodging-house. Lastly, a charitable institution will not cease to be a common lodging-house by reason only that the charity has other purposes, either benevolent or religious, which, taken by themselves, are outside the operation of the Acts of 1851 and 1853. This was the case with the Salvation Army shelters, dealt with in *Logsdon* v. *Booth* (*ubi sup.*).

Nov. 1.—*Avory*, K.C. and *E. A. Nepean* stated that since judgment was delivered it had been discovered that the Common Lodging Houses Act (Ireland) 1860 had been repealed by sect. 294 of the Public Health (Ireland) Act 1878 (41 & 42 Vict. c. 52), and suggested that it was doubtful whether an Act which had been repealed could be considered for the purpose of construing an earlier Act.

VAUGHAN WILLIAMS, L.J.—I do not think it makes any difference. The Act of 1860 says that certain expressions used in the Acts of 1851 and 1853 "are hereby declared and explained to have been intended to bear the following meaning." Therefore it must have been an intention at the time of the passing of those Acts of 1851 and 1853, for, although they were not intended to apply to Ireland when they were passed, it would not otherwise be true to say that this expression had "been intended" to bear the meaning stated in the Act of 1860. It is quite true that the Act of 1860 was passed for application to Ireland, but the point is that it says the expression "common lodging-house" in the Acts of 1851 and 1853 was "intended" to have the meaning afterwards stated. If it is an Act which determines the construction of another Act of Parliament for the time being, the repeal cannot make it wrong for us to look at it. The construction of an Act of Parliament must be once and for all. The repeal of this statute which has put a construction on these Acts does not alter that construction.

STIRLING and COZENS-HARDY, L.JJ. concurred.

By consent the hearing of the appeal was treated as the trial of the action, and the action was dismissed.

Solicitors: *Bellord* and *Coveney*; *Parker, Garrett, Holman*, and *Howden*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Tuesday, Aug. 8, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

THIELBAR (app.) *v.* CRAIGEN (resp.). (*a*)

Cruelty to animals—Causing animal to be cruelly ill-treated—Performance with savage animals—Bringing tame animal in contact with wild animals—Tame animal attacked and injured—Conviction—Cruelty to Animals Act 1849 (12 & 13 *Vict. c.* 92), *s.* 2.

The appellant, a lion-tamer, conducted performances in a cage with lions, and part of the performance consisted of a roundabout of six boats in each of which was seated a lion, the roundabout being draw by a pony. At one of these performances, after the appellant had introduced the pony into the cage and attached it to the roundabout, one of the lions jumped out of its boat and raised itself on to the hindquarters of the pony and sniffed at it. The appellant drove the lion back to its boat, but immediately the appellant's attention was diverted from the lion it attacked the pony, causing injuries from which the pony died two days afterwards. A considerable number of performances with the same pony had taken place for several years, and nothing of the kind had happened. Formerly during the performance three or four men with iron bars kept watch on the stage, and recently a man with a fire hose kept watch. The appellant having been convicted, under sect. 2 *of the Cruelty to Animals Act* 1849, *of having unlawfully and cruelly caused the pony to be ill-treated:*

Held, that there was sufficient evidence of mens rea *on the part of the appellant to justify the conviction, and that the conviction was right.*

CASE stated by justices of the peace for the city of Nottingham.

1. At a petty sessions held in the city of Nottingham on the 13th Dec. 1904 one Georg Thielbar (the appellant) was charged upon an information made by James Craigen (the respondent), an officer of the Royal Society for the Prevention of Cruelty to Animals, that the appellant did on the 28th Nov. 1904, at the city of Nottingham, unlawfully and cruelly cause to be ill-treated an animal, to wit, a pony.

2. On the hearing of the information it was proved to the justices that the appellant Thielbar was a lion tamer, and that he conducted a performance in a cage with lions known as "Seeth's Lions," and that part of the performance consisted of a roundabout of six boats, in each of which boats was seated a lion, such roundabout being drawn by a pony.

3. On the 28th Nov. 1904, at the Empire Music Hall, Nottingham, the appellant introduced a pony into a cage with the above-named lions, and attached the pony to the roundabout, in the boats of which five lions were seated. One of the lions jumped out of its boat and raised itself up on the hindquarters of the pony and sniffed at it. The appellant drove the lion to its boat and continued the performance, but immediately the appellant's attention was diverted from the lion it attacked

(*a*) Reported by W. W. OAR, Esq., Barrister-at-Law.

the pony, causing injuries from which the pony died two days afterwards.

4. It was alleged to the justices that the performance described in par. 2 of the case had been given, and that the pony which was injured had taken part in it between 3000 and 4000 times during the past twelve years, and it was also alleged, but not proved to the justices' satisfaction, that the lions had not attacked or injured, or attempted to attack or injure, the pony on any previous occasion, and that the pony had never exhibited any terror of the lions, but had appeared to be intimate and friendly with them.

5. It was admitted for the respondent that there was no wish on the part of the appellant that the pony should be ill-treated, and it was also admitted that the appellant did nothing more on the night of the 28th Nov. than on any previous occasion, except that on the night in question the appellant had continued the performance after the lion in question had jumped out of its boat and exhibited a savage disposition towards the pony.

6. It was also admitted on behalf of the appellant that formerly, during the performance, three or four men with iron bars kept watch on the stage, and that recently, instead of these three or four men, one man with a fire hose had kept watch during the performance.

7. It was contended before the justices on behalf of the respondent that the appellant had on the above facts caused the pony to be cruelly ill-treated.

8. It was contended before the justices on behalf of the appellant that, as this performance had been given over 3000 times, and the lions had never previously attempted to attack the pony, the appellant could not be taken to know that the probable result of introducing the pony amongst the lions would be an attack by them, or one of them, on the pony.

9. The justices, however, were of opinion that upon the above facts the appellant caused the pony to be cruelly ill-treated.

10. They therefore convicted the appellant that he did unlawfully and cruelly cause the pony to be ill-treated, and fined him 40*s*., including costs.

The question for the opinion of the court was whether there was any evidence to support the finding of the justices.

If the court should be of opinion in the affirmative, the conviction was to stand; if in the negative, the conviction was to be quashed.

The Cruelty to Animals Act 1849 (12 & 13 Vict. c. 92)—an Act for the more effectual prevention of cruelty to animals—provides:

Sect. 2. And be it enacted that if any person shall from and after the passing of this Act cruelly beat, ill-treat, overdrive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, overdriven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding five pounds.

W. H. Stevenson for the appellant.—There was no evidence upon which the justices could properly convict the appellant under the section. The justices were of opinion that the appellant "caused" the pony to be cruelly ill-treated, so that the question is, what is the meaning of the word "cause" in the section. The meaning of the word does not seem to have been considered in this connection, but it is submitted that the word "cause" refers to the case of a person doing a cruel act to an animal, of which there is no evidence in the present case. The person must be not only the *causa causans*, but also the *causa sine quâ non*:

Cullerne v. *London and Suburban General Permanent Benefit Building Society*, 63 L. T. Rep. 511; 25 Q. B. Div. 485.

It is necessary to show *mens rea* on the part of the appellant, and the facts negative any *mens rea*. It was admitted that there had been some thousands of performances, and that no injury had ever before happened to the pony, and that the appellant had done nothing more on the occasion in question than on any previous occasion, and it was admitted that there was no wish on his part that the pony should be ill-treated. Upon these admissions it is contended that the appellant could not be convicted of having "caused" the pony to be cruelly ill-treated.

Lush, K.C. (*Colam* with him) for the respondent.—The sole question is whether there was any evidence upon which the justices could properly convict the appellant. Upon the whole facts of the case the conviction was justified. It is found that formerly it was necessary during a performance to have three or four men with iron bars who kept watch on the stage, and that recently it was necessary to have a man with a fire-hose. That alone shows the dangerous nature of the performances, and the mere bringing of these savage animals in contact with a tame animal was likely to cause injury to the tame animal. On the occasion in question the appellant had continued the performance after the lion had jumped out of its boat and exhibited a savage disposition towards the pony. If *mens rea* is necessary, there was sufficient evidence of it to support the conviction.

Lord ALVERSTONE, C.J.—I am not prepared to assent to any general proposition that a performance of this kind with wild animals would come within the language of the section, as causing another animal to be cruelly beaten, ill-treated, overdriven, abused, or tortured, or procuring that to be done, merely because there was a risk of the wild animal reverting to its natural state. I think that the experience of history and one's own personal experience is that all animals of the most savage nature are under the most complete control, and I think, as far as the general principle is concerned, that performance in itself would not come within the statute. That being so, and the fact that a considerable number of performances with the same animal had taken place and nothing of the kind had happened, would go a long way to rebut any evidence of *mens rea*, which is necessary under this section, as was decided in the case of *Elliott* v. *Osborn* (65 L. T. Rep. 378), and I think in other cases. But in this case the magistrates obviously had their minds—if I may use the expression—upon the right point, and had the argument addressed to them that the appellant had continued the performance after the lion had jumped out of the cage and evinced a savage disposition towards the pony. I do not think it is too much to say that a person who takes part in these performances must expect generally

to show the greatest watchfulness and care of other animals if he risks them and their lives, and not his own life only, in connection with the savage animals. In this case there are two or three things which to my mind prevent us from saying that there was no evidence of *mens rea*. First, one of the lions jumped out of its boat, raised itself on the hindquarters of the pony, and sniffed at it. I think if that pony had had a mind and was not under control he would have left the cage after that; it is a matter of common sense; he did not because he was under the control of the appellant. The appellant drove the lion to its boat and continued the performance, but immediately the appellant's attention was diverted from the lion it attacked the pony and caused it injury. That shows that the lion was being kept under control by the personal attention of the man, and it was evident by its former conduct that it was not in its normal condition of training —I do not mean in its normal condition of savagery, but in its normal condition of training. And then we have the fact that the character of the performance was such that notwithstanding the tame condition of the animals there were three or four men with iron bars who kept watch at the cage, and recently one man with a fire hose—I do not know whether that was considered to be useful. I do not know whether they had the fire hose before, but that does not matter for the purpose of our judgment. It was a performance which, tame as the animals were, still had these surroundings. In these circumstances it seems to me that we ought not to say, where a man continues the performance after such an amount of notice and does subject an innocent and docile animal to risk and torture of that kind, that there is no evidence of *mens rea* because on previous occasions nothing had happened. I only wish it to be understood that, if it had not been for the incident which occurred on the occasion in question, I should not have been disposed to adopt the larger proposition which counsel for the respondent was beginning to invite us to adopt, that, simply because an animal has originally had a savage disposition, it must be an offence under this statute because it is put in juxtaposition with another animal to which it might do injury. I think in this present case there was some evidence for the magistrates, and in such circumstances we ought to be slow to interfere with the magistrates' decision, unless we can clearly say that they went wrong on a point of law. In my opinion they did not go wrong on a point of law, and therefore I think the appeal must be dismissed.

LAWRANCE, J.—I agree.

RIDLEY, J.—I agree. I wish to say that I do not express any opinion on the more general proposition, as it is unnecessary under the circumstances.

Appeal dismissed and conviction upheld.

Solicitor for the appellant, *E. Downes*, for *C. E. W. Lucas*, Nottingham.

Solicitor for the respondent, *S. G. Polhill.*

Aug. 7 and 8, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

NEWARK UNION (apps.) *v.* MAIDSTONE UNION (resps.). (*a*)

Poor law—Settlement—Removal—Irremovability—Computation of time of residence—Break in residence—Absence of soldier on military service—Exclusions—Poor Removal Act 1846 (9 & 10 *Vict. c.* 66), *s.* 1—*Divided Parishes and Poor Law Amendment Act* 1876 (39 & 40 *Vict. c.* 61), *s.* 34.

The absence of a person on military service from the parish where he has been residing constitutes a break in the residence necessary for the purpose of acquiring a settlement in the parish under sect. 34 *of the Divided Parishes and Poor Law Amendment Act* 1876, *notwithstanding that his absence is compulsory and that during such absence his wife and children continue to live in the parish, and that he has the intention of returning and does return to the parish. In such case the two separate periods of residence before his departure and after his return cannot be added together for the purpose of making up the three years' residence necessary to confer a settlement under that section, although the time during which a person is serving as a soldier is by sect.* 1 *of the Poor Removal Act* 1846 *to be excluded from the computation of the time for the purposes of that section.*

St. Olave's Union *v.* Canterbury Union (76 *L. T. Rep.* 517; (1897) 1 *Q. B.* 682) *followed.*

CASE stated by the Court of Quarter Sessions of the county of Kent, upon an appeal to them wherein the guardians of the Newark Union were the appellants and the guardians of the Maidstone Union were the respondents, on the question whether a pauper woman and her three children were removable from the Maidstone Union to the Newark Union.

By an order dated the 18th July 1904, made by two justices of the peace acting in and for the county of Kent, at Maidstone, upon a complaint made to them by the guardians of the poor of the Maidstone Union that a woman, named A. C., and her three children (thereinafter called the "paupers") had come to inhabit and were then inhabiting in the Maidstone Union, and had become and were then actually chargeable thereto, not having a legal settlement therein nor having resided in any part thereof for the space of one year next before the application for this warrant of removal, it was, after hearing the evidence, adjudged that the place of the last legal settlement of the paupers was in the parish, township, or place of Newark in the Newark Union, and the justices thereby ordered the guardians of the Maidstone Union to remove and convey the paupers from their union to the Newark Union and there deliver them to the guardians of such union, who were thereby required to receive and provide for such paupers according to law.

The statement of the grounds upon which such order was made, including the particulars of the settlement relied upon by the guardians of the Maidstone Union in support thereof, were as follows:

That the last place of settlement of the paupers

(*a*) Reported by W. W. OAR, Esq., Barrister-at-Law.

was at the time of making the order and still was at the date of this case in the parish, township, or place of Newark in the Newark Union; that at the time of making the order the paupers had come to and did then inhabit in and were actually chargeable to the Maidstone Union, and were not irremovable therefrom; that the said A. C. was the lawful wife and was then the widow of T. C., deceased; that the said T. C. (the husband of the pauper) resided in the parish of Newark for three years and upwards prior to the year 1889 or thereabouts, within the provisions of the statute 39 & 40 Vict. c. 61 (the Divided Parishes and Poor Law Amendment Act 1876), s. 34; and that the pauper derived and retained such settlement.

The guardians of the Newark Union appealed against the order, and on the hearing of such appeal the facts were agreed as follows:—

The pauper A. C. was the lawful wife and was at the time in question the widow of T. C., deceased, who died in June 1904. A. C. (the widow) was then residing with her three children, who were under the age of sixteen, in the parish of Boughton Monchelsea, in the Maidstone Union, and was chargeable to the common fund of that union.

The husband, T. C., resided in the parish of Newark for upwards of three years prior to Aug. 1898 in such a manner and in such circumstances as to acquire a settlement there under sect. 34 of the Divided Parishes and Poor Law Amendment Act 1876. The pauper A. C. was married to her late husband in Dec. 1897, at Newark, and in Aug. 1898 she and her husband went to reside in the parish of Boughton Monchelsea, in the Maidstone Union, and so resided until the 26th Dec. 1899. The husband being a reservist was called upon to serve with the colours in the Boer War, and on the 26th Dec. 1899 he left Boughton Monchelsea to join the colours on the 4th Jan. 1900, and proceeded to South Africa with his regiment. From the 26th Dec. 1899 the husband was absent on military service with his regiment till he was invalided home in the month of June 1900. On his return in June 1900 he went to reside with his wife and children in the parish of Boughton Monchelsea, where his wife had continued to reside with her children during his absence as aforesaid. The wife and her husband continued to reside at Boughton Monchelsea from the month of June 1900 till the month of Sept. 1902, when they went to reside in the parish of Bermondsey, London, and there resided until the death of the husband in the month of June 1904, and upon his death his widow returned to Boughton Monchelsea with her children and became chargeable as aforesaid. It was admitted that the pauper and her three children took the settlement of her husband T. C.

On these facts it was contended for the appellants, the guardians of the Newark Union, that the pauper was settled in Maidstone Union, in that the absence of T. C. (her husband) upon military service under the particular circumstances of the case did not constitute a break in his residence so as to deprive him of the settlement he was alleged to have acquired in the Maidstone Union under sect. 34 of the Act 39 & 40 Vict. c. 61.

It was contended for the respondents, the guardians of the Maidstone Union, that the absence of the husband on military service constituted a break in his residence, and that the pauper had consequently not acquired a settlement in the Maidstone Union.

The justices in quarter sessions held that the absence of the husband upon military service under the circumstances aforesaid did not constitute a break in his residence in the Maidstone Union, and that the pauper, who took his settlement, was consequently settled in the Maidstone Union.

The question for the opinion of the court was whether the justices were right in so holding.

If the court should be of opinion that the justices were right in law in so holding, then this appeal was to be dismissed and the order of the justices for the removal of the pauper and her children to the Newark Union was to be quashed.

If the court should be of opinion that the justices were wrong in law in so holding, then this appeal was to be allowed, and the case remitted to them with the opinion of the court thereon.

Sect. 1 of the Poor Removal Act 1846 (9 & 10 Vict. c. 66) provides:

> No person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years [now one year by sect. 8 of the Union Chargeability Act 1865 (28 & 29 Vict. c. 79)] next before the application for the warrant: Provided always that the time during which such person shall be a prisoner in a prison, or shall be serving Her Majesty as a soldier, marine, or sailor, or reside as an in-pensioner in Greenwich or Chelsea hospitals, or shall be confined in a lunatic asylum or house duly licensed or hospital registered for the reception of lunatics, or as a patient in a hospital . . . shall for all purposes be excluded in the computation of time hereinbefore mentioned. . . .

Sect. 34 of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61) provides:

> Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise: Provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or court think sufficient.

Hohler for the guardians of the Maidstone Union.—The decision of the quarter sessions in favour of the Newark Union was wrong. The question is whether the absence of the husband on military service in South Africa constituted a break in his residence in the Maidstone Union for the purpose of determining his legal settlement. It is submitted that such absence constituted a break in his residence for these purposes. At the time when the husband came to reside in the Maidstone Union in 1898 his legal settlement was then in the Newark Union. If he had not been called out on military service, but had resided without any break in the Maidstone Union until he finally left in Sept. 1902, then he would have acquired a legal settlement in the Maidstone Union, and that would have been his settlement on his death in 1904, as he had not resided for three years in Bermondsey, and had not acquired a settlement there. If his absence during his

military service did not constitute a break in his residence in the Maidstone Union, then his settlement was in that union at the time of his death; but if such absence on military service was a break in his residence, then the time for this purpose would begin from his return from South Africa in June 1900, and as he ceased to reside in the Maidstone Union in Sept. 1902, when he went to Bermondsey, that portion of his residence in the Maidstone Union (being less than three years) would not give him a settlement in that union, and the two periods of his residence in that union cannot be added together for the purpose of giving a settlement. Both upon the wording of the sections in the Acts and upon authority, his absence on military service was a break in his residence. By sect. 34 of the Divided Parishes and Poor Law Amendment Act 1876, a person is to be deemed to be settled in a parish in which he has resided for a period of three years in such manner and under such circumstances "in each of such years" as would, in accordance with the statutes, render him irremovable. By sect. 1 of the Poor Removal Act 1846, in determining the question of irremovability, the time during which a person is serving as a soldier is expressly excluded from the computation; so that upon the statutes the period of military service constituted a break. The case is also concluded by the cases of *Dorchester Union* v. *Weymouth Union* (54 L. T. Rep. 52; 16 Q. B. Div. 31) and *St. Olave's Union* v. *Canterbury Union* (76 L. T. Rep. 517; (1897) 1 Q. B. 682). In *St. Olave's* case it was held by the Court of Appeal that the period during which a person is a patient in a hospital must be excluded in computing the time necessary for acquisition of a settlement under sect. 34, and sect. 1 of the Poor Removal Act of 1846 exoludes equally the time during which a person is serving as a soldier, and the time during which a person is a patient in a hospital, so that there is no difference between the case where a person is absent on military service and where a person is a patient in a hospital. That case is an express authority on this question.

Percival Hughes for the Newark Union.—The quarter sessions were right in holding that the absence of the husband upon military service was not a break in his residence. There was no break in the residence by his absence on military service. During the time of his absence he still had his home in the Maidstone Union, and his wife and children resided there. He had the intention of returning to that home, and he did return to it. His absence on military service during this period was compulsory, which distinguishes this case from the case of *St. Olave's Union* v. *Canterbury Union* (*ubi sup.*), as in that case the absence of the person in the hospital as a patient was voluntary. There was therefore no break in the residence of the husband in the Maidstone Union from the time he went there in 1898 until he left in 1902, a period sufficient to give him a settlement there. In the next place, even if his absence on military service did constitute a break in his residence, the two periods of his residence there—the period before he went to South Africa, and the period after he returned—can be added together, and if so added they make up more than the three years' residence required under sect. 34 to confer a settlement by residence. Sect. 34 refers to sect. 1 of the Poor Removal Act 1846, under which a status of irremovability is acquired, and for the purpose of acquiring that status of irremovability separate or broken periods of residence may be added together, provided that the interval between the periods sought to be added together is one which by the terms of the section is to be excluded from the computation. Thus, under that section the period during which a person is a prisoner in a prison is to be excluded, and it has been held that in computing the time necessary to confer a status of irremovability under the section, the period during which a person is in prison is to be excluded; in other words, the two periods are to be added together (*Hartfield* v. *Rotherfield* and *Reg.* v. *St. Andrew, Holborn*, 18 L. T. Rep. O. S. 237, 238; 17 Q. B. 746 and 753), and the same has been held with regard to a person serving in the militia (*Horton Overseers* v. *Leeds Overseers*, 26 L. T. Rep. O. S. 73; 5 E. & B. 595). These cases show that for the purpose of acquiring a status of irremovability under sect. 1 of the Act of 1861, and consequently a settlement under sect. 34 of the Act of 1876, the period before the husband of the pauper in this case was called out for military service and the period of his residence after his return can be added together, and there was thus a residence of more than three years in the Maidstone Union. The intention clearly was that the absence of a soldier on military service should not deprive him of his rights under the section.

The following cases were also referred to:

Easton Overseers v. *St. Mary, Marlborough, Overseers*, L. Rep. 2 Q. B. 128;
Reigate Union v. *Croydon Union*, 61 L. T. Rep. 733; 14 App. Cas. 465;
West Ham Union v. *Cardiff Union*, 72 L. T. Rep. 497; (1895) 1 Q. B. 766.

Lord ALVERSTONE, C.J.—No one can deny the difficulty of these pauper settlement cases, and the courts from time to time and the House of Lords have recognised the impossibility of reconciling the views which have been expressed in some of the older cases by judges very learned in the poor law, and in one of the most recent cases which was before the House of Lords, the case of *Reigate Union* v. *Croydon Union* (61 L. T. Rep. 733; 14 App. Cas. 465), Lord Watson, in a very luminous judgment, which has been a great guide to us in one branch of this law, took the opportunity of saying that it was impossible to reconcile the cases, and that nothing would be gained by going through them. If this case had been absolutely free from authority, I should have thought that there was a good deal to be said in favour of the view that if a man had resided in a place in the sense of having had a residence there, being responsible for rent, having his family residing there, and being in fact a resident in the place in every respect, except his own personal residence there, that might be a residence within sect. 34 of the Divided Parishes and Poor Law Amendment Act 1876. The difficulty is that that section says: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein." Now, that does involve the con-

ditions of residence which are laid down in (among other places) sect. 1 of the Poor Removal Act 1846 (9 & 10 Vict. c. 66), and that section, which has given rise to very extraordinary difference of opinion in some judgments which it is quite impossible to reconcile with later decisions, says that for the purpose of residence which shall bring about irremovability the original term of five years, subsequently of three years, and now of one year, shall have excluded from it the time during which the person in question shall have been personally serving as a soldier, &c., with a number of other exceptions, and therefore one can see why the less liberal or narrower construction was put upon the word "residence" in reference to sect. 34 than would have been put upon it if that statute, so to speak, had been taken by itself. Whether or not the courts have gone too far in applying the condition in the earlier Act it is not for us to say, because we are bound in this court to follow the decision of the Court of Appeal and in fact the decision of our own court, if the views there expressed conclude this case, as counsel for the respondents has contended that they do. There are two cases which seem to me to decide distinctly that we are bound to adopt the rule for which counsel for the respondents contends, first, that there must for the whole period be a constructive residence of the person from whom the settlement is derived, and, secondly, that we cannot piece together two periods of residence in order to make up the necessary period; and, notwithstanding the contention for the appellants that, even although the absence be compulsory, the same rule applies. The first of these cases is the case of *Dorchester Union* v. *Weymouth Union* (54 L. T. Rep. 52; 16 Q. B. Div. 31), which was decided by Day and Smith, JJ. in the year 1885. That case decided—reading from the headnote in the Law Reports: "In order that a settlement by residence may be acquired under sect. 34 of the Divided Parishes Act 1876, there must have been a residence for three consecutive years under such conditions in each of such years as would have created a status of irremovability." Day, J., in dealing with that part of the case, referred to the Act which created the condition of irremovability, and decided that in order to make up the time the period during which the person was absent was to be excluded, or, in other words, he applied to the period of residence required in sect. 34 the condition of residence which is applied in the earlier Act; and Smith, J. in his short judgment says: "There are two things in the section that render the argument for the appellants untenable, because no construction at all is put on them, while they receive their natural interpretation if the argument for the respondents is right. One is the expression 'term of three years'; the other the expression 'in each of such years.' I think, therefore, the correct construction is that put on the section by the respondents, that to confer a settlement there must be residence for three consecutive years, in each of which the nature of the residence is such that the residence would have conferred a status of irremovability." It might have been open to the court, and it may still be open to the Court of Appeal, to say that, notwithstanding that view, we think that if there be a residence under a year with a temporary absence under such circumstances as these it did not prevent it from being residence; but I think this distinction is one which has to be drawn, and must be drawn, by the Court of Appeal. The other case which disposes of any doubt in the matter, if I may use the expression, and which also points out that any earlier decisions conflicting with this view must be regarded as no longer law, is the case of *St. Olave's Union* v. *Canterbury Union* (76 L. T. Rep. 517; (1897) 1 Q. B. 438, 682). There the person in question had been away in a hospital. He had had a residence maintained during all the time while he was there, and therefore in this case the point which I have suggested as being a point which, if free from authority, may be well worth consideration was obviously patent to the court which gave the decision. The case of *Dorchester Union* v. *Weymouth Union* (*ubi sup.*) came up for consideration in that case, and was approved; and the Court of Appeal decided that the character of the residence which is to give the settlement is the character of the residence which is indicated by sect. 1 of the Poor Removal Act 1846; and that, the period when the patient was absent in the hospital being obliged to be taken out, there was not a fulfilment of the conditions of sect. 34 of the Divided Parishes and Poor Law Amendment Act 1876. Counsel for the appellants asked us not to apply that to the case of a soldier, because the patient in the *St. Olave's* case had voluntarily gone to the hospital. It is not possible for us to take that view, because in sect. 1 of the Poor Removal Act 1846 the service of a soldier is coupled with and is part of the same enactment as that which contains the words "or as a patient in a hospital," and, therefore, it is not possible, in my opinion, to say that if the voluntary absence, though the person keeps a residence, prevents there being a settlement, the compulsory absence can allow that settlement to be established when the voluntary absence could not. But further than that, as I have already indicated, the Court of Appeal in the *St. Olave's* case (*ubi sup.*), having referred to the fact of a previous view having been entertained, expressly say that they prefer the reasoning in the case of *Dorchester Union* v. *Weymouth Union* (*ubi sup.*) to that in *Hartfield* v. *Rotherfield* (*ubi sup.*), where the man had been in prison, and where therefore, as he was not there of his own free will, his absence was compulsory. In the *St. Olave's* case (*ubi sup.*) the man during his absence was voluntarily in the place where he was, and both those cases were decided in favour of the view that to bring about the residence contemplated by the Act there must be a continuous residence for the necessary period. I think, therefore, that the effect of those decisions in this court, and possibly in any court short of the House of Lords, prevents it from being open to counsel for the appellants to say that he may piece together two broken periods, and also that the compulsory absence prevents him from saying that there has been no break in the period of residence. I think, therefore, that the appeal must be allowed, and that the order which settled the paupers in the Maidstone Union must be avoided, and the order of the justices for removal to the Newark Union must be reinstated.

LAWRANCE, J.—I am of the same opinion.

RIDLEY, J.—I am also of the same opinion.

Appeal allowed. Leave to appeal.

Solicitors: for the appellants, *A. J. Franks*, Newark; for the respondents, *Kingsford, Dorman, and Co.*, for *Hoar, Howlett*, and *Tatham*, Maidstone.

Wednesday, Aug. 9, 1905.

(Before Lord Alverstone, C.J., Lawrance and Ridley, JJ.)

Rex *v.* Russell and another; *Ex parte* Morris and others. (*a*)

Criminal law—Libel — Criminal information—Libel upon persons discharging public duties imposed by statute—Committee acting under Licensing Act 1904*—Libel upon—Jurisdiction of court to grant criminal information.*

The remedy of criminal information for a libel is not confined to cases of libel upon persons acting in a judicial capacity while discharging judicial duties; but the court can in its discretion grant a criminal information for the protection of persons who are discharging public duties imposed upon them by statute, in respect of a libel published of them in the exercise of those duties.

Accordingly, if a libel is published in a newspaper concerning the members of a committee of justices appointed under the Licensing Act 1904*, by the quarter sessions or the general body of justices in a county borough, to carry out the provisions of that Act and to decide as to the amount of compensation to be levied upon existing licences as a compensation fund for the extinction of other licences—the libel charging the members of that committee with being influenced by improper motives in fixing the amount of the levy—the court will grant a criminal information upon the ground that the committee are acting in the discharge of public duties imposed upon them by the Act, although they may not be acting in a strictly judicial capacity.*

Rule calling upon Sir Edward Russell and Mr. Alexander Jeans to show cause why an information or informations should not be exhibited against them or either of them for certain misdemeanours in printing and publishing in a newspaper called the *Liverpool Daily Post and Liverpool Mercury* of the 13th July 1905 certain false and scandalous libels of and concerning the applicants for the rule, eight justices of the peace in and for the city of Liverpool. The applicants were Mr. Isaac Morris, deputy-chairman of the Liverpool Licensing Committee, and the following members of the committee—namely, Sir Charles Petrie, Messrs. W. Oulton, F. W. Frodsham, Charles H. Giles, Thomas Menlove, Morris P. Jones, and Dr. Richard I. Richardson.

The libel complained of was published in the *Liverpool Daily Post and Liverpool Mercury* on the 13th July 1905, in the form of a leading article, which commented upon certain proceedings of the licensing committee. The article was as follows:

In the course of the debate on the third reading of the Licensing Act the Prime Minister said: "I am perfectly convinced that when the Bill is working, and when it is seen that by this Bill, and by this Bill alone, you can without gross injustice and discontent really diminish the number of licences in this country, all parties, forgetting the differences which have unhappily divided us for the last three months, will admit that this is the greatest contribution ever made to the cause of temperance reform." Brave words these! Now, let us see how this greatest contribution ever made to the cause of temperance reform is operating in Liverpool to diminish the number of licences. Yesterday there was a meeting of the licensing committee to fix the rate of levy on licensed houses to form the compensation fund. Four members of the committee—Mr. Charles Jones, Mr. Henderson, Mr. T. D. Laurence, and Mr. Doughan—were in favour of fixing the rate at the maximum allowed by the Act. Sir Thomas Hughes, probably feeling that it would be impossible to persuade the committee to impose the maximum, suggested three-fifths. Even this modest compromise was rejected, and the committee decided, by the votes of Sir Charles Petrie, and Messrs. Isaac Morris, Oulton, Frodsham, Giles, Menlove, M. P. Jones, and Richardson, to fix the rate at half the maximum. These gentlemen will hardly pretend that they were influenced in the course they took by the desire to diminish the number of licences in the city. The sum which it will be possible to raise in the current year at the fixed rate will amount to about 17,500*l*. Now, apart from the expenses of administration, which will be considerable, the very modest programme which the Bench have decided on for the present year must involve an expenditure considerably in excess of the total that can be raised by yesterday's decision. The Bench have not ventured to propose the extinction of a single full licence, but they have taken a few of the 1869 beerhouses in the A and B divisions for abolition under the Act. Compensation for a few of these, amounting in all to 8000*l*., has been fixed by mutual agreement, and the rest have been referred, as provided by the Act, to the arbitration of the Inland Revenue authority. The amount of these cases is not likely to be less than 13,000*l*. The matter, therefore, stands thus: For the extinction of the selected licences—licences which the bench have decided ought to be extinguished forthwith in the interests of the community—a sum of not less than 21,000*l*. is required, and now the licensing committee decline to levy a larger sum than 17,500*l*. There is only one explanation of this state of affairs. The dominant party on the Bench do not desire to facilitate the working of "the greatest contribution ever made to the cause of temperance reform"; they do not desire to diminish the number of licences in the city, but rather to hamper and obstruct those who are striving to effect, without "gross injustice and discontent," a sorely needed reduction. The effect of the committee's decision will be to make the rate of reduction actually less than it was under the old order of things, a result which, no doubt, was shrewdly foreseen. We congratulate "the trade" upon the ability and courage of their friends—we had almost said their representatives—on the licensing committee.

The affidavit of Mr. Isaac Morris upon which the rule was granted was as follows:

1. Prior to the Licensing Act 1904 I had been a justice of the peace for the city of Liverpool for fourteen years, and as such was closely identified with the administration of the Licensing Acts in Liverpool, sitting as a magistrate at the general annual licensing meetings and at the transfer sessions.

2. In the city of Liverpool there are 152 justices of the peace, and on the 19th Jan. 1905 a meeting of the justices was specially convened to appoint a licensing committee for the year 1905, pursuant to and in order to carry out the provisions of the Licensing Act 1904.

3. At this meeting a licensing committee, consisting of sixteen members, including myself and the other justices above named, was unanimously appointed, with instructions to report to the whole body of justices what powers and duties the body should delegate to the

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

committee pursuant to the Act, and at a meeting of the committee held on the 24th Jan. 1905 I was unanimously appointed deputy-chairman thereof.

4. On the 31st Jan. 1905 the licensing committee appointed as aforesaid made a report to the whole body of justices for the city of Liverpool (a copy of which was made an exhibit), and on the 7th Feb. the report was unanimously adopted at a meeting of the whole body of the justices, specially convened to consider the report a print whereof had previously been sent to every member of the body.

5. The committee, after visiting the premises and hearing evidence in court on application for renewal, decided to refer certain cases to the whole body of justices, and pursuant to sect. 1, sub-sect. 2, of the Act, on the 22nd March 1905 made a reference and a report thereon.

6. On the 29th March the report was unanimously adopted at a meeting of the whole body of justices, specially convened to consider such reference and report.

7. In eighteen cases the amount of such compensation had been fixed by agreement with the persons interested, but in the remaining ten cases no agreement had been arrived at with the persons interested, and these claims had consequently been referred to the Commissioners of Inland Revenue for determination in pursuance of the provisions of the Act. The commissioners have not yet given their decision in any of the cases. The total amount claimed in the eighteen cases was 12,548*l*., but, after appearance and discussion before the committee, the various claimants reduced their claims, and filed agreements accepting sums amounting in the aggregate to 7850*l*., and the claims so reduced were approved by the committee. The amount claimed in the remaining ten cases was 13,541*l*., and, taking them upon the same basis, they would amount to 8480*l*. The maximum levy is estimated to produce 36,705*l*., so that in my judgment half the maximum levy will be sufficient to meet all the claims and pay the costs of the administration of the Act, and in my opinion it would not have been consistent for the committee to have fixed the levy at any sum in excess of one-half the maximum levy, having regard to the representations made in the reports.

8. On the 12th July 1905 a meeting of the committee was held, having been specially convened to determine the amount of the levy to compensate the holders of these licences which had been taken away. The meeting of the committee was a private one, consisting only of the members thereof and their clerk.

9. A minority of the members of the committee desired to levy the maximum amount sanctioned by the Licensing Act 1904. The chairman, Sir Thomas Hughes, advocated a levy of three-fifths of the maximum, but a majority, consisting of myself and the other justices above named, were of opinion that a levy of one-half of the maximum would be sufficient to provide for all compensation necessary for the said cases and the expenses of administration, and a resolution to that effect was accordingly carried.

10. On the 13th July 1905 a leading article appeared in the *Liverpool Daily Post and Liverpool Mercury*, a newspaper which enjoys a very wide circulation in Liverpool and throughout the North of England and North Wales, a true copy of which article is now shown to me.

11. The said *Liverpool Daily Post and Liverpool Mercury* is printed and published by Sir Edward Russell and Alexander Jeans at Victoria-street and Wood-street, Liverpool, and they are also the editors thereof.

12. The said article contains a garbled account of the said meeting, and many inaccurate and misleading statements, as will be seen by a comparison of the same with the statements herein contained and the reports aforesaid.

13. The said article contains the following false and malicious statements: (*a*) "These gentlemen will hardly pretend that they were influenced in the course they took by a desire to diminish the number of licences in the city." (*b*) "There is only one explanation of this state of affairs. The dominant party on the Bench do not desire to facilitate the working of 'the greatest contribution ever made to the cause of temperance reform'; they do not desire to diminish the number of licences in the city, but rather to hamper and obstruct those who are striving to effect without 'gross injustice and discontent a sorely needed reduction." (*c*) "The effect of the committee's decision will be to make the rate of reduction actually less than it was under the old state of things, a result which no doubt was shrewdly foreseen." (*d*) "We congratulate 'the trade' upon the ability and courage of their friends—we had almost said their representatives — on the licensing committee."

The plain and obvious meaning of these statements is that I in common with the majority of the said committee was not actuated by a fair and impartial motive in the exercise of my duties, but wished to obstruct and defeat the administration and provisions of the said Act, being actuated by a corrupt and wicked desire to favour the owners and holders of licences, and that we administered the said Act for the purpose of safeguarding and protecting the interests of the liquor trade, all of which statements and suggestions are absolutely false and baseless, so far as I am concerned.

14. In the discharge of my duties aforesaid I was solely actuated by a desire to discharge the same faithfully and impartially without fear or favour. The said false and malicious statements are most seriously calculated to prejudice the administration of justice and the carrying out of the provisions of the Licensing Acts.

The other justices who voted in the majority made affidavits confirming generally the statements in the above affidavit of Mr. Morris.

The affidavit made by Sir Edward Russell, in answer to the rule, was as follows:

1. Since 1869 I have been sole controlling editor of the *Liverpool Daily Post*. Before that date I had been assistant editor and writer for five and four years respectively, so that I have worked continuously as a journalist in Liverpool for forty-five years, and have a general knowledge of its public affairs.

2. On licensing questions the *Liverpool Daily Post* has not taken any extreme line, but as in duty bound it has duly observed and commented upon the administration of the licensing laws.

3. For some time prior to the passing of the Licensing Act 1904 very important action was taken by the Bench in Liverpool for the better regulation of the trade, and for the reduction in the number of licences, 541 licences having been extinguished since 1889. In the city and throughout the country this policy of the Liverpool Bench has been recognised as a great improvement in administration, and as productive of considerable social amelioration. Among others, the Bishop of Liverpool has emphatically expressed himself to this effect. Liverpool has, perhaps, to a greater degree than almost any city in England been afflicted by the curse of excessive drinking, and it is almost invariably the case that the judges of assize attribute a large proportion of the crime which comes before them to this cause. It has been the part of the *Liverpool Daily Post*, and of myself, as its editor, to do all that was possible to strengthen the hands of those who were endeavouring to reduce the facilities for excessive drinking in the city, and to diminish as far as possible the number of licensed houses, which must be admitted on all hands to be sadly beyond the requirements of the population.

4. It would have been unworthy and futile for any responsible journal in Liverpool not to have taken

serious notice of the initial measures adopted by the administrative body in bringing the new Act into work.

5. Accordingly, when the Licensing Act now in force was about to come into operation, the *Liverpool Daily Post and Liverpool Mercury* published the leading article, a copy of which I produce as an exhibit to this affidavit, in which a strong recommendation was given to the magistrates that an effort should be made to guard against the licensing committee being nominated in a spirit of political partisanship, in order to secure the best administration of the Act in the public interest, and more especially that those entrusted with the administration of the Act should, by means of the levy under the Act, proceed with the reduction of the licences as in recent years, by which policy the licensing magistrates had improved the character of Liverpool and earned warm public approbation.

6. The aim of the paper being to advocate the particular method of administering the Act thus specified, when the committee (which was subsequently appointed) proceeded, on the 12th of July 1905, to fix the rate of the levy on licensed houses to form the compensation fund, the *Liverpool Daily Post and Liverpool Mercury*, in the article now attacked, complained that this particular method of administering the Act had not been adopted.

7. I have read an affidavit by Mr. John Henderson, sworn herein in opposition to a rule *nisi* for a criminal information against myself and Alexander Grigor Jeans, and I say that all the facts therein set out were (in substance) known to me (except those set out in pars. 13 and 16) when the aforesaid article was written. In the comment made in the said article there was no desire to reflect on the character or the personal conduct of the magistrates who were named as voting in the majority. The said magistrates had chosen to support a particular policy which, in the opinion of the *Liverpool Daily Post and Liverpool Mercury* was prejudicial to the public interest. The course which they had taken in limiting the levy more narrowly than, in the opinion of the *Liverpool Daily Post and Liverpool Mercury*, was required by the public interest was part of a definite administrative policy. This policy seemed to the *Liverpool Daily Post and Liverpool Mercury* not only in itself undesirable, but deserving of the most rigorous scrutiny in that those who had carried it out were all on one side of politics, and that side the side popularly, and in Liverpool actually, associated with the liquor trade.

8. So far is it from being the case that the *Liverpool Daily Post and Liverpool Mercury* is actuated by malice towards any of the complainants, I myself, who accept all responsibility for the tone of any comments appearing therein, hold in respect and esteem all the present complainants, and several of them are my personal friends. They were entitled to prefer the policy which they, as administrators of the Act, thought the best, but, as controlling the utterances of the *Liverpool Daily Post and Liverpool Mercury*, I felt it necessary, in the ordinary course of my duty as the conductor of a public journal, to express the opinion that they had administered the Act in a manner less beneficial than would have been the case if they had adopted the policy of the minority, and that by so administering the Act they were actually benefiting the liquor trade, and were in danger of becoming in fact, though not in intention, its representatives. There was no idea whatever of reflecting on the magistrates in the exercise of any judicial or magisterial functions. The *Liverpool Daily Post and Liverpool Mercury* regarded the whole matter as one of responsible administration, and criticised the conduct of the majority in precisely the same manner as it might have criticised the action of the Admiralty, or the War Office, or the choice by the city council or any of its committees of any particular method of carrying out an improvement Act.

9. I respectfully submit that the results of the deliberations of the said committee is all the more a fair matter for criticism inasmuch as their meeting of the 12th July 1905, as well as some other meetings, was held in private.

10. I have read what purports to be a copy of an affidavit of Mr. Isaac Morris sworn in support of an application for a rule *nisi* for a criminal information against myself and Alexander Grigor Jeans. It is not the fact as therein stated that Mr. Jeans is one of the editors of the *Liverpool Daily Post and Liverpool Mercury*.

An affidavit was also made by Mr. John Ferguson, a justice of the peace for the city of Liverpool, and one of the committee in question. This affidavit was filed on behalf of the respondents, setting out the facts at length, and supporting the statements made by Sir Edward Russell in his affidavit, and tending to show that the statements in the alleged libel were justified by what was done by the majority of the committee; and the other members of the committee who voted in the minority also made affidavits confirming generally the affidavit of Mr. Ferguson.

Asquith, K.C. and *Horridge*, K.C. (*Hemmerde* with them), showed cause against the rule.—Sir Edward Russell, as the editor of the paper, takes all the responsibility for what appears in the paper, Mr. Jeans being the printer and publisher. There is no ground whatever, even if the applicants' evidence remains unanswered, for putting into operation this prerogative remedy on behalf of the applicants, whose only grievance is that in the discharge of administrative functions they had been the subject of perfectly legitimate criticism, although that criticism is severe. The limits which regulated the discretion of the court in granting a criminal information varied greatly from time to time, but the whole subject was reviewed in *Reg.* v. *Labouchere* (50 L. T. Rep. 177; 12 Q. B. Div. 320) by Lord Coleridge, C.J., and he pointed out that while in the time of Lord Tenterden—or even earlier—criminal informations were granted freely, the modern tendency had been to restrict them and to confine them to cases in which the libel complained of was published of persons occupying a judicial or official position, in respect of their discharge of the duties of that position, and where the libel was in its terms scandalous, but that they were not granted in cases of fair comment or of legitimate criticism. Unless those two conditions are satisfied —that the libel is published of persons occupying a judicial or official position, and that in its terms it is scandalous—the well-established practice of this court is to refer the applicants to the ordinary remedy provided by the law. The criticism here was a criticism of the conduct of the applicants as members of the Licensing Committee of Liverpool with regard to recommendations for the reduction of licences, and the levying of compensation under the Licensing Act 1904 for the extinction of those licences. That committee is appointed under sect. 5, sub-sect. 4, of the Licensing Act 1904, and their status and functions are thereby determined. Under that Act the jurisdiction of the licensing justices to refuse the renewal of licences, except on certain specified grounds, has been transferred to quarter sessions, but in the case of county boroughs that jurisdiction goes, not to the quarter sessions, but to the

general body of justices under sect. 5, sub-sect. 4. The committee are not a licensing authority; they are a reporting authority. The applicants in this case were exercising the functions of such a committee, and in doing so were attacked. The justices acting on such a committee were not acting judicially. In *Boulter* v. *Kent Justices* (77 L. T. Rep. 288; (1897) A. C. 556) it was held that licensing justices do not act as a judicial body, and the Lord Chancellor points out that the justices were not acting as judges at all, and he draws the clearest distinction between justices who are acting judicially and those who are acting in an administrative capacity only. So, in *Royal Aquarium, &c., Society* v. *Parkinson* (66 L. T. Rep. 513; (1892) 1 Q. B. 431), it was held that the London County Council, when engaged in hearing applications for music licences, were not acting judicially, and the same principle appears in *Rex* v. *Farnham Justices* (86 L. T. Rep. 839, s.c. *Rex* v. *Howard* (1902) 2 K. B. 363). This committee had considered the question of what reductions should be made in the licences, and had come to the conclusion that certain reductions should be made, and so reported to the general body of justices, who in a county borough take the place of quarter sessions, and who confirmed the report. The committee then proceeded to consider how much compensation should be levied from the surviving licences to compensate the extinguished licences, and it was in respect of their proceedings in discussing and determining that question of the levy that these comments were published. That was in no sense a judicial act; it was a purely administrative act. Reading the article complained of, there never has been a case, for the last fifty years, at any rate, in which this court has granted a criminal information in respect of an article couched in such terms. It was a criticism—perhaps severe—of the action of these gentlemen sitting in the exercise of a purely administrative function in regard to a matter in which the whole community of Liverpool were interested, and in which they have not been guided by the rules of sworn evidence. Journalists have a right to criticise their conduct as they have to criticise the conduct, say, of the city council, subject to the ordinary liability as to libel. The cases referred to on the application for the rule—namely, *Reg.* v. *Masters* (6 Times L. Rep. 44), and *Ex parte the Earl of Radnor* (33 J. P. 740), in which criminal informations were granted, were wholly different, as there the justices were sitting in their judicial capacity simply. [They referred to the facts as set out in the affidavits.]

Sir *Edward Clarke*, K.C. and *W. F. Taylor*, K.C. (*F. E. Smith* and *W. H. Oulton* with them) in support of the rule.—The rule ought to be made absolute. The sting of this article is not in its imputation on a political party in Liverpool. The really serious part of the libel is that it mentions by name a certain number of gentlemen who are clothed with a public duty and are discharging a public duty, and it is said at the end of the article that they were acting as the representatives of a trade. That has nothing to do with a political party at all. It was an imputation that these justices were allowing a private influence to affect them, which ought not to be allowed to affect them in the discharge of these public duties; and, in fact, in the affidavit made by Sir E. Russell he does not recede from that position, but rather makes it worse (par. 7 of his affidavit). It is not suggested in any of the affidavits that any of these justices had any connection whatever with the liquor trade; but the suggestion is that they have allowed themselves to be influenced by motives from which they ought to keep themselves absolutely free if they are properly to discharge these important public duties. There is no ground at all for the distinction that has been drawn between the administrative and the judicial proceedings of magistrates. A magistrate is a person clothed with certain duties, some of them judicial and some administrative, and it is just as serious an interference with the discharge of those duties to say of him that he is corrupt in his administrative capacity as to say of him that he is corrupt in his judicial capacity, and it comes within the very definition given for the respondents, that a criminal information would be granted where the libel was published in respect of persons occupying judicial or official positions and regarding their conduct in such positions. The present case comes precisely within that definition, as the applicants were occupying judicial and official positions. When they were deciding on a matter which they might decide either way, the amount of the levy to be made, they were exercising their authority as magistrates, and they have a right to be protected in the exercise of their public duties, and from statements which, if true, would render them wholly unfitted for their position. They referred to

Ex parte Hoskyns, 33 J. P. 68.

Lord Alverstone, C.J.—When this rule was granted I departed from the course usually followed in granting rules *nisi* by pointing out that we considered there was a serious matter to be discussed in order that the court might come to a right decision as to whether it was a case for a criminal information or not, and that we were not in any way expressing any opinion in granting the rule *nisi*. That point has been discussed, and the effect of the very able and careful argument on behalf of Sir Edward Russell and Mr. Jeans has been to force me to the conviction that this rule must be made absolute. I am quite aware, and have often recognised, that the practice with regard to a criminal information has of recent years been very properly narrowed. I have had occasion to point that out several times during the few years I have been on the bench. I know it is confined to special cases, and it is said that it should only be applied in order to protect public persons in the discharge of their public duties. I do not want to draw any distinction between persons who are in a high position and persons who are in a low position. I do not think that would be a right distinction to draw, especially as in these days people of, comparatively speaking, humble position are sometimes called on to perform very responsible duties, and are entitled to as much protection as the highest in the land. If there had been a case of honest political criticism upon the conduct of an individual, or possibly on the conduct of more than one individual—if this could be regarded and read by the ordinary commonplace mind as being a mere discussion as to the way in which judicial or *quasi* judicial functions had been exercised, I

should be very slow indeed to allow the criminal law to be put in force in that way. But it seems to me I must point out, having regard to the criticism and to the argument on the criticism which has been addressed to the court, that what we have to consider is whether we should sanction a criminal proceeding of this kind on the same kind of ground as would be considered by a judge at chambers if it had been an indictment against an individual where a rule has been obtained to issue a criminal proceeding against the editor or proprietor of a newspaper. But I have said before, and I wish to repeat, that I recognise that in exceptional cases, and under exceptional circumstances, this protection ought to be given. I decline to recognise the theory that no protection should be offered by criminal information simply because people are not acting in a judicial capacity. There are authorities which show that in those cases it ought not to be applied; but I prefer to say that, in my opinion, it would be highly detrimental to the public interest if public officials called on to perform public acts were not entitled to the same protection simply because the particular act they were then doing was said not to be a judicial act. It is, in fact, inverting the proposition. It is attempted to be argued that, because it is understood there is protection for officials when they are acting judicially, they ought not to be protected when they are not. It will be found—and the authorities which Mr. Asquith has read are illustrative of this—that this protection has been accorded where persons are discharging public duties as well as where they are discharging judicial duties. But there are other considerations which induce me to come to the conclusion that this case is very near the border line. It must be remembered that we are dealing with a new Act of Parliament, and with new duties imposed on magistrates. It cannot be disputed that, if it had been simply the renewal or the refusal to renew a licence at quarter sessions, and the magistrates had been acting and sitting as magistrates to decide whether a licence should be renewed or not, they would have been acting judicially. What is their position here? The quarter sessions has to decide finally whether or not licences are to be renewed or refused, subject to compensation. I do not wish to express any opinion as to what its effect would be, but I have no doubt, as at present advised, that, exercising that jurisdiction, the quarter sessions are acting *quasi*-judicially if not judicially. In this case the statute contemplates the delegation of the duties of the quarter sessions to a committee, and one of the things that the committee has to decide is what rates shall be imposed in the locality under sect. 3, sub-sect. 1, of the Licensing Act 1904, in order to form a fund out of which compensation shall be paid; and if they decide that no amount shall be imposed they have to certify that. It is enough for these purposes to say that in my opinion it is not accurate to describe the functions of these magistrates as being purely administrative, but I wish it also to be understood that, it being a public duty to be performed by them impartially and as magistrates, I must not be thought to concur in the opinion that they are entitled to less protection because this particular act in which they were engaged might be said to be not strictly judicial in character. With regard to the passages which were read from the cases of *Boulter* v. *Kent Justices* (*ubi sup.*), *Royal Aquarium, &c., Society* v. *Parkinson* (*ubi sup.*), and *Rex* v. *Howard* (*ubi sup.*), they were passages which had no relation to the subject-matter we are now considering. They were only expressions of opinion as to what was the position of persons who were exercising the functions of licensing justices as a preliminary licensing authority under the Acts of Parliament, and they certainly had no relation, and were intended to have no relation, to such a matter as we are now considering. I recognise, therefore, that in order to justify the court in making the rule absolute for a criminal information the persons who are seeking the protection in question must in such a case as this satisfy the court that they were exercising a public duty as magistrates, and that in performing these duties they were discharging duties imposed on them by statute. Certainly, to anyone who has followed the agitation on the licensing question and the legislation which led up to the Licensing Act of 1904 there are few branches of public duty which require a greater demand upon impartiality and fair dealing. I have said this much as clearly as I could in order that it may be recognised what is the modern state of the law and the modern application of the rule regarding criminal information. What is this case? All the seven gentlemen who voted in favour of the reduction of the amount to be levied are named, all of them, in the libel, or the alleged libel. The gentlemen who opposed them are referred to as being in favour of fixing the maximum amount, and the chairman as supporting a compromise. The article proceeds: "These gentlemen will hardly pretend that they were influenced in the course they took by the desire to diminish the number of licences in the city." I think, as regards that paragraph, that Mr. Asquith's criticism was just, that it was in the nature of comment upon what might have been done by one side or the other. If that had been the only criticism I should have agreed entirely with Mr. Asquith that it was not a case for a criminal information, but it must be taken in connection with the passage in which the names are mentioned and contrasted with other names. Because what follows? Statements were made in the article to which no exception could be taken as to the amount which would be required, whether it was 21,000*l.* or only 17,500*l.* I do not think that makes much difference. That would be fair comment; but there follows this: "The dominant party on the bench do not desire to facilitate the working of the"—I will leave out the laudatory phrases from a political speech—"they do not desire to diminish the number of licences in this city, but rather to hamper and obstruct those who are striving to effect, without gross injustice and discontent, a sorely-needed reduction." I can only read that, after the fullest consideration, as any fair-minded man would, as a suggestion that these gentlemen did not approach the question fairly or with one desire to discharge a public duty fairly, but were striving to prevent the Act from being carried into effect. The article proceeds: "The effect of the committee's decision will be to make the rate of reduction actually less than it was under the old order of

things, a result which no doubt was shrewdly foreseen. We congratulate the trade on the ability and courage of their friends — we had almost said their representatives—on the licensing committee." I know the high position filled by Sir Edward Russell, and I note his counsel's statement that he was influenced by the most honest and straightforward motives, but he says in one breath that he did not wish to attack these gentlemen's motives; yet he has given no explanation of the words, "A result which no doubt was shrewdly foreseen." There can be but one thing aimed at when so alluding to the conduct of these gentlemen; and then there are the words, "We congratulate the trade on the ability and courage of their friends," and then are interposed the words, "We had almost said their representatives—on the licensing committee." I know it is very easy for us sitting here to criticise such language—and we ought to be very careful in judicial criticism—and one ought to make every allowance possible for a sudden thought which occurs to the mind of some brilliant writer under the pressure of publication and on the moment, but here is a public charge persisted in—that these seven gentlemen who voted had been actuated by these motives. In my opinion, this is one of the cases in which, for the protection of public men in the discharge of a public duty, the remedy by criminal information still remains. The doubt I had when I granted this rule—and I had grave doubts as to whether the article was one which came within the rules recently applied to criminal information —has been removed, and the case is one in which there is no alternative but to make the rule absolute. I think it will be sufficient to make it absolute only against Sir Edward Russell, because from the position of Mr. Jeans, as has been stated, he was not a party to the publication of this article. So far as he is concerned, the rule will be discharged without costs; but the rule will be made absolute in the case of Sir Edward Russell.

LAWRANCE, J.—I agree.

RIDLEY, J.—I also agree.

Rule absolute against Sir E. Russell; discharged as against Mr. Jeans.

Solicitors: in opposition to the rule, *Field, Roscoe*, and *Co.*, for *Oliver Jones, Billson*, and *Co.*, Liverpool; in support of the rule, *Sharpe, Parker, Pritchards, Barham*, and *Lawford*, for *Payne, Frodsham* and *Bewley*, Liverpool.

HOUSE OF LORDS.

June 30, *July* 3, 4, *and Aug.* 3, 1905.

(Before the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN and ROBERTSON.)

GUARDIANS OF WEST HAM *v.* GUARDIANS OF HOLBEACH. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Poor law—Settlement—Three years' residence by child under sixteen—Divided Parishes Act 1876 (39 *&* 40 *Vict. c.* 61), *ss.* 34, 35.

Under sect. 34 *of the Divided Parishes Act* 1876 *a child under the age of sixteen can by three years' residence in a parish with his parents acquire a settlement in that parish which can be made available after he has attained the age of sixteen.*

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal (Collins, M.R., Romer and Mathew, L.JJ.), reported 91 L. T. Rep. 304; (1904) 2 K. B. 121, who had affirmed a judgment of the Divisional Court (Lord Alverstone, C.J., Wills and Channell, JJ.), reported 89 L. T. Rep. 609; (1903) 2 K. B. 627, upon a case stated upon an appeal to quarter sessions as to the settlement of a pauper.

The pauper, George Ernest Neep, was the illegitimate child of Emma Neep, and was born in the Holbeach Workhouse, in the respondents' union, on the 25th Oct. 1899. Emma Neep, mother of the pauper, was the illegitimate child of Mary Ann Neep, and was born in the parish of Tilney St. Lawrence, in the Wisbech Union, on the 11th April 1879. Mary Ann Neep married Alfred Frederick Chapman at Tilney St. Lawrence on the 23rd Dec. 1881. From the 27th June 1890 to the 7th Sept. 1893 Alfred Frederick Chapman resided in the parish of West Ham, in the appellants' union, with his wife, for a term of three years, in such manner and such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render him irremovable therefrom and settled therein. From the 7th Sept. 1893 Alfred Frederick Chapman continued to reside in the parish of West Ham, and was in receipt of relief from the West Ham Union until his death on the 8th Sept. 1894. His wife, Mary Ann Chapman, resided with him until his death. From the 8th Sept. 1894 Mary Ann Chapman continued to reside in the parish of West Ham, and was in receipt of relief from the West Ham Union from the 8th Sept. 1894 until the 28th Nov. 1895, when she ceased to reside in the West Ham Union. She died in the Poplar Union infirmary on the 14th Oct. 1896. From the 27th June 1890 to the 28th July 1893 Emma Neep (the mother of the pauper) resided with Alfred Frederick Chapman and her mother, Mary Ann Chapman, in the parish of West Ham, in the appellants' union. On the 28th July 1895 she went into service in the Poplar Union, and had since had no settled residence. On the 3rd Dec. 1901, the pauper then being resident at Long Sutton, in the parish of Long Sutton, in the respondents' union, and having become actually chargeable to the common fund of the union, the respondents obtained an order of justices adjudging the pauper to be settled in the parish of West Ham, in the appellants' union, and ordering the appellants to receive and provide for such pauper according to law. This order was affirmed by the Divisional Court and the Court of Appeal. The question turned upon the construction of sects. 34 and 35 of the Divided Parishes Act 1876, which are in the following terms:

Sect. 34. Where are person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise. . . .

(*a*) Reported by C. E. MALDEN, Esq. Barrister-at-Law.

Sect. 35. No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be up to that age, and shall retain the settlement so taken until it shall acquire another. An illegitimate child shall retain the settlement of its mother until such child acquires another settlement. If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

H. Avory, K.C., *M. Lush*, K.C., and *Grubbe* appeared for the appellants, and contended that the court below considered that the case was governed by *Guardians of Highworth and Swindon* v. *Guardians of Westbury* (61 L. T. Rep. 733; 14 App. Cas. 465), which followed *Reg.* v. *Elvet* (2 E. & E. 266; 29 L. J. 17, M. C.), but those cases deal with the case of a child over sixteen, and do not really touch the point. In the report in the *Law Journal* the words "*independent* status of irremovability," on which Collins, M.R. relied, do not occur in the judgment of Erle, J.; the words are, "*original* status of irremovability."(a) "Residence" must be by choice, not only a mere physical presence in the locality. Sect. 34 was not intended to deal with the case of children under sixteen, and the last clause of sect. 35 only allows of one derivation. It is impossible to derive a settlement from a settlement which is itself derivative. They also referred to

Medway Union v. *Bedminster Union*, 61 L. T. Rep. 733; 14 App. Cas. 465;
Reg. v. *St. Anne's, Blackfriars*, 22 L. J. 137, M. C.;
Guardians of Salford v. *Guardians of Manchester*, 48 L. T. Rep. 119; 10 Q. B. Div. 172;
Dorchester Union v. *Poplar Union*, 59 L. T. Rep. 687; 21 Q. B. Div. 88;
Manchester Overseers v. *Ormskirk Union*, 62 L. T. Rep. 661; 24 Q. B. Div. 678;
West Ham Union v. *St. Matthew's, Bethnal Green*, 70 L. T. Rep. 818; (1894) A. C. 230;
Reigate Union v. *Croydon Union*, 61 L. T. Rep. 733; 14 App. Cas. 465;
Guardians of Wayland v. *Guardians of Mitford*, 62 L. T. Rep. 691; 24 Q. B. Div. 122;
Reg. v. *St. Mary, Exeter*, 31 L. J. 77, M. C.;
Woolwich Union v. *Parish of Fulham*, 92 L. T. Rep. 838; (1905) 2 K. B. 203;
Guardians of West Derby v. *Guardians of Atcham*, 24 Q. B. Div. 117;
Rutherglen v. *Glasgow*, 86 L. T. Rep. 607; (1902) A. C. 360.

Rawlinson, K.C. and *Marriott*, for the respondents, maintained that the only question was whether the pauper was irremovable. Sect. 34 does not distinguish between acquired and original irremovability. The case of illegitimate children was dealt with by sect. 71 of the Poor Law Act 1834, and sect. 35 of the Act of 1874 is to the same effect. Lord Watson was mistaken in supposing in the *Highworth* case that it only applied to persons over sixteen. See also the provisions of 9 & 10 Vict. c. 66, and the case of *Bodenham* v. *St. Andrew's, Worcester* (1 E. & B. 465). *Reg.* v. *St. Anne's, Blackfriars* (*ubi sup.*) does not touch the case at all.

M. Lush, K.C. in reply.—The provisions of the Act of 1834 and of 9 & 10 Vict. c. 66 do not apply. See 24 & 25 Vict. c. 55, s. 2.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Aug. 3.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: In this case, if it were *res integra*, I might be inclined to favour the view which Mr. Lush has urged upon us with so much ability. Indeed, I am not sure that I would not go further than he does and strive to bring back the meaning of the word "settlement" to the meaning it had when Bott and Lord Kenyon were its expositors; but the statute, which has turned a status of irremovability into a settlement, has rendered such an effort impossible. The case of *Reg.* v. *Elvet* (2 E. & E. 266; 29 L. J. 17, M. C.), expounded as it was by this House, decides the question here in debate. Rightly or wrongly, this House has decided that unemancipated residence could found a settlement in the *Highworth* case (61 L. T. Rep. 733; 14 App. Cas. 465). I see no answer to what the Master of the Rolls pointed out, that, if a part of the residence while under sixteen may be made available to make up the settlement, what logic could be suggested that the whole residence under sixteen cannot do so also? If that decision was wrong we must abide by it till it is altered by an Act of Parliament. I move, therefore, that the appeal be dismissed with costs.

Lord MACNAGHTEN.—My Lords: The question proposed in the special case for the opinion of the court is whether Emma Neep, the mother of the pauper, acquired a settlement in West Ham under the Divided Parishes Act 1876, ss. 34 and 35. The opinion of the Court of Appeal was in the affirmative. In the result of that opinion I agree. But I was much impressed by the argument of counsel as to the difficulties that may arise if it be held that an unemancipated child can acquire a settlement by residence no part of which is after emancipation; and, therefore, without expressly disagreeing with the view of the Lord Chancellor, I should be disposed to rest the case on sect. 35 rather than on sect. 34. Emma Neep was herself illegitimate. Her mother married after Emma Neep was born and derived from her husband a settlement in West Ham. Emma Neep resided with her mother and her mother's husband in West Ham, and therefore she took and followed her mother's settlement until she attained the age of sixteen. On attaining that age she retained her mother's settlement. But her settlement then, in my opinion, ceased to be a derivative settlement, and became a statutory settlement—a settlement created for the first time by the second clause of sect. 35 of the Act of 1876. And thus Emma Neep acquired a settlement, which was no longer a derivative settlement, in the parish of West Ham. By the first clause of sect. 35 all derivative settlements are abolished, with two exceptions. One is the case of a wife, which has no application to the present question, and the other is the case of a legitimate child

(a) In the reports of the case in 33 L. T. Rep. O. S. 202; 5 Jurist, N. S. 1350; and 7 W. R. 596 the adjective is omitted altogether.

under the age of sixteen. In the latter case the child on attaining sixteen retains the settlement which it had taken up to that age. But it can no longer be a derivative settlement, for the enactment expressly abolishes derivative settlements with the two exceptions I have referred to. The corresponding result must, as it seems to me, follow in the case of an illegitimate child, though the provision is rather obscure, owing to its brevity. The practical effect of the second clause of sect. 35 is, says Lord Watson, to place illegitimate as nearly as may be on the same footing as legitimate children.

Lord ROBERTSON concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellants, *F. E. Hilleary*.

Solicitors for the respondents, *Callard* and *Vulliamy*, for *R. P. Mossop*, Holbeach.

May 18, 19, *and Aug.* 3, 1905.

(Before the LORD CHANCELLOR (Halsbury), Lords DAVEY, JAMES OF HEREFORD, and ROBERTSON.)

CORPORATION OF LONDON *v.* NETHERLANDS STEAMBOAT COMPANY. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Rating—Exemption—Statutory exemption "from the payment of all and all manner of rates and assessments" — Liability for rate imposed by subsequent statute.

In a case in which the Crown had assumed a statutory liability for the payment of a commutation in lieu of rates upon property in the city of London in the hands of the Crown, and the statute provided that such property "shall be and shall be deemed and considered to be to all intents and purposes free and exempt from the payment of all and all manner of rates and assessments, although the same . . . may become private property by the sale or assignment thereof to individuals, any law, usage, or custom to the contrary notwithstanding":

Held (affirming the judgment of the court below), that the property, after it had passed into private hands, was exempt from a "consolidated rate" imposed by a subsequent statute.

Sion College *v.* Corporation of London (84 *L. T. Rep.* 133; (1901) 1 *K. B.* 617) *distinguished.*

APPEAL from a judgment of the Court of Appeal (Collins, M.R., Romer and Mathew, L.JJ.), who had reversed a decision of the King's Bench Division (Lord Alverstone, C.J., Wills and Channell, JJ.) upon a special case.

The respondents had been assessed to the "consolidated rate" payable under the City of London Sewers Act 1848 (11 & 12 Vict. c. clxiii.), but they alleged that they were exempt under the provisions of the Act 52 Geo. 3, c. 49.

The facts, and the sections of the Act of Parliament, appear from the judgments of their Lordships.

The King's Bench Division held that the case was governed by *Sion College* v. *Corporation of London* (84 L. T. Rep. 133; (1901) 1 K. B. 617), and gave judgment for the appellants, but their judgment was reversed as above mentioned.

Danckwerts, K.C., *Cave*, K.C., and *R. Cunningham Glen* appeared for the appellants, and contended that the question was whether the exemption conferred by the Act of George III. was confined to existing rates or extended to all future rates. The Act of 1848 repealed the old rating Acts, and conferred new rating powers on the appellants, and established a new "consolidated rate." Sect. 169 takes away all pre-existing exemptions. The old rate is gone; therefore the commutation in lieu of it is gone, and therefore the exemption consequent on the commutation is gone. See *Heath* v. *Weaverham*, 70 L. T. Rep. 729; (1894) 2 Q. B. 108) and *Perchard* v. *Heywood* (8 T. R. 468), which was followed in *Sion College* v. *Corporation of London* (*ubi sup.*). That case decided that the consolidated rate under the Act of 1848 is a new rate. The Court of Appeal thought that the words "for ever hereafter" in sects. 3 and 4 of the Act of 1812, referring to the payment of the commutation, distinguished this case from the *Sion College* case. But those words only mean "as long as the Act is in force." Future legislation was not contemplated, for no Act can bind a future Parliament. See also

Rex v. *London Gas Company*, 8 B. & C. 54;
Mile End Vestry v. *Whitby*, 78 L. T. Rep. 80;
Surtees v. *Woodhouse*, 88 L. T. Rep. 407; (1903) 1 K. B. 396.

[Lord ROBERTSON referred to *Dunbar's Trustees* v. *British Fisheries Society* (3 App. Cas. 1298).] As to the principle upon which exemption is granted, see

Coomber v. *Justices of Berkshire*, 50 L. T. Rep. 405; 9 App. Cas. 61.

The commutation was a rentcharge payable by the proprietors, leaving the occupiers liable to all future rates. The rate under the Act of 1848 was a new rate, from different sources, going to different people, and for different purposes.

Macmorran, K.C., *H. Avory*, K.C., and *Roskill*, for the respondents, maintained that the words of the Act were clear and definite, and, if fairly construed, extended by necessary implication to all future rates. The authorities from *Williams* v. *Pritchard* (4 T. R. 2; 2 R. R. 310) down to the *Sion College* case are all on an Act of 7 Geo. 3, dealing with lands reclaimed from the Thames, and have no bearing on this case, or, if rightly understood, support the contention of the respondents. See

Eddington v. *Borman*, 4 T. R. 4;
Perchard v. *Heywood*, 8 T. R. 468;
Rex v. *London Gas Company*, 8 B. & C. 54.

Cave, K.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Aug. 3.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury). — My Lords: In the year 1812 the Government was minded to build a new Custom House, the old one, which was situated in Lower Thames-street, being decayed and unfit for its purpose. In order to do this, they pulled down the old Custom House, and, under the powers of an Act of Parliament (52 Geo. 3, c. 49), purchased more

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

land for the same purpose. The Custom House, as it then existed, was not liable to rates at all, as it was Crown property, but the other land purchased by the Government was rateable. The Government, however, in view of the hardship upon the ratepayers in the district within which the Custom House was situated, voluntarily paid the sum of 220*l.* 12*s.* 10½*d.* every year in respect of the then existing Custom House and other premises contiguous to or connected therewith. Another sum they paid, amounting to 220*l.* 12*s.* 10½*d.*, which, however, was paid because it was legally due. It was enacted, therefore, that the said respective annual sums should yearly and every year for ever hereafter be paid to the respective collectors for the time being of the rates and assessments to whom the same respectively are now paid, without any abatement or deduction. A specific section then was passed with a view to relieving the ratepayers when certain houses and other buildings became vested in the Crown for public purposes. The Act recites that it is not consistent with equity that an additional burden should be imposed on the parishes in consequence of the buildings being so conveyed to the Crown, and it enacts that the sum of 816*l.* 7*s.* 5*d.* should be paid every year for ever hereafter, and it accounts for the selection of that sum as what was to be paid hereafter for ever because it was the sum of what was assessed as the parochial and ward assessment according to the last assessment made before the passing of the Act. It will be observed that this is to be a perpetual payment every year in lieu of rates, and as a corollary another section declares that after a certain day the present Custom House and, after the completion of the purchase thereof, the property in Lower Thames-street shall be deemed and considered free and exempt from the payment of all manner of rates and assessments, although the same and each of them may become private property by the assignment thereof to individuals. Surely, if the payment was to be perpetual, so was the immunity from rates. In 1832 another Act was passed (2 & 3 Will. 4, c. 66) transferring or enabling the property in question to be transferred to private purchasers, and also the liability to make the payments, which, while the Crown were the owners, were paid by the Crown. The result of this arrangement, made under the authority of a statute (obviously intended, and, I think, in sufficiently plain language enacted) was to make the property in question rate free for all time. One does not understand what could be the object of the whole arrangement including a commuted sum to be payable for all time if the land was still to be liable to have fresh rates assessed upon it. The Acts to which I have referred are essentially public Acts—they deal with public rights, and involve the rights of the Crown. I think it hopeless to contend that the Sewers Act of 1848 took away the privilege thus granted. It is needless to point out that the Crown must have obtained considerably larger sums for the property they sold because it was rate free, and it certainly would be somewhat strange if another Act of Parliament, and that a private one, should have taken away the privileges thus purchased. As to the case of *Sion College* (*ubi sup.*), the circumstances and the language construed in that case are entirely different. I think that the judgment of the Court of Appeal was right, and this appeal should be dismissed with costs.

Lord DAVEY.—My Lords: A great many authorities have been referred to in the course of the argument, and, so far as they lay down general principles applicable to the construction of statutory enactments exempting particular persons from the payment of rates, they may be usefully consulted. But for the most part, the cases referred to related to the construction of private agreements between landlord and tenant as to the incidence of public burdens on the land demised as between themselves, and to the construction of other Acts of Parliament expressed in different language. Cases of that description will not, I think, afford much assistance to your Lordships. Ultimately the opinion of your Lordships must be formed on the language and effect of the particular enactments now in question. I confess that I am somewhat surprised to hear the Act of 52 Geo. 3 (1812) and the subsequent Act of 1832 described as local and personal Acts. The Act of 1812 must have been brought in and promoted by the Treasury on behalf of the Crown, and the effect was to authorise the application of public moneys to the purchase of a site for the erection of a new Custom House, and also to impose a large annual charge on the consolidated customs which were part of the public revenue. According to constitutional usage, such purposes could only be effected by a public Act, and I think that the Acts both of 1812 and of 1832 ought to be treated as public Acts. There are three separate properties referred to in the Act of 1812—viz.: (1) The site of the old Custom House which was about to be pulled down; (2) houses and buildings in Lower Thames-street which the Treasury was empowered to purchase as a site for a new Custom House, (3) lands called "legal quays" lying between the old Custom House and the river, which were also then in private ownership, but about to be purchased by the Treasury. The bargain or arrangement between the Treasury and the local rating authorities (the Tower Ward and the parish of All Hallows, Barking), which was carried into effect by the Act, was that the Treasury should, out of the consolidated customs continue to pay an annual sum of 220*l.* 12*s.* 10½*d.* which had theretofore been voluntarily paid to the collectors of rates in respect of the old Custom House, and also a sum of the same amount which had been paid for the rates on the "legal quays," and should pay an annual sum of 816*l.* 7*s.* 5*d.*, being the amount of the parochial and ward rates on the buildings in Lower Thames-street according to the last assessment, and on the other hand the old Custom House, and, after the purchase thereof, the buildings in Lower Thames-street were declared to be free and exempt "from all and all manner of rates and assessments although the same might become private property by the sale or assignment thereof to individuals, any law, usage, or custom to the contrary notwithstanding." By the 2nd section of the Act of 1832 it was enacted that after the conveyance and assurance by the Treasury of certain quays, warehouses, and other buildings in respect of which or some part or parts thereof the two sums of 220*l.* 12*s.* 10½*d.* and 220*l.* 12*s.* 10½*d.* were payable, the direction in the Act of 1812 for payment of those sums out of the consolidated

customs should be repealed, and by the 3rd section the collectors of the said two sums were empowered to collect the same and no more from the occupiers of the said premises for the time being. Your Lordships will have observed that there is no express exemption of the "legal quays" in the Act of 1812 from rates and assessments when they should again come into private ownership. But I agree with the learned judges in the Court of Appeal that they are treated as becoming when purchased in the same position as the site of the old Custom House to which they were contiguous, and that the effect of the Act of 1832 is to make the payment of the sum of 220*l.* 12*s.* 10½*d.* in respect of them perpetual, though no longer out of the consolidated customs, and to extend to the "legal quays" the same exemption as attached to the site of the old Custom House. The provisions of these Acts appear to me to differ from all the Acts of Parliament referred to in the previous cases, inasmuch as a composition was made payable in respect of the rates on the property in question, and the Crown by assuming a statutory liability for payment of the composition out of the public revenue gave a valuable consideration for the exemption of the property from rates after it should come into private ownership; and I agree with the learned judges in thinking that difference a vital one for the present purpose. It may be assumed that the sum of 220*l.* odd was fixed with reference to the amount which would have been payable if the property had not been Crown property. But there is nothing in the Act which shows how the sum was made up, or in what proportions it was then divisible between the ward rates and the parochial rates. The provision at the end of sect. 3 of the Act of 1812 directs only that the division should be made in whatever proportion might for the time being be proper. This would, of course, be easily done by taking the rate per pound of the respective assessments. It does not appear to me to contain any reference to existing rates or to assist the appellants' argument. I am of opinion that, according to the true construction of sect. 5 of the Act of 1812 and sect. 3 of the Act of 1832, the respondents are exempted from payment of the consolidated rate made by the appellants in respect of the property comprised within the sites of the old Custom House and legal quays. And I do not think that such exemption is taken away by sect. 169 of the City of London Sewers Act 1848. The words in that section appear to me to be directed to the case of a person claiming exemption by reason of his not being liable to be assessed to the relief of the poor in respect of his premises, and were probably inserted to meet the decision in *Eddington* v. *Borman* (4 T. R. 4). But in this case the respondents claim exemption, not because they are exempted from poor rates, but because they are exempted by the statutes from all manner of rates. I am also of opinion that the language of the 169th section is not sufficiently explicit to repeal by implication an express statutory exemption in the earlier Acts and ought not to be so construed. I am of opinion the appeal should be dismissed with costs.

Lord JAMES OF HEREFORD.—My Lords: In order to make clear the questions involved in this case, it is necessary to consider the condition of certain property immediately prior to the passing of the Act of 1812. At that time, the Custom House situated in Lower Thames-street was in a very dilapidated condition. In front of it were certain quays called "legal quays," and it was contemplated to pull down the old Custom House and to purchase under compulsory powers certain other land situated in Lower Thames-street for the purpose of building thereon another Custom House. The site of the legal quays at this time was not vested in the Crown. The old Custom House being vested in the Crown was not liable to be rated, but the legal quays not being so vested were liable. Certain payments in lieu of rates were made by the Crown as shown by recitals in the Act of 1812. Sect. 3 of that Act says:

> And whereas the sum of 220*l.* 12*s.* 10½*d.* is annually paid by the direction of the Lords Commissioners of His Majesty's Treasury in respect of the present Custom House and other premises contiguous to or connected therewith which by law are not rateable, and another sum amounting to 220*l.* 12*s.* 10½*d.* is legally payable and paid as rates in respect of the legal quays in front of the said Custom House and premises to the respective collectors of the parochial and ward rates and assessments in the said ward of Tower and in the parish of All Hallows, Barking, within the said ward, and it is expedient that the payment of the said respective annual sums should be continued: Be it therefore further enacted that the respective annual sums now paid shall yearly and every year for ever hereafter be paid out of the consolidated customs to the respective collectors for the time being of the rates and assessments to whom the same respectively are now paid without any abatement or deduction whatsoever in the same.

Then sect. 4, dealing with the land about to be purchased in Lower Thames-street for the purpose of erecting a new Custom House upon it, says:

> And whereas by reason of the houses and other buildings in Lower Thames-street becoming vested in His Majesty for the public purposes aforesaid, deficiencies will be occasioned, and it is not consistent with equity that an additional burden should be imposed upon the said wards and parishes in consequence of the application of premises situated thereon to purposes of general utility, be it enacted that from and after the completion of the purchase of the said premises the sum of 816*l.* 7*s.* 5*d.*, being the amount of what was assessed as the parochial and ward assessments and rates on the said houses and buildings according to the last assessment of rates thereon made before the passing of this Act, shall be paid, and the said commissioners of the Customs are being directed and authorised yearly and every year for ever hereafter to pay the respective collector or collectors for the time being of the same rates or assessments respectively out of consolidated customs.

Then by sect. 5 it is enacted:

> That from and after the said fifth day of April the said present Custom House, and, after the completion of the purchase thereof, the said premises in Lower Thames-street shall be, and be deemed and considered to be, to all intents and purposes free and exempt from the payment of all and all manner of rates and assessments, although the same and each and every of the said premises may become private property by the sale or assignment thereof to individuals, any law, usage, or custom to the contrary notwithstanding.

If the legislation on the subject had been confined to the Act of 1812, I think considerable doubt

would exist whether the legal quays were included in the land and premises exempted from rateability, but a second statute, 2 & 3 Will. 4, c. 66, was passed for the purpose of transferring to private purchasers of these lands and premises the liability to pay the sums undertaken to be paid by the Crown whilst they were the owners of them. And it seems to me that the recitals and enactments in sects. 2 and 3 of that Act make it clear that the legal quays were intended to be dealt with in like manner as the site of the Custom House. This being so, I think that the whole of the land and premises in question now in the hands of purchasers are free from the payment of rates and liable only to payment of the commuted sum. I agree with Collins, M.R. when he says that the composition was made in respect of all time thereafter. The statutes do not refer to then existing rates but apparently all future rates were contemplated. The words "for ever" appear to be employed for the purpose of showing that this bargain was to be taken on both sides for better or for worse, and that the property should, in the hands of private owners, be as free from rateability as if it had been occupied by the Crown. The case of *Sion College* (*ubi sup.*) was pressed strongly upon your Lordships' consideration in support of the appellants' case. In that case it was held that a provision in an Act of Parliament that certain lands should vest in adjoining owners "free from all taxes and assessments whatsoever," applied only to then existing assessments. And this decision was founded on the authority of several cases which held that *primâ facie* a statutory exemption from rateability referred only to rates and assessments existing at the time of the making of the commutation. But every case must depend upon the words creating what I will call the contract of exemption, and in the present case I find words in the statutes showing that the future as well as the then present rates were intended to be dealt with, words which are absent from the statute controlling the non-rateability of Sion College. I cannot give effect to the argument that the method of collecting rates is changed, and that there will be difficulty in finding the proper collector to receive the commuted sum. Some method must be found—even by legislation if necessary—for overcoming such difficulties if they exist. If the Legislature has freed these properties from payment of rates, their owners who have acquired and paid for the properties so freed are not to be deprived of their legal right in consequence of the existence of a difficulty not in any way created by them. I also concur in the view that the exemption thus created is not taken away by the provisions of the Sewers Act of 1848. I think that the judgment of Mathew, L.J. correctly deals with the arguments raised in support of a contrary view. I therefore think that this appeal should be dismissed with costs.

Lord ROBERTSON.—My Lords: I concur.

Order appealed from affirmed; and appeal dismissed with costs.

Solicitor for the appellants, Sir *H. Crawford*, City Solicitor.

Solicitors for the respondents, *Pritchard* and *Sons.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

July 18, 19, *and Nov.* 7, 1905.

(Present: The Right Hons. Lords MACNAGHTEN, DAVEY, and JAMES OF HEREFORD, and Sir ARTHUR WILSON.)

MAYOR AND CORPORATION OF HAWTHORN *v.* KANNULUIK. (*a*)

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Municipal corporation — Overflow of drain — Liability for damage—Negligence.

A municipal authority, acting under statutory powers, took over the management of a natural watercourse, and made it into a main drain for their district. Various subsidiary channels were made by the authorities which ran into the main drain. In consequence of the increase of building in the district served by the main drain it became insufficient for carrying off the storm-water and sewage, and houses and land in the low-lying parts of the district were frequently flooded.

Held, that there was evidence that the municipal authority had been guilty of negligence in the management of the drain, and they were liable for the damage caused by its insufficiency.

Judgment of the court below affirmed.

APPEAL from a judgment of the Supreme Court of Victoria given on the 14th Oct. 1903, affirming the judgment directed by Williams, J. to be entered for the respondent in an action in which the respondent was plaintiff and the appellant was defendant.

The facts which gave rise to this action were as follows:—

On the 1st Sept. 1888 the plaintiff purchased a house and land known as 26, Malmsbury-street, situate within the municipal district of Hawthorn, in the State of Victoria, and he and his wife and family occupied and lived in such house from Dec. 1891.

The defendants were the municipality of Hawthorn—a municipality constituted under the Local Government Act 1890, of the State of Victoria, or corresponding prior enactments, and having the control and management of all drains within the district.

From the year 1889 to the year 1902 the plaintiff's house and the portion of Malmsbury-street adjacent thereto were repeatedly flooded. This flooding was caused by the overflow of water from the main drain which ran through the municipal district of Hawthorn in a westerly direction and past the plaintiff's land. The overflow was due on each occasion to the insufficient capacity of the main drain, which could not carry off quickly enough the water which was brought down into it during heavy but not extraordinary showers by subsidiary drains, gutters, or ditches constructed either by the defendant municipality or by individuals with their permission. The water turned into the main drain by reason of these subsidiary channels came, not only from Hawthorn, but in part also from an outside area. It was not all rainfall, but it contained an admixture of drainage from houses and stables,

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

and where it had overflowed left behind it a deposit of stinking slime, with garbage and other refuse.

This flooding and nuisance were alleged to be caused by the negligence of the defendants in the original design, plan, and construction of the main drain, and in the formation and construction from time to time of tributary channels leading into the main drain.

The main drain was constructed piecemeal at intervals of a few years, commencing in 1888 and ending in 1896. During its construction and since its completion building had progressed in the vicinity, sometimes very slowly, sometimes with rapidity. Both before and continuously since its completion the quantity of water discharged into it had been increasing, and the subsidiary channels had also increased in number.

Other properties round about the plaintiff's were damaged in the same way.

The overflow whenever it occurred created a public nuisance by obstructing Malmsbury-street, which was a public thoroughfare, and emitting foul odours injurious to health.

Such overflow was also a private nuisance whereby the plaintiff sustained damage. His house was flooded, his furniture and effects were damaged, and his property was depreciated in value.

The plaintiff issued a writ against the defendants on the 14th May 1902, and by his statement of claim which was delivered on the 12th June 1902, the plaintiff claimed damages against the defendants for (1) Trespass to the plaintiff's land and premises occasioned by the overflowing of a main drain and other drains constructed or made by the defendant. (2) Nuisance occasioned by the overflowing of the aforesaid drains whereby drainage and other offensive matter was deposited on Malmsbury-street and on the plaintiff's land and premises. (3) Negligence: (*a*) In constructing and keeping open certain drains, gutters, and ditches, and in permitting or suffering its ratepayers and others so to construct and connect their drains, gutters, and ditches with the main drain; (*b*) In collecting and permitting to be collected or concentrated in the main drain and in damming back the water drainage and offensive matter therein so as to overflow and be cast upon the plaintiff's premises; (*c*) In permitting water drainage and offensive matter in the main drain to overflow and the water drainage and offensive matter to be dammed back and forced or cast upon the plaintiff's land and premises. (4) Alternatively the plaintiff claimed compensation under the provisions of the Local Government Acts or the corresponding prior enactments.

The defence was delivered on the 13th Aug. 1902, and thereby the defendants admitted (Par. 4) That they had made and constructed large numbers of drains, gutters, and ditches connecting with and flowing into the main drain; (Par. 6) And that they kept open the drains, gutters, and ditches mentioned in par. 4 of the defence.

The defence then traversed all other material allegations in the statement of claim and alleged (Par. 3) That as to one part of the main drain it was originally cut and made by the plaintiff's predecessor in title, and as to the other part that it was made or cut by the adjoining owners with the consent of the plaintiff's predecessor in title, and that afterwards the defendants improved the said drain along both parts at the request of the plaintiff's predecessor in title; (Par. 9) That all the acts alleged in the statement of claim were done by the defendants under and by virtue of the powers conferred upon them by the Local Government Acts or corresponding prior enactments in the *bonâ fide* and reasonable exercise of the discretion given to them by the said Acts, and that the injuries alleged to have been sustained by the plaintiff were the natural and necessary result of the said acts and matters so done, permitted or suffered by the defendant; (Par. 11) The facts relied upon by the plaintiff did not constitute negligence in law against the defendants or such negligence as would give rise to any cause of action against the defendants; (Par. 12) The claim disclosed no cause of action against the defendants as it was not alleged that the acts complained of were done, permitted or suffered by the defendants oppressively or *malâ fide*; (Par. 13) The claim disclosed no right in the plaintiff to compensation under the Local Government Acts or corresponding prior enactments; and the reply was delivered on the 2nd Sept. 1902.

The action was tried on the 2nd, 3rd, 4th, 5th, 6th, 9th, and 10th March 1903, before Williams, J.

Williams, J. gave judgment on the 1st April 1903. He found as a fact that the defendants had been guilty of negligence both in the designing and planning of the original drain, and also in the formation and construction of the tributory channels subsequently constructed from time to time by the defendants. He stated that he accepted and believed the evidence of the expert or scientific witnesses who had been called on behalf of the plaintiff. He assessed the damages at 250*l.*, and ordered judgment to be entered for the plaintiff for that amount with costs.

On the 9th April 1903 the defendants gave notice of motion to the full court, asking that the judgment might be reversed and set aside, and that judgment be entered for the defendants with costs of the action and of the appeal, or, failing that, that a new trial might be had.

The appeal was heard before Holroyd, A. Beckett, and Hood, JJ. on the 4th, 5th, 6th, and 7th Aug. 1903.

On the 14th Oct. 1903 the court gave judgment affirming the judgment of the court below and dismissing the appeal with costs.

On the 30th Nov. 1903, on motion made to it on behalf of the defendants, the court gave the defendants leave to appeal to His Majesty in Council.

Danckwerts, K.C. and *M. Romer*, for the appellants, contended that the appellants, having acted *bonâ fide* in the exercise of their statutory powers, were not liable to an action of this nature. If the respondent has suffered any damage from the construction of the drain, his remedy is to claim compensation under the statute. The evidence shows that the drain was sufficient when originally constructed, and the appellants are not liable for a mere nonfeasance since that date. They referred to

Glossop v. *Heston and Isleworth*, 40 L. T. Rep. 736; 12 Ch. Div. 102;

Attorney-General v. *Dorking*, 46 L. T. Rep. 573; 20 Ch. Div. 595;

Mayor of East Fremantle v. *Annois*, 85 L. T. Rep. 732; (1902) A. C. 213;
Clarke v. *Sutton*, 6 Taunton, 29;
Corporation of Raleigh v. *Williams*, 69 L. T. Rep. 506; (1893) A. C. 540;
Brierley Hill v. *Pearsall*, 51 L. T. Rep. 577; 9 App. Cas. 594;
Sanitary Commissioners of Gibraltar v. *Orfila*, 63 L. T. Rep. 58; 15 App. Cas. 400;
Cowley v. *Newmarket*, 67 L. T. Rep. 486; (1892) A. C. 345;
Municipal Council of Sydney v. *Bourke*, 72 L. T. Rep. 605; (1895) A. C. 433.

Hugo Young, K.C. and *Hodges*, for the respondents, maintained that, assuming that the appellants were acting under their statutory powers, if the particular thing done was authorised, and damage to one individual necessarily followed, he might have no remedy; but not so if the particular thing was not authorised, or the damage done was due to negligence, which is the case here. They cited

London Brighton and South Coast Railway Company v. *Truman*, 54 L. T. Rep. 250; 11 App. Cas. 45;
Carslake v. *Shire of Caulfield*, 17 Vict. L. Rep. 560, which was followed in *Curry* v. *Shire of Benulla*, 21 Vict. L. Rep. 159;
Hill v. *Metropolitan Asylums Board*, 44 L. T. Rep. 653; 6 App. Cas. 193;
Canadian Pacific Railway Company v. *Parke*, 81 L. T. Rep. 127; (1899) A. C. 535;
Geddes v. *Bann Reservoir Company*, 3 App. Cas. 430;
Whitehouse v. *Fellowes*, 4 L. T. Rep. 77; 10 C. B. N. S. 765;
Colac v. *East Summerfield*, 68 L. T. Rep. 769; (1893) A. C. 187;
Southwark and Vauxhall Water Company v. *Wandsworth Board of Works*, 79 L. T. Rep. 132; (1898) 2 Ch. 603.

Danckwerts, K.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Nov. 7.—Their Lordships' judgment was delivered by

Lord MACNAGHTEN.—The conduit in the city of Hawthorn, which is now known as the "main drain" and for the most part is an open sewer, was formerly a natural watercourse receiving and carrying off nothing but the surplus storm water of a hilly district about 500 acres in extent. This district or drainage area, as it may be termed, has been divided between the municipalities of Hawthorn, Kew, and Boroondara. Hawthorn has about half. The rest is comprised within the limits of the other two municipalities in nearly equal proportions. Kew on the north and Boroondara on the north-east and east are at rather a higher level and naturally drain through Hawthorn. In 1888 the plaintiff Jaan Kannuluik purchased a plot of ground abutting on the watercourse at its lowest point in Hawthorn just where it turns to the south with a sharp bend after passing under Auburn-road. From a contour plan of the drainage area it appears that the fall to this point is not less than 140ft. In 1889 the municipal authorities of Hawthorn under their statutory powers took over the care and management of this watercourse and made it into a public drain. They spent a good deal of money upon it in the way of improvement at intervals down to the year 1896. The work was done in sections. The section adjoining Kannuluik's property was pitched and finished in 1889. A number of subsidiary channels have since been made by the municipal authorities of Hawthorn, or with their permission, for the purpose of running off the storm water and sewage into the main drain. The result is that the water and sewage from the upper parts of Hawthorn and from the parts of Kew and Boroondara which drain through Hawthorn are concentrated and poured into the main drain with great violence. When there is heavy rain the rush of water is so great and so sudden that the channel becomes choked. There is an overflow, and when the flood subsides the low-lying lands, and Mr. Kannuluik's premises in particular, the ground floor of his dwelling-house and the surface of his garden, are covered with an offensive mixture of sewage and slime. After several ineffectual complaints Mr. Kannuluik brought this action against the municipality of Hawthorn. The case was tried by Williams, J. without a jury. It occupied no less than seven days. The learned judge found in favour of the plaintiff and assessed the damages at 250*l*. On appeal the full court affirmed the judgment of Williams, J., but not altogether upon the same grounds. The learned judge who tried the case relied principally, though not entirely, on faulty construction in 1889. In the full court, where the leading judgment was given by Holroyd, J., the decision turned rather on the subsequent acts and conduct of the municipal authorities. Their Lordships agree with Holroyd, J. The case seems to be a very simple one. The only question is, have the municipal authorities acted negligently so as to do unnecessary damage to Mr. Kannuluik? As for negligence it is difficult to imagine a more conspicuous example of negligence than is shown by repeatedly pouring offensive stuff into a receptacle or channel proved over and over again to be insufficient to hold it and pass it on. The municipal authorities might just as well pour this stuff directly on the plaintiff's land. The damage to the plaintiff cannot be denied. It is nothing to the purpose, even if it be true, to say that the property in the plaintiff's hands and in the hands of his predecessors in title was often flooded before the municipal authorities turned the water course into a public drain. Nor is it enough to prove that the work done in 1889 was sufficient at the time. It is insufficient now. It has been insufficient for some time past. The mischief grows as building increases, as new roads are made, new channels formed, and more and more of the surface becomes impervious to rainfall. It is not suggested that there is any real difficulty in remedying the mischief. Indeed, if the evidence of the surveyors called on behalf of the plaintiff may be trusted, the matter can be set right at a very trifling cost. Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Solicitors: for the appellants, *Roy* and *Cartwright*; for the respondent, *Lee*, *Ockerby*, and *Everington*.

Supreme Court of Judicature.

COURT OF APPEAL.

May 25, 26, 29, *and Aug.* 11, 1905.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.)

SOOTHILL UPPER URBAN DISTRICT COUNCIL *v.* WAKEFIELD RURAL DISTRICT COUNCIL AND ARDSLEY EAST AND WEST URBAN DISTRICT COUNCIL. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Local government—Contract for supply of water by one local authority to another—Sanction of Local Government Board—Enlargement of district—Penalty clause—Public Health Act 1875 (38 & 39 *Vict. c.* 55), *ss.* 61, 174 (2).

In 1882 *the plaintiffs entered into an agreement with the defendants with the sanction of the Local Government Board under sect.* 61 *of the Public Health Act* 1875, *by which the plaintiffs agreed to supply water to the defendants for certain places within their district. In* 1895 *the plaintiffs and defendants entered into an agreement for the supply to the defendants' district, or such part thereof as the defendants might wish to supply, or any place outside their district which for the time being they might contract to supply, of a certain quantity of water, the minimum amount being largely increased beyond the amount of the former contract. It was provided that unless the consent of the Local Government Board to the agreement was obtained within six calendar months, or such sanction was ascertained to be unnecessary, the agreement should be void. The Board refused to give a general sanction in respect of the area comprised in the agreement.*

Held, that the sanction of the Board in 1882 *referred only to the places mentioned, and no sanction having been given to the agreement of* 1895 *within the prescribed time it was void.*

Decision of Swinfen Eady, J. (91 *L. T. Rep.* 800; (1905) 1 *Ch.* 53) *reversed.*

Held, also (*Vaughan Williams, L.J. dissenting*), *that sect.* 174, *sub-sect.* 2, *of the Public Health Act* 1875 *was directory only and therefore the omission of any penalty clause did not render the agreements invalid.*

ON the 24th Dec. 1881 the Soothill Upper Local Board (the predecessors of the plaintiffs) and the guardians of the Wakefield Union acting as the rural sanitary authority (the predecessors of the Wakefield Rural District Council) jointly applied in writing to the Local Government Board to sanction the supply by Soothill to Wakefield for the parishes of East and West Ardsley of water which Soothill obtained in bulk from the corporation of Halifax.

A question also arose between the parties upon a clause of the draft agreement then being negotiated, and, as they were unable to agree upon this clause, an application was made to the Local Government Board to determine the matter.

In reply, the Local Government Board, on the 15th and 17th May 1882, stated in writing to the two authorities respectively that, as regarded the supply of water by Soothill to Wakefield, the board were not aware of any reason why, at the proper time, their consent should not be given, but they pointed out that under the statute no sanction on their part was required to the proposed terms of agreement, and that they had no power to deal with the question in dispute between the parties.

Shortly afterwards an agreement under seal, dated the 17th July 1882, was come to between the two authorities for a supply of water within certain minimum and maximum limits of supply for East and West Ardsley by the Soothill Upper Local Board to the Wakefield Union at a certain price, and water was duly supplied on the terms of it by Soothill to Wakefield, without any further formal sanction being given by the Local Government Board.

By clause 12 of that agreement all payments for water thereunder were to be made quarterly, and if any quarterly payment was in arrear and not paid for one calendar month from the day appointed for payment thereof, the Wakefield Union was to pay interest thereon to the Soothill Upper Local Board at the rate of 5 per cent. per annum.

By clause 13 it was provided that if at any time and from any cause the water meters should cease to indicate correctly the quantity of water passing through them, or if any of them should have been removed for the purpose of repairs, the Soothill Board should, until the meters should be repaired or replaced, be entitled to charge, and the Wakefield Union liable to pay, for the full quantity of water to which the Wakefield Union should for the time being be entitled under that agreement within the minimum and maximum limits then applicable.

In 1885 it was proposed that Soothill should give to Wakefield an increased supply, and on the 26th June 1885 the clerk to the Soothill Upper Local Board wrote to the Local Government Board stating that it was proposed to increase the supply, and sent a copy of the proposed agreement for that purpose, and expressly asked for the sanction of the Local Government Board under sect. 61 of the Public Health Act 1875.

In reply, the Local Government Board on the 15th July 1885 stated in writing that under sect. 61 of the Public Health Act 1875 the board thereby sanctioned the supply of water by the Soothill Upper Local Board to the Wakefield Union "for the benefit of the parishes of East and West Ardsley." This arrangement was carried out by an agreement under seal dated the 29th Sept. 1885.

On the 16th Nov. 1889, the Local Government Board, understanding that an agreement had been come to between the Wakefield and Hunslet unions for the supply of water to the township of Middleton, gave their sanction under sect. 61 to the supply by Wakefield to Hunslet for the purposes of that district, and at the same time forwarded to the Wakefield authority a copy of the letter addressed by the Local Government Board to the Soothill authority sanctioning the supply given by that authority to Wakefield. An agreement under seal was afterwards entered into to carry this arrangement into effect.

By an order of the 14th Jan. 1895 the board sanctioned the supply of water by the Wakefield Council to the Rothwell Urban District Council.

(*a*) Reported by W. C. Bass, Esq., Barrister-at-Law.

This was carried out by an agreement under seal of the 27th March 1895, which showed that this water was intended to be Soothill water supplied to Wakefield and by Wakefield to Rothwell for Lofthouse and Thorpe. Thus far everything was done with the sanction of the Local Government Board, so far as that sanction was requisite.

In 1895 the plaintiffs and the Wakefield Rural Council, the successors of the authorities above mentioned, negotiated a new water agreement, dated the 31st Jan. 1895, which was that upon which the plaintiffs now sued.

By that agreement (clause 4) the Soothill Council agreed to supply and the Wakefield Council agreed to take for thirty years from the 24th Sept. 1894, for the supply of their district or any part thereof or any place outside their district which they might contract to supply, a minimum quantity of 100,000 gallons of water per day of twenty-four hours.

A certain price was fixed for the water, and the Wakefield Council agreed (clause 5) to pay for such minimum quantity, whether actually taken or not.

It was further agreed (clause 9) that unless within six calendar months from the date of the agreement the sanction of the Local Government Board to it was obtained, or ascertained to be unnecessary, the agreement should be void.

Neither this agreement, nor those of the 17th July 1882, the 29th Sept. 1885, and the 3rd Dec. 1890, contained a provision that any pecuniary penalty should be paid to either party in case the terms of the contract were not duly performed by the other party, pursuant to sect. 174, sub-sect. 2, of the Public Health Act 1875.

By an agreement of even date between the same parties it was provided that if the sanction of the Local Government Board was obtained the previous agreements should determine, but in the event of the above agreement becoming void under clause 9, they should remain in force.

On the 28th Jan. 1895 the plaintiffs wrote to the Local Government Board inclosing a copy of the proposed agreement, and asking for the sanction of the Local Government Board to the agreement.

In reply, the board stated that, under sect. 61 of the Public Health Act 1875, the board's sanction was only required to the supply of water by one authority to another, and that it was not their practice to approve of the agreements entered into by the authorities. They added that, if the area for which the supply under the new agreement was to be given was the same as or wholly comprised in the area for which the board had previously sanctioned the supply, no further sanction on the part of the board was required.

In reply to a further letter of the 11th April, on the 22nd May 1895 the Local Government Board wrote saying that it was not their practice to give a general sanction in respect of all the contributory places in a rural district, but they would consider applications in respect of particular contributory places when the supply was actually furnished.

By the Ardsley East and West (Constitution of Urban District) Order 1895, as confirmed by the County of the West Riding of Yorkshire (Ardsley East and West) Confirmation Order 1895, the townships of Ardsley East and Ardsley West were together constituted an urban district within the meaning of the Public Health Act 1875 and the Local Government Act 1894, with the usual consequential provisions.

By an agreement, dated the 24th March 1897, between the Wakefield Council and the Ardsley Council, it was agreed that the water agreement should become the sole property of the Ardsley Council, who should be entitled exclusively to all the benefits and be exclusively liable and responsible for all liabilities thereunder, and should indemnify the Wakefield Council therefrom, and that the parties thereto should use their utmost endeavours to obtain the sanction of the plaintiffs to such of the clauses as affected (*inter alia*) the water agreement of 1895, and until that sanction was obtained the clauses of the agreement should be binding upon the defendants *inter se*, who should indemnify the other of them in respect of the liabilities and stipulations for which those parties had respectively made themselves exclusively liable.

On the 16th Jan. 1900 the plaintiffs wrote to the Local Government Board with reference to the correspondence of 1895, and asked whether they were right in regarding, as they had done, the sanction given by the Local Government Board in 1882 for the supply of water by Soothill to Wakefield for East and West Ardsley as extending to sanction a supply of water to East and West Ardsley under the agreement of 1895, so far as that supply was confined to the district of East and West Ardsley.

The Local Government Board, in reply, expressed their opinion that the terms of the order constituting the urban district of Ardsley East and West were sufficiently wide to cover the transfer of powers vested in the Wakefield authority by virtue of any sanction given by the board under sect. 61 of the Public Health Act 1875, so far as such powers related to the area formed into the urban district of any part of such area; but, with reference to the question of the agreement of 1895, they stated that they were not prepared to discuss the bearing of any such sanction on it, and that it was not their practice under sect. 61 of the Act to go beyond the actual duty imposed on them by that section—namely, sanctioning the supply of water by the one authority to the other.

On the 8th March 1900 the plaintiffs wrote to the board that from their letter the plaintiffs gathered that they had still the sanction of the Local Government Board to the supply of water by them to the urban district council of East and West Ardsley, and asking whether that understanding was correct, and in reply the board stated that they had nothing to add to their letter of the 28th Feb. 1900.

The Wakefield Rural District Council took less than the minimum quantity of 100,000 gallons of water per day of twenty-four hours, and paid for the smaller quantity actually used, but refused to pay for the minimum quantity according to the terms of the agreement of the 31st Jan. 1895.

This action was brought by the Soothill Upper Urban District Council against the Wakefield Rural District Council and the Ardsley East and West Urban District Council to enforce payment of the balance due on account of the price of the minimum quantity of water fixed by that agreement, and claimed a declaration that the agree-

ment was valid and binding, but in the event of that agreement being held to be invalid, they claimed a declaration that the agreements of the 17th July 1882 and the 29th Sept. 1885 were valid and binding on the defendants.

The defence was (*inter alia*) that the agreement of the 31st Jan. 1895 was invalid on two grounds; (1) that the sanction of the Local Government Board was not obtained pursuant to sect. 61 of the Public Health Act 1875; and (2) that the agreement did not specify any pecuniary penalty pursuant to sect. 174 (2) of the same act.

Swinfen Eady, J. held that the sanction of the Local Government Board required by sect. 61 of the Public Health Act 1875 was a sanction to the supply of the water and not to the terms of the agreement; and that the sanction given by the board originally rendered further sanction unnecessary; and that the agreement was not void in the absence of a penalty clause under sect. 174, sub-sect. 2 of that Act.

He therefore gave judgment for the plaintiffs, and the defendants appealed.

The question whether the sanction of the Local Government Board to the agreement of the 31st Jan. 1895 had been given or was necessary was first argued.

Micklem, K.C., *R. J. Parker*, and *T. J. C. Tomlin* for the appellants.—The agreement of the 31st Jan. 1895 is void and cannot be enforced, as the sanction of the Local Government Board, as required by sect. 61 of the Public Health Act 1875 has not been given. The sanction given in 1885 was not a sanction for the whole Wakefield district. To treat in that way is to strike out the words "for the benefit of the parishes of East and West Ardsley." A consent for a limited purpose cannot be construed as a consent for an unlimited purpose.

Eve, K.C. and *E. Clayton* for the respondents.—The sanction of the Local Government Board covers the arrear of supply in question, and their sanction to the agreement of the 31st Jan. 1895 was not required. That agreement did not involve any extension of supply. The correspondence which took place with reference to the agreement confirmed their sanction.

Halifax Corporation v. *Soothill Upper Local Board*, 31 L. T. Rep. 6.

R. J. Parker in reply.

VAUGHAN WILLIAMS, L.J.—Upon this first point I am of opinion that the sanction of the Local Government Board was necessary in respect of the agreement of the 31st Jan. 1895, and that it has not been obtained, and therefore that the defendants are not either of them—that is to say, either the Wakefield District Council or the East and West Ardsley District Council—bound to pay for the water that they have not had under this minimum clause. Now, the agreement in question is an agreement which, if one looks generally at the clauses providing for the works which are to be executed and also at clause 4, makes it plain that the Wakefield Council, which was the party to this agreement other than the Soothill Council, contemplated a scheme under which the Wakefield Council intended to supply, the whole of their district, and intended not only to take water for the supply of their own district but for "any place outside the said district which for the time being they may contract to supply, the quantities of water following," and then it sets out the minimum and maximum quantity. Then clause 9 says, "The vendors shall forthwith apply for and with all due diligence endeavour to obtain the sanction of the Local Government Board to these presents, and, unless within six calendar months from the date hereof such sanction shall be obtained or it shall be ascertained that no such sanction is nesessary, then this agreement shall be void." In my judgment, in construing clause 9 one must not construe the words "the sanction of the Local Government Board to these presents" as merely meaning the sanction of the Local Government Board to these two public bodies entering into this agreement, but construe it as referring to the sanction of the Local Government Board to those things which are contemplated by the scheme which is set forth in this agreement for which the sanction of the Local Government Board is necessary. It was known to all the parties to this agreement that the sanction of the Local Government Board to the agreement as a mere agreement was quite unnecessary. In the correspondence that had passed in earlier years between the Local Government Board and these public authorities that had been pointed out again and again, and in my judgment the sanction which is referred to in clause 9 is the sanction to this action, which is contemplated by the Wakefield District Council under this agreement. When one remembers that they contemplated a supply of water within such areas as obviously would require the sanction of the Local Government Board, in my judgment it is a condition precedent to the validity of this agreement, and to the application of this agreement that that sanction should be obtained within the six months. The parties did actually apply to the Local Government Board for the sanction, and the Local Government Board, taking into consideration that really that which they were being asked to sanction was future supplies in such a manner as to prevent the necessity of any reference to the Local Government Board in future by the Wakefield District Council for sanction of the supplies contemplated, refused the application. I have dealt with the matter at present as if the only defendants here were the Wakefield District Council, but really there is very little which need be added with regard to the East and West Ardsley District Council as an independent local body, which they have now been constituted. They are defendants as well as the Wakefield District Council in this action. With regard to them one only has to look at the order of the 8th Aug. 1895, which constitutes them an independent authority, to see that the terms of that order clearly do not operate to throw upon the East and West Ardsley District Council any liability in respect of this contract. In the first place it is plain that no liability can be transferred from the Wakefield District Council to the East and West Ardsley District Council except in respect of a contract under which the Wakefield District Council themselves were liable at the moment of the segregation of the East and West Ardsley District Council. For the reasons I have already given I am of opinion that the

contract of 1895 is not a contract which could have been enforced against the Wakefield District Council, and, even apart from that, if one had been of opinion that the contract was a contract binding upon the Wakefield District Council, it is perfectly impossible to say that the contract, which admittedly—to put it shortly—was a contract for the purpose of enabling the Wakefield District Council to supply water throughout their district and take their supply of water for that purpose, could fall within these words, which only apply to contracts which exclusively relate to the area which is taken over by the newly constituted urban authority. For these reasons I think that on this first point we must decide in favour of the objection of the defendants and hold that this contract is not a contract which is enforceable against either of the defendant bodies.

ROMER, L.J.—I have come to the same conclusion. With regard to the construction of sect. 61 of the Public Health Act 1875, it appears to me that the Local Government Board, when an application is made to it for its consent under the section, may give a consent limited to a supply by the local authority to another local authority of water for the use of a particular district, part of the larger district over which the local authority has power. This view is one that has clearly been taken consistently by the Local Government Board throughout the correspondence which is in evidence in this case, and I think is a correct view. It is to my mind impossible to suppose that, if an application is made for the board's consent to the supply of water to a particular district not constituting the whole of the district of the local authority requiring it, that the Local Government Board are in this dilemma—viz., that if they should think it is right that a consent to the supply of water be given for that particular district, but not to the whole district, they are either obliged to refuse to sanction the supply for the purpose of the limited area or are obliged to sanction the supply to the whole of the area of the authority requiring the water, which they might think very undesirable. To my mind sect. 61 does give power to the Local Government Board to give such a limited consent as I have indicated—that is to say, to limit the area for the use of which the water is to be supplied. Indeed, I do not think that the view that I am expressing is one which is really challenged by the respondents in the present case. There was an application made originally to the Local Government Board by the Soothill District Council for a certain consent. The application was first made by a letter of the 13th Feb. 1882 from the Wakefield Rural Sanitary Authority, and the application is made in this form. It is a joint application sent in by the clerk of the rural sanitary authority of the Wakefield Union, which is the district requiring the water, and the clerk to the Soothill Local Board, the authority supplying the water, for the sanction to a scheme of water supply for the townships of East and West Ardsley, together with a draft of the proposed agreement. Now, with reference to that application, the Local Government Board took the view which I have expressed. So far as concerns the area for which the supply of water is to be used, they had to consider that question of course, and their consent has to be obtained before one authority can supply another with water for the purpose of their area. They point out that it is the view they have always taken, and I am not for a moment disposed to say that the Local Government Board were wrong in the view they took—that, so far as concerned the details of the agreement between the parties, the two local authorities, when once the sanction of the board is given for the supply of water, the question as to terms is one that is left to the two authorities themselves, and the Local Government Board is not concerned with those terms at all. Accordingly, the letter I have mentioned was replied to by letter dated the 23rd Feb. 1882, which refers to the application as being one in connection with the intended supply of water to the parishes of East and West Ardsley from the mains of the Soothill Local Board. So that both the application and the reply show that the application is treated as one limited to the supply of water to the two particular parishes. On the 15th May 1882 the Local Government Board, having in the meantime with reference to a proposed loan held an inquiry, wrote a further letter, in which they state that they have had a report, and they are considering the application for the board's consent, under sect. 61 of the Public Health Act 1875 to a supply of water being furnished to the Wakefield Rural Sanitary Authority by the Soothill Upper Local Board for the use of the inhabitants of these parishes—showing the view that is taken both by the applicants and the Local Government Board of the limited nature of the consent asked for and ultimately given. In the same letter the Local Government Board say that no sanction of theirs is required to the proposed terms of the agreement between the two authorities, and they accordingly return the draft agreement between the parties which had been forwarded to them. Then on the 17th May 1882 again the Local Government Board refer to the application for their consent under sect. 61 to a supply of water being furnished by the Soothill District Council to the sanitary authority of the Wakefield Union for the use of the inhabitants of the parishes of East and West Ardsley; and that ultimately culminates in the formal consent being given. It was given on the 15th July 1885, and sanctioned "the supply of water by the Soothill Upper Local Board to the rural sanitary authority of the Wakefield Union for the benefit of the parishes of East and West Ardsley." It is therefore clear that the application was treated by both parties as one limited to the supply of a particular area and for the benefit of that area, "for the benefit of the two parishes," as it is termed. and that the consent given was limited to that. So far it appears to me that there is no ground for any contention that the Local Government Board has given any consent to the Soothill District Council except to the supply of water limited to the use of the two parishes. A little later on a further application was made to the Local Government Board on behalf of the Soothill District Council for the supply of water to a larger area. In this respect the Wakefield Local Authority, in whose district East and West Ardsley were, wanted authority for the water to be supplied from East and West Ardsley to a place called Middleton, which is an adjoining district. Accordingly I find on the 16th Nov.

1889 the Local Government Board wrote to the Soothill Local Board that they understood arrangements had been made between the Wakefield Union and the Hunslet Union for the supply of water for the use of the township of Middleton, that being the adjoining district to East and West Ardsley, and that these arrangements had necessitated a modification of the agreements subsisting between the Soothill Upper Local Board and the first-named authority. The letter proceeded: "Under these circumstances it appears to the board that their further sanction is required under sect. 61 of the Public Health Act 1875 to the supply of water by the local board to the rural sanitary authority of the Wakefield Union, and such sanction is hereby given." In my opinion the Local Government Board was quite correct in the view it took that, inasmuch as the area of supply was being extended, the sanction of the Local Government Board was necessary in order to justify or entitle the Soothill Upper Local Board to supply that extra area, and the consent is obviously limited, to my mind, in its true construction to the extension of the limited area to the township of Middleton. We have then so far the consent of the Local Government Board given to the supply of East and West Ardsley, and we have further the extension of right of supply of East and West Ardsley to supply a part of their water supply to Middleton. Now, no further consent has ever been given by the Local Government Board to any extension of the area for the supply of water by the Soothill Local Board to the Wakefield Local Board. When the agreement which we have to consider of the 31st Jan. 1895 was come to, it is clear, as it appears to me, that the parties to it considered, and I think rightly considered, that the agreement might require, at any rate as to the supply of water by the Soothill Local Board, the consent of the Local Government Board, for that agreement was one which on the face of it extended the area of the supply of water by the Soothill Local Board. It contracted for the supply of water to the Wakefield Board for the whole of the district of the Wakefield Board, of which East and West Ardsley formed a part, and a comparatively small part, and it was not even limited to that, for it contemplated a supply for the benefit of or for the use of any place outside their district which for the time being the Wakefield Board might contract to supply with water. It is clear to my mind that by that agreement there was a minimum amount of water fixed, which was fixed—at least I cannot help thinking it must be taken to have been fixed—with reference to the larger area. It was a different minimum to that provided for by the prior agreements which had been entered into under the sanction of the Local Government Board to which I have before adverted. Now, that being the nature of the agreement come to, an application was made to the Local Government Board for its consent, and the application states in the clearest possible way the view of the Soothill Local Board as to the effect and scope of the agreement. By the letter of the 11th April 1895 the Soothill Local Board called the attention of the Local Government Board to the fact that the supply for which sanction was now asked was for the whole of the district of the rural district council of Wakefield. Then follows the clause of the agreement, "or such part thereof as the purchasers may for the time being wish to supply or any place outside their said district which for the time being they may contract to supply." That is clearly the correct view. There were other provisions that I need not advert to showing that the view which I have expressed as to the true meaning and extent and effect of the agreement is the correct one, such for example as the provision for the establishment of means of storage at any place within their large district which the Wakefield Board might select for the holding of water to be supplied, and other provisions to the same effect. Now, when the application was made to the Local Government Board for their consent to the supply of water by the Soothill Board to this lately enlarged district, their answer is as clear as daylight. It is a distinct refusal. On the 22nd May 1895 the answer is this: "It would not accord with the practice of the board to give a general sanction to the supply in respect of all the contributory places in the rural district by the urban district council, but the board will be prepared to consider applications for such sanction in respect of particular contributory places when the supply is actually to be furnished." That, to my mind, is as clearly expressed a view as we could have. They were asked to sanction the supply to the whole of this area. The answer was: "We refuse; you must come if you want to have extensions of area and ask for extensions of area, and ask for extensions showing the particular parts you want and we will consider these separately, and say whether we will or not give our consent." It is clear that to that application at least a refusal is given. Two things then follow to my mind; first, that to this agreement of the 31st Jan. 1895 the consent of the Local Government Board was to be obtained, and that the consent of the Local Government Board was refused. That being so, there was the provision in the agreement itself providing for the case where, if the consent of the Local Government Board was necessary and was not obtained within the six months there specified, the agreement should come to an end. In my opinion, the consent of the Local Government Board was necessary to validate it. That consent was not obtained within the time fixed, and the whole agreement came to an end, nor is the agreement one which can be severed. I have tried to see whether I could construe the agreement as one which could be in some shape or form limited to East and West Ardsley and to the supply by East and West Ardsley. I cannot arrive at that. The agreement appears to me to be one which is not capable of division. I cannot think that agreement is one which could be validated in such a way. I cannot make out any fresh agreement between the parties to the effect contained in the agreement of the 31st Jan. 1895, but so limited as to make it valid. It appears to me, therefore, that so far as this case is concerned the rights of the plaintiffs must depend on the prior agreements and not upon the provision of this agreement of the 31st Jan. 1895, and so far I do not agree with the decision of the court below.

STIRLING, L.J.—I agree with what has been said by my brethren, and I have very little to add; but, as we are differing from Swinfen Eady, J., I shall indicate very briefly the grounds on which my judgment is based. Under sect. 61

of the Public Health Act 1875 any local authority supplying water within their own district may, with the sanction of the Local Government Board, supply to the local authority of any adjoining district on such terms as may be agreed on between such authorities. The supply of the water cannot be made without the sanction of the Local Government Board, but I agree with the view which has been adopted by the Local Government Board itself that, if that board considers the supply of water to be proper, and sanctions it, this section does not throw upon them the obligation of entering into the nature of the terms upon which the two authorities propose to deal with one another in reference to the supply of water. Where the authority which desires to be supplied with water has jurisdiction extending over a wide area, sub-divided into various contributory districts, it has been the practice of the Local Government Board, as shown by the correspondence in this case, when an application is made for their sanction with respect to the supply of one of those contributory districts, to grant that in a limited form—that is to say, the supply is sanctioned for the benefit of that contributory district and no more; and if the authority which is to be supplied at a later date requires an extension of the authority so as to supply the water to another contributory district, the view taken by the Local Government Board is that they must come again, when the matter would receive further consideration, and sanction be given or withheld according to the view which the Local Government Board may form at the time of the subsequent application. It seems to me that practice is one which the Local Government Board are justified in adopting by the terms of this Act. Now, that being so, I may state the point which we have to deal with very shortly. Previously to the 31st Jan. 1895 the Soothill Local Board, which has the control of a large supply of water, had obtained the sanction of the Local Government Board to the supply of water to the district consisting of the parishes of East and West Ardsley, which is a contributory district within the Wakefield local authority. That sanction had afterwards been extended to the supply of the township of Middleton, which is another part, but beyond that the sanction had not gone. In Jan. 1895 the Soothill Local Board and the Wakefield local authority came to terms as to the future supply by which the Soothill authority were to come under obligations to supply water, and the Wakefield authority came under obligations to take a supply not merely for the portion of the Wakefield district in respect of which sanction had already been given by the Local Government Board, but for the supply of water to the whole of the Wakefield district or such part thereof as for the time being they might wish to supply and also outside that district. An agreement is entered into between the parties which contains a clause which has already been read: [His Lordship read clause 9, and proceeded:] That is emphasised by a contemporary agreement bearing date the same day by which in the event of this agreement of the 31st Jan. 1895 becoming void under that clause the parties are thrown back on the pre-existing agreements. Well, the application was made to the Local Government Board, and it took the form of an application to sanction the new agreement of which a copy was sent to the Local Government Board. The answer of the Local Government Board is clear and distinct: "So far as we are asked to sanction the particular document which you have submitted to us, that is a matter with which we have nothing to do; we decline to sanction that document in itself. So far as regards matters to which our sanction is requisite, that is the sanction to the supply of water beyond the limited portions of the Wakefield district to which a supply has been already sanctioned, we refuse it." They say "it is not in accordance with our practice, and we therefore decline to sanction any such supply until the time arrives when the supply is necessary." Then what is the nature of this scheme. This scheme was one which contemplated the erection, amongst other things, of what is called means of storage at some place within the district capable of containing not less than 500,000 gallons of water under certain conditions involving a large expenditure on the part of the board. It is obvious, I think, reading this document, that the meaning of clause 9 was this: "We are not to be in a position to be called upon to embark on the expenditure until we are satisfied that the Local Government Board will give such a sanction as will enable us to secure a customer for the large amount of supply which we are contemplating." That being so, it seems to me that the sanction which the Local Government Board refused to give was one which was necessary for the purpose of the agreement and was not obtained. The sanction which was asked and which was sought to be obtained was one without which the agreement could not be legally carried into effect. It seems to me, that that being so, on these short grounds, and agreeing with the rest of what has been said, in this case we ought not to agree with the judgment of the learned judge in the court below.

The question with reference to the absence of a penalty clause in the prior agreement was then argued.

Micklem, K.C., *Parker*, and *T. J. C. Tomlin* for the appellants.—The provisions of sub-sects. 1 and 2 of the Public Health Act 1875 are obligatory and not directory:

Young and Co. v. *Mayor, &c., of Royal Leamington Spa*, 49 L. T. Rep. 1; 8 App. Cas. 517;
British Insulated Wire Company Limited v. *Prescot Urban District Council*, 73 L. T. Rep. 383; (1895) 2 Q. B. 463, 538;
Hunt v. *Wimbledon Local Board*, 40 L. T. Rep. 115; 4 C. P. Div. 48.

Eve, K.C. and *E. Clayton* for the respondents.—Sect. 174, sub-sect. 2 is directory only. Besides, the contract in question is not within the class of contracts referred to by that sub-section. The class referred to are contracts with reference to contracts under which works are to be done by someone else for the authority. This view is supported by sub-sect. 5 of sect. 174. The provision is for the protection of the ratepayers of the urban authority and it would be no protection to them that the urban authority was liable to a penalty. No penalty could be imposed for the nonpayment of money. [VAUGHAN WILLIAMS, L.J. referred to Bullen and Leake's Precedents of Pleading, 3rd edit., p. 217, and *Lowe* v. *Peers*, 4 Burr. 2225, 2229.] The provisions of clauses 12 and 13 of the agreement of the 17th July 1882 really impose

a penalty, though perhaps they do not do so in form. This agreement is merely for a supply of water, and contracts for the supply of water to consumers are not within sect. 174. They also referred to

Re Burdett; Ex parte Byrne, 58 L. T. Rep. 708; 20 Q. B. Div. 310;
Attorney-General v. *Gaskill*, 47 L. T. Rep. 567; 22 Ch. Div. 537;
Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), ss. 33 and 52.

Micklem, K.C. in reply.

Cur. adv. vult.

Aug. 11.—ROMER, L.J. read the following judgment:—The question has been argued in this case whether the provision in sect. 174, sub-sect. 2, of the Public Health Act 1875 as to some pecuniary penalty being stated is directory only or imperative. Although it is not necessary for the purposes of this appeal to decide the point, I think there is good ground for the view that the whole of sub-sect. 2 is directory only. Sub-sect. 1 is undoubtedly imperative. It requires every contract of the value or amount of 50*l.* to be in writing and sealed with the common seal of the urban authority. Now to carry that requirement out it follows that all the essential terms of the contract must appear in the written contract as sealed. That being so, when we come to consider the first part of sub-sect. 2 it is clear that it only points out what obviously are or may be essential terms in such a contract. If imperative, it would add nothing to the effect of sub, sect. 1, and the first part of sub-sect. 2, therefore can only be useful in the view that it is directory, inserted in the section for the guidance and direction of the authority, in order to call its attention to what are ordinarily essential terms, which may exist, and which, if existing, ought to be inserted therein. Bearing this in mind, I think the directory nature of sub-sect. 2 as a whole is further supported by the provision in the second part of the sub-section as to a penalty, for that provision in itself appears to me to be directory, for reasons which I hereafter state in detail. It is, moreover, noticeable that sub-sects. 3 and 4, which immediately follow, are clearly directory only. But even assuming that the first part of sub-sect. 2, which shortly speaking, requires that all the terms of the contracts coming within the operation of the sub-section shall be duly set forth, is imperative, it does not of necessity follow that the second part of the sub-section, dealing with the matter of a penalty, is not directory only. The provision as to the penalty is distinct in character from the general provisions of the first part of sub-sect. 2. Those general provisions concern matters arranged between the parties and require those matters to be truly stated. The provision as to the penalty points to the necessity or propriety of a particular clause being made to form part of the contract otherwise agreed to by the parties. It may well be then that the penalty provision is directory only, though the other provisions are imperative. Now there are several considerations which, in my opinion, strongly support the view that the penalty provision must have been intended by the Legislature to be, and ought to be construed as being, directory only. In the first place, it is clear that some discretion as to the penalty is left to the urban authority. The amount of the pecuniary penalty and the form it should take are entirely in the discretion of the authority. Is it then unreasonable to suppose that in other respects the urban authority is to have a discretion? Suppose that in a particular case the authority has to make a necessary contract, in regard to which a substantial pecuniary penalty would be inappropriate, or would be so injurious as to prevent responsible contractors coming forward. Can the Legislature have intended that in such a case there should be no discretion on the part of the authority and no power on its part to impose no penalty, or to impose a merely nominal penalty? I add "impose a merely nominal penalty," for, if the provision be imperative, a nominal penalty might be impeached as a non-compliance with the sub-section. I think the Legislature could not have intended this, and I think my view is supported by the second part of sub-sect. 5, for that gives full power to an urban authority to compound for any penalty which may have been actually incurred, and, moreover, appears to contemplate the penalty being not in the contract, but in some independent bond or other document. If the penalty clause was imperative, it must have appeared in the contract itself. But, further, it is clear that the penalty referred to in sub-sect. 2 is to be imposed not on the authority but on the contractors. The provision as to penalty is intended to benefit the authority and its ratepayers. It is difficult to suppose that the Legislature intended that the authority, acting in the interests of the ratepayers, should have no power to waive a provision intended only for the benefit of the authority and its ratepayers. Again if the matter be regarded from the point of view of the contractor, it is difficult to suppose that by the sub-section a duty was cast upon him in a case where the authority did not require a penalty, of insisting that a penalty must be imposed upon him in order to give him a valid contract. It appears to me that to hold that the penalty provision is not directory only would lead to consequences that could not have been intended by the Legislature. Take a case where the authority, by a contract duly set forth and executed, contracts to sell goods to a contractor who contracts to pay for the same at a future time. Can the Legislature have intended that if the authority did not impose a penalty on the contractor for nonpayment at the time fixed, he, after obtaining and consuming the goods, could defeat an action against him for the price, because he was not required to pay a penalty for nonpayment? It appears to me difficult so to hold. For these reasons I think that the penalty clause should be held to be directory, though I fully admit that the point is one of great difficulty. This view renders it unnecessary for me to determine the question whether, assuming the penalty clause to be imperative, it has not been in substance complied with in the present case. This question itself is not free from difficulty, for the action is said by the plaintiffs to be based on the agreement of the 29th Sept. 1885, which only continued the then existing provisions of the original agreement of the 17th July 1882, those existing provisions, so far as they relate to acts to be performed by the defendants, being (shortly stated) for payment by them of the price of the water supplied, and for the keeping by them in due order of the water

meters. As to these two provisions it is contended on behalf of the plaintiffs that a penalty, not in form, but in substance, has been imposed by clause 12 and 13 of the original agreement; but, as I have said, in the view I take as to the penalty clause, it is not necessary for me to decide upon this last mentioned contention. The further question was also argued whether sub-sect. 2 was not confined to cases of work done for or goods supplied to the urban authority, but under the circumstances this further question need not be determined by me.

VAUGHAN WILLIAMS, L.J.—Sect. 174, being a section which is intended, amongst other things, to protect ratepayers by the terms contained in the contract in the case of contracts entered into by the local authority, I cannot bring myself to hold that sect. 174, sub-sect. 2, is only directory. I should naturally, in a case like the present, have desired so to hold and defeat this defence.

STIRLING, L.J.—I feel the difficulty of the case but I have brought myself to agree with the view of Romer, L.J.

Solicitors: *Barton* and *Pearman*, agents for *R. B. Hopkins*, Leeds; *Jaques* and *Co.*, agents for *Scholefield, Taylor*, and *Maggs*, Batley.

HIGH COURT OF JUSTICE

CHANCERY DIVISION.

Oct. 30 *and* 31, 1905.

(Before KEKEWICH, J.)

ATTORNEY-GENERAL *v.* MELVILLE AND KING. (*a*)

Local government — By-laws — New street—Air space and ventilation—One "domestic building"—Occupation—Communication— Frontage —Tests of definition.

Defendants were proposing to erect a long construction on a strip of land extending for about a hundred yards from D.-road, within the district to which the by-laws of the W. G. Urban District Council applied, along the G. N. Railway. The erection consisted of three blocks of stables and coach-houses with lofts above joined by two lower brick and slate "lean-to's" which were also suitable to be fitted as stables. There was communication from end to end leading to a garden and the termination of the stables remote from D.-road. On the remaining side there was a paved yard and fence. There was ventilation, but no "air space" on the side towards the railway. The by-laws of the W. G. Urban Sanitary Authority required an open space of 24ft. in front and 200 square feet, exclusively belonging to such building, in the rear of any new domestic building. If the stables and coach-houses fronted on D.-road the by-laws had been complied with. The council asserted that the erection constituted more than one building not fronting on D.-road, and that the defendants' plans infringed the by-laws as to laying out new streets.

Held, that the erection constituted one building, and that the by-laws as to air space were not infringed.

It seems that the fact that the erection might easily be adapted for occupation by more than one person will not prevent its being held to be one building, as the question must be dealt with on the facts as they exist, and the test of occupation is misleading. A better test is the existence of means of communication between the blocks, and the situation and control of the outer door.

WITNESS ACTION.

The plaintiffs, the Urban District Council of Wood Green, are the local authority having control over new streets and buildings in the urban sanitary district of Wood Green, in the county of Middlesex. The defendant Walter Melville is a builder, and the defendant John Ware King is the owner of a strip of land within the district upon which he is proceeding to erect buildings.

The land of which King is owner is bounded throughout its whole length on the side which is almost due north by the fence of the Great Northern Railway, at the distance of a foot or two; on the south by a fence dividing the land on which he proposes to build from other land belonging to him abutting on a road called Crescent-road, leading into Dagmar-road, and from shops he has there constructed on other portions of his property; on the east his land is bounded by a fence at the end of a plot of garden ground, and on the west by Dagmar-road.

The nature of the erections the defendants are proposing to make on this land may be gathered from the following details and those contained in the judgment of the court.

On the 5th March 1904 the defendants—who had previously submitted two sets of plans for a dwelling-house and a double row of stables facing each other with communication to Crescent-road, which had been disapproved by the council on the ground that they infringed the council's by-laws for the construction of new streets, and were in effect a mews—submitted to the council certain plans (No. 1095) of work to be executed on King's land abutting on Dagmar-road, consisting of one dwellling-house with a block of stables in the rear, being erections of a domestic character.

These plans and work having been disapproved by the council, on the 10th May 1904 the amended plans of such work (No. 1113) were submitted not showing a dwelling-house, for which a coach-house and stables were substituted, but showing three blocks of two-storied coach-house and stable buildings with lofts above, and two lengths of one-storied stables, or brick and slate lean-to's, the latter being about 8ft. 6in. in width, the two lengths of one-story stables being entered from Dagmar-road only through the folding doors of the coach-house into which the lower rooms of the dwelling-house, shown on the former plan (No. 1095), had been converted. There were six separate divisions by brick walls of the larger block of stabling, which was about 160ft. in length, with openings through until the outer wall was reached, through which there was also an opening into the garden or yard which extended about 20ft. beyond. There were step ladders in each division leading to the lofts above.

The wall of the premises on the side of the Great Northern Railway extended all along for a distance of 288 feet from the entrance in Dagmar-road to the end of the longer block of stables, and

(*a*) Reported by W. P. PAIN, Esq., Barrister-at-Law.

was of a greater height where the two storied coach-house and stables and lofts joined it. From that side there appeared to be three separate buildings, the "intermediate lean-to" erections not being visible. There was communication through both the lofts and stables.

The plans showed that it was intended to preserve an inclosed open space or garden at the eastern end of the longer block of stables for a width of 30ft., with w.c.s in it attached to those stables.

This block of buildings had openings towards the railway of about 13in. square to each section of the building for ventilation, and windows towards Crescent-road.

There were wide paved yards on the south side of the building, about 15ft. 6in. wide, and an entrance from them through a double door wide enough to admit a carriage to the first stable in the longer block.

The frontage to Dagmar-road on that side was about 20ft.

The defendant King stated that he intended to place a fence with barbed wire on the south or Crescent-road side of his premises.

All the intermediate doors were wide enough to admit of horses being taken through them except those through the inner walls of the larger block of stables.

The stables in the two plans first submitted were intended for the use of tradesmen having shops in the adjacent Crescent-road, the erections in the last plan (No. 1113) for the use of contractors' horses.

It did not appear that there were windows in the second stables except to east and west, the wall being blank towards Crescent-road.

A model of the premises was in court, and is referred to in the evidence and judgment.

The plaintiffs in this action, which was originally commenced against the defendant Melville alone, claimed a declaration that the proposed works were in contravention of their by-laws, and an injunction.

By the by-laws made in 1893 by the acting urban sanitary authority with respect to new streets and buildings in the urban sanitary district of Wood Green, confirmed by the Local Government Board, and substantially following their by-laws:

1. In the construction of the by-laws relating to new streets and buildings, "party wall" means (*a*) a wall forming part of a building, and being used or constructed to be used in any part of the height or length of such wall for separation of adjoining buildings belonging to different owners, or occupied or constructed or adapted to be occupied by different persons. "Public building" means a building used or constructed or adapted to be used either ordinarily or occasionally as a church, chapel, or other place of public worship, or as a hospital, workhouse, college, school (not being merely a dwelling-house so used), theatre, public hall, public concert-room, public ballroom, public lecture-room, or public exhibition-room, or as a public place of assembly for persons admitted thereto, by ticket or otherwise, or used or constructed or adapted to be used, either ordinarily or occasionally for any other public purpose. "Building of the warehouse class" means a warehouse, factory, manufactory, brewery, or distillery. "Domestic building" means a dwelling-house or an office building or other outbuilding appurtenant to a dwelling-house, whether attached thereto or not, or a shop, or any other building, not being a public building or of the warehouse class

4. Every person who shall lay out a new street which shall be intended for use as a carriage road shall so lay out such street that the width thereof shall be fifty feet at the least.

5. Every person who shall construct a new street which shall exceed one hundred feet in length, shall construct such street for use as a carriage road, and shall, as regards such street, comply with the requirements of every by-law relating to a new street intended for use as a carriage road.

8. Every person who shall construct a new street shall provide at one end at least of such street an entrance of a width equal to the width of such street and open from the ground upwards.

With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings:

53. Every person who shall erect a new domestic building shall provide in front of such building an open space, which shall be free from any erection thereon above the level of the ground, except any portico, porch, step, or other like projection from such building, or any gate, fence, or wall, not exceeding seven feet in height, and which, measured to the boundary of any lands or premises immediately opposite, or to the opposite side of any street which such building may front, shall, throughout the whole line of frontage of such building extend to a distance of twenty-four feet at the least; such distance being measured in every case at right angles to the external face of any wall of such building which shall front, or abut on such open space.

54. Every person who shall erect a new domestic building shall provide in the rear of such building an open space exclusively belonging to such building and of an aggregate extent of not less than two hundred square feet, and free from any erection thereon above the level of the ground, except a water-closet, earth-closet, or privy, and an ashpit. He shall cause such open space to extend laterally throughout the entire width of such building, and he shall cause the distance across such open space from every part of such building to the boundary of any lands or premises immediately opposite or adjoining the site of such building, to be not less in any case than twelve feet six inches. If the height of such building be fifteen feet he shall cause such distance to be eighteen feet nine inches at the least. If the height of such building be twenty-five feet he shall cause such distance to be twenty-five feet at the least. If the height of such building be thirty-five feet or exceed thirty-five feet he shall cause such distance to be thirty feet three inches at the least.

55. Every person who shall erect a new domestic building shall construct in the wall of each story of such building which shall immediately front or abut on such open spaces as, in pursuance of the by-laws in that behalf shall be provided in connection with such building, a sufficient number of suitable windows in such manner and in such position that each of such windows shall afford effectual means of ventilation by direct communication with the external air.

Macmorran, K.C., *Beddall*, and *Austin F. Jenkin* for the plaintiffs.—These by-laws do not differ from those in force in the metropolis and throughout the country. In all urban by-laws as to building there is a by-law as to air space, which must be air space exclusively belonging to that building. Unless the building fronts Dagmar-road there is not sufficient air space. This long line of buildings abuts immediately on the Great Northern Railway so that there is no air space there within by-law 54. I say there are several buildings. If one can put up one row of stables with a narrow front to a street, the whole mischief of building in urban districts as to air space and ventilation will be incurred.

The object which the Legislature had in view in its public health legislation must be kept in view. Defendants are laying out a new street and infringed the by-laws as to width of streets. If the defendants are right there will be nothing to prevent putting up another row of buildings towards the Crescent-road front. A person submitting plans cannot take advantage of an open space not belonging to himself, whether it be a railway or anything else. If it were not so the same open space might be utilised for two buildings:

Jones v. *Parry*, 57 L. T. Rep. 492; per Pollock, B. and Field, J., at p. 494.

Assuming I am right, there is sufficient air space at the south front of the stables. Even if the passage is not intended to be used as a private street, it is a passage intended for carriage traffic; but that would not prevent the letting of the stables to any number of different persons. They might be occupied in a legal sense by different persons. It is a question of fact which has to be decided upon all the circumstances of the case. Here there is no proper air space. There are no proper windows as provided by by-law 55. The party walls should be carried out through the roof. [*Lawrence*, K.C. admitted that if these are separate buildings the by-laws had not been complied with.] If the large building may be a separate building the others may be separate. [KEKEWICH, J.—The question what is a building must be decided by reference to some standard. His Lordship referred to the 92nd section of the Lands Clauses Consolidation Act 1845.] In the Public Health Act 1875 there is a definition of "house," but not of "building." On the question whether the defendants had infringed the by-laws with respect to the laying out and construction of new streets, as to which it was contended the by-laws were infringed, the definition of "new street" in sect. 4 and sect. 157 of the Public Health Act 1875, and the cases *Taylor* v. *Corporation of Oldham* (35 L. T. Rep. 696; 4 Ch. Div. 395), *Reg.* v. *Goole Local Board* (64 L. T. Rep. 595, per Day, J., at p. 596; (1891) 2 Q. B. 212), and *Armstrong* v. *London County Council* (81 L. T. Rep. 638; (1900) 1 Q. B. 416, per Lord Russell, C.J., at p. 423) were cited.

P. Ogden Lawrence, K.C. and *St. J. Micklethwait* for the defendants.—Some idea of the nature of a building may be gathered from by-law 18, which speaks of the brick and stone or other blocks of hard substance of which every external and party wall of new domestic buildings are to be constructed. The building may have external walls and may have party walls. There are no merits in the attempt here made to coerce the defendant King. He is entitled to build on his land from Dagmar-road to the extreme end. The building is designed to be used as one building. The test which has been applied has been whether the erection is physically separated by party walls. Under the Revenue Acts if a common owner wishes to make one building of several, and joins them, that is one building for the purposes of the Acts. Party wall openings under the Metropolitan Building Acts are not allowed, except under very severe restrictions. The question whether this is one building is one of bricks and mortar, and the question of occupation in the case of stables has little to do with it. The person who has the keys of the entrance controls the whole building. The experts have differed in their estimate as to the number of buildings here, both before your Lordship and on the motion for injunction.

Macmorran in reply.—The defendants' contention involves the proposition that if a man has a frontage and a long erection, he can, by making a way through that, avoid making a new street or leaving the air space required by the by-laws. If so, where a man has a domestic building such as these are, and a garden, he can lay the building out irrespective of the by-laws. The question is what is the front of these stables. I care not whether they are approached from Dagmar-road or Crescent-road, they front to the south. It is in effect a mews. It is not a case of several entrances to buildings. If the larger stable building stood alone people would say it fronted on the paved yard, and the fact that other buildings are put up adjoining it cannot make any difference in the direction in which it fronts. The other buildings are not necessary to the stables, which would be complete without them. *Goodchild* v. *Matthews* (89 L. T. Rep. 369) is no authority that these are one building. There the question was whether the defendant had committed an offence. It did not decide that five blocks of fronts did not constitute one building. Although they are designed as coach-houses and stables they might be let as different warehouses. Then no one could say they were one building. The Legislature has required the local authority to decide what is to be a street. On the earlier plans the question of air space did not arise. Can it make any difference that a passage goes through? This is intended to be used by horses and carriages. If the other side are right that this is a stable 190ft. in length fronting Dagmar-road, the result is subversive of all by-laws as to new streets and air space, and the defendants might cover the whole open space with dwellings, provided windows were put at the front.

KEKEWICH, J.—It has been said that this case has no merits, and the observation seems to be well founded. No possible advantage can accrue to the public, or to any member of the public, by preventing Mr. King from completing this building in the manner in which he wishes to complete it. I only mention that to add that that is no concern of mine. The district council are clearly entitled to ask the opinion of the court on the question whether the building which they seek to prevent can properly be prevented according to law, and the court is bound to give an opinion irrespective of any question whether the district council is wise or not in coming here to litigate the question. One other preliminary remark. This is a case of complete honesty. I have myself been concerned in cases before now, and plenty have been heard in the courts of this character in a general way in which there has been trickery, an attempt to get out of restrictions or out of the meaning of covenants, or the meaning of by-laws, by something which is not adopted honestly, but simply by way of trickery, in order to deceive, if possible, those who are enforcing the covenant or the by-law. There is nothing here of that kind. Mr. King was unfortunate enough more than once to submit plans to the district council which the district council rejected. He did not quarrel with them, he did not question their decision; he

submitted, and endeavoured to meet their views. Ultimately he has, so he says, done all that can be reasonably required of him. He is now trying the question, as he also is entitled to do, whether he has met the proper, reasonable requirements of the district council, and whether now he is at fault or not. That brings me to the real question, a very simple one in words, but perhaps not so simple when one comes to consider it in detail. The question is whether this block of buildings, as I will call it, is really in substance one building or many buildings. Let us consider the position, so as to bring one's mind to bear on this real question. Mr. King is the owner of this strip or plot of land which is bounded for the whole length on one side by the Great Northern Railway —an iron boundary which, of course, he cannot transgress. On the other side he happens also to be owner of a considerable piece of land. It is suggested that he might use, or ought to use, that land on the other side in order to improve his building on this strip which is here in question. To my mind that has nothing to do with the case whatever. He is not desiring to build on that other plot of land at present. It is the same as if he was not owner of that at all. He is minded to build on this long, rather narrow piece of land, and the only question is whether he can build on that what he proposes to build. That brings us down to a very narrow issue. I entirely agree with Mr. Gruning, the surveyor, that it is a question of common sense; but, unfortunately, there is no sense so little common in the world as common sense. Common sense in one man leads him in one direction, and common sense in another in an entirely different direction —perhaps even the directly opposite direction; and it may fairly be said to be a dubious guide. Still it is a phrase which has a meaning, and, I think, a well understood meaning. It is a question of common sense, not a question of law or of science, but it is a question which one must decide for one's self as well as one can according to one's own experience, and with such intelligence as one has in such matters. Now I come to this question, which has to be decided by common sense. I have before me this model, which, as explained, is a sufficient and complete representation of what is in course of erection or of what has been so far erected. I put aside all earlier proposals, and I look only to this model. Alone it would not be sufficient, but, with the evidence explaining it, it is quite sufficient. Are there any tests which I can apply so as to help me to determine whether the block of buildings to be erected according to that model constitutes one building or many buildings? There may be some. I think there are some. But, on the other hand, I think it is very difficult to apply any test which would be conclusive one way or the other. One test which has been very much applied during the argument was the test of occupation. It is contended that if this is intended to be occupied, and can be and is adapted for occupation by one person, that will go a long way to prove that it is one building. If, on the other hand, it is adapted to be occupied by more than one, then you have gone a long way to arrive at a different conclusion. I am disposed to agree with counsel for the defendants that occupation has very little to do with the matter. Mr. King has told us that he looks out for one tenant—a tenant with a large number of horses and carts. The proportion of carts to horses may differ, and the buildings, if completed, must be so completed as to provide for the proportion in a convenient way. That is his notion, and he has no idea, according to what he has said, of letting this to more than one tenant in that way. And it may be said, possibly, that he is well advised, because I agree with him if a number of persons occupied this stable their horses and carts might jostle against one another. But supposing this was let out as a common stable in the same way as a common lodging-house for men is let out, I cannot see that the occupation by six or more persons with six or more horses will make the slightest difference, if it is otherwise one building, any more than if one horse occupied the same stable for more than one night. I do not see that that has anything at all to do with the case. I doubt whether one may not be easily misled by considering the question of occupation. The question to my mind really is the construction of the building—not as it may be, or might have been, but as it is. It may be possibly converted easily into many buildings. Assuming it is three now, it may be converted into many more, or it might be reconverted into one. But that is not the question. But it cannot be converted from what it is without the leave of the district council, and without conforming to the by-laws. The question must be considered — assuming it, as I have done, to be a really honest case—according to what it is, not what it may be. Counsel for the relators went into the question of what the defendant (Mr. King) might do or might have done. I am not concerned with that. I am concerned with the building as it is. The first thing to be observed is that there is a continuous way from beginning to end. As it is constructed, there is no entrance to any part of the building except from what has been called the front—I will not dwell upon that—in Dagmar-road. There is no partition between Mr. King's land which is devoted to this particular purpose and the land beyond. Mr. King has told us that he intends to erect a permanent fence, and that permanent fence is part of the construction as contemplated. Therefore if anyone wishes to go into the very remotest stable, or to the w.c.s beyond them there, he must enter by Dagmar-road; not only can he not enter otherwise, but having once entered there, there is a free passage for him and also for the horses and carts—for horses at any rate—the whole way down throughout the whole length. That is one thing which seems to me to be a very strong point to be borne in mind. There is no obstruction at any point such as you would meet where there is a division between one building and another. The phrase "party wall" has a technical meaning, and to say that there is no party wall may be equivalent to saying there is one building or it may not. There is no wall the whole way down the whole length, which really constitutes a division of one compartment—a phrase which I think can be conveniently used—from another. There are, we have been told, in the different stables, divisions by walls—I think five—and they have been so constructed, we have heard, rather strong intentionally, so as to avert the necessity of building thicker outer walls than 9in. There is a passage in each case through. I cannot see them

because they are inside, but I can see them with my mind's eye, and it would be erroneous to say they constitute divisions between one building and another. What else is there? I have put aside the occupation. It can be used by entering in at Dagmar-road, and it can be used by one man or any number of men from end to end; there is nothing to stop them, as I have already mentioned. And that seems to me to be a very strong point in favour of its being one building. There are divisions in the style of the building. There is a more lofty building fronting Dagmar-road. Then a low building which is called a "lean-to," and then another more lofty building, then another "lean-to," and then the stables. It does look at first as if there were a succession of buildings. We might conveniently call them blocks of buildings. The eye is struck by the different heights of the parts and the conformation of it, and it looks as if they were intended to be independent. But that has been thoroughly explained. It was not desired or convenient to have these buildings lighted by skylights throughout, or at all; the result is that you are bound to break them up into parts so that each part might be conveniently lighted from either end. That is what has been done and it is only for that purpose. I do not think that ought to make the slightest difference in my consideration of the case that there are five blocks of buildings. The same thing would have occurred if there had been one block from beginning to end, though the construction would, of course, have varied very much, because it would have been impossible to light the building without altering the roof. I do not think there is anything else which has been called to my attention on which I need dwell. It seems to me that as I look at it, with such practical common sense as I can command, it is really one building and not many. It is not for me to say how many it is if it is more than one, for I think that it is only one. The action will be dismissed with costs.

Solicitors for the District Council, *Croft* and *Mortimer*.

Solicitors for the defendants, *Gamlen*, *Burdett*, and *Gamlen*.

Thursday, April 6, 1905.

(Before WARRINGTON, J.)

CORPORATION OF SUDBURY *v.* EMPIRE ELECTRIC LIGHT AND POWER COMPANY LIMITED. (*a*)

Local government—Electric lighting—Provisional order—Corporation as undertakers—Agreement with company—Transfer of powers—No consent of Board of Trade—Electric Lighting Act 1882 (45 *&* 46 *Vict. c.* 50), *s.* 11.

In 1900 *the corporation of S. obtained a provisional order from the Board of Trade authorising them to supply electrical energy within their district. In* 1904 *the corporation entered into an agreement with the E. E. Light and Power Company for the manufacture and supply of electricity within their district, but nothing in the agreement was to be deemed to transfer to the company any powers which the corporation were by the order and the Electric Lighting Acts of* 1882 *and* 1888 *prohibited from transferring. No application had ever been made to the Board of Trade to sanction this agreement.*

The company failed to carry out the agreement, and upon an action for damages for breach of it the company contended that this was an illegal agreement which could not be enforced.

Held, that the agreement was prohibited by sect. 11 *of the Electric Lighting Act of* 1882, *and could not be enforced.*

ACTION by the corporation of Sudbury against the Empire Electric Light and Power Company Limited to recover 2000*l.* payable by the company as liquidated damages for the breach of an agreement for the manufacture, supply, and distribution of electricity within the borough.

All the material facts and clauses of the agreement appear fully in the judgment of Warrington, J.

E. P. Hewitt and *F. E. Farrer* for the plaintiff corporation.—This agreement was carefully drawn so as to fall within the first part of sect. 11 of the Electric Lighting Act 1882. There was no legal assignment of the order by the corporation to the company to bring the case within the second part of sect. 11 of the Act. The corporation have not parted with their legal powers, and the electricity is supplied by them and not by the company as far as the consumer is concerned.

G. Cave, K.C., *J. Bolt*, and *Tyldesley Jones* for the defendant company, were not called upon.

WARRINGTON, J.—This is an action brought by the corporation of Sudbury against an electric supply company to recover damages for breach of an agreement dated the 30th May 1904. The defence is that the agreement was an illegal agreement, into which the corporation were prohibited from entering by sect. 11 of the Electric Lighting Act 1882. In the year 1900 the corporation of Sudbury were promoting a provisional order intended to confer upon them the power of lighting their borough by electricity. The Electric Lighting (Clauses) Act of 1899 contains in its schedule the regulations and provisions which, prior to that time, were usually inserted in electric lighting orders. There is one point which comes up in every part of those regulations, and that is the distinction between cases in which the local authority are the undertakers and cases in which persons other than the local authorities are undertakers. That is a distinction which has a prominent part in the schedule to the Electric Lighting (Clauses) Act of 1899. I need not go through it in detail, but it occurs constantly throughout the regulations so made. It is clear, therefore, that Parliament in dealing with these matters drew a strong distinction between the class of cases in which the local authority itself undertakes the duty of lighting its town or district and where the duty is undertaken for its own profit by some outside person or company. Now, I will read sect. 11 of the Act of 1882, on which this question turns. The first part of it deals with one, and with one only, of the two classes of cases which I have just mentioned—namely, that in which the local authority is the undertaker. It provides this: "Any local authority who have obtained a licence, order, or special Act for the supply of electricity

(*a*) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

may contract with any company or person for the execution and maintenance of any works needed for the purpose of such supply, or for the supply of electricity within any area mentioned in such licence, order, or special Act, or in any part of such area; but no local authority, company, or person shall by any contract or assignment transfer to any other company or person or divest themselves of any legal powers given to them, or any legal liabilities imposed on them, by this Act, or by any licence, order, or special Act, without the consent of the Board of Trade." As I have said, the first part of sect. 11 refers to one of the two classes. The second part of that section refers to both classes. Now, what is really the meaning of the first part, which relates to local authorities only? What does it empower them to do? It first describes the person to whom the authority is to be given as the local authority who have obtained an order for the supply of electricity. Now, that means an order for the supply by itself to its district of electricity; and it enables that authority to contract with any company or person for the execution and maintenance of any works needed for the purposes of such supply; that is, for a supply by the local authority. It is still the local authority who are the persons supplying the electricity. All that this part of the section enables them to do is to contract with persons for the construction of works and the execution and maintenance of works enabling the local authority to carry out their undertaking of supplying electricity. That is the first thing. The next sentence relates to a different matter. It may be that the local authority find it convenient not themselves to construct generating stations, and so forth. In that case they make contracts with other persons for the supply of electricity. That only means that the local authority, who are the undertakers, may buy the current in bulk or in some other way, according to the terms of the contract, from the outside person or company. That seems to me to be all that the first part of the section authorises. The second part of the section, which, as I have pointed out, deals not only with local authorities, but with both the classes to whom provisional orders may be granted, prohibits the undertakers by any contract or assignment from transferring to another company or person or divesting themselves of any legal powers given to them, or any legal liabilities imposed on them, by the Act without the consent of the Board of Trade. Now, take the case of a local authority. It seems to me that the section means that the power which the provisional order gives to the local authority of itself supplying the district with electricity is not without the consent of the Board of Trade to be put into the hands of any other company or person. I come now to the facts of this particular case. The Sudbury Corporation got their order, and it was confirmed by Act of Parliament on the 25th June 1900. They could not, or were unwilling to, carry out the supply to the borough themselves and, after considerable delay, on the 30th May 1904 they made the agreement in question. That agreement recites that the corporation, being the local authority, have obtained a provisional order, and that it was confirmed, and that "In pursuance of the powers granted in that respect by sect. 11 of the Electric Lighting Act 1882, the corporation have power to contract with the company for the execution and maintenance of the works needed for the purposes of the supply of electricity within the area mentioned in the order, and for the supply of electricity therein, on the terms and conditions hereinafter contained." That follows the exact words of sect. 11. Whether they have the power to contract for the things which they there mention "on the terms and conditions hereinafter contained" is the question I have to determine. Then, this agreement provides, by clause 1, that the company are within a certain date to "commence to construct, erect, provide, and equip all necessary works, and provide and lay and fix all necessary things for the manufacture, supply, and distribution of electricity within the area of supply," and to complete the same in accordance with the order, the Acts, and the regulations of the Board of Trade within a certain period. Then, "From that date and until the purchase by the corporation hereinafter mentioned, or the determination of this agreement under the powers or in the circumstances herein mentioned, will manufacture, distribute, and supply electricity for, to, and within the said area of supply, and the several persons, companies, and bodies who shall be entitled to the same for use therein, and will, during the continuance of this agreement and until such purchase, continue such manufacture, distribution, and supply, and in all of the said matters aforesaid, and in all other respects as between the company and the corporation, carry out the provisions of the said order as fully as if the company were the undertakers themselves, except as in this agreement is otherwise provided." By the terms of that clause, if there was nothing else in the agreement. it seems to me plain that not only is the company to construct the necessary works and supply the electricity, but they are to carry on the business. They are to do that which the provisional order authorised the corporation to do. That is made clearer as we go on. I will pass over clause 2, which is with regard to the staff. Then clause 3 is somewhat important: "The company shall, whilst they manufacture and supply electricity in the said area under this contract, be entitled for their own benefit to the revenue and receipts to be derived from the installation and supply of electricity within the said area of supply"; thus apparently realising that they might be unable to treat themselves as regards third persons as the undertakers. Then the clause goes on to provide that if legal proceedings are required the corporation shall take them, but that the moneys that may be received by the corporation in respect of electricity supplied by the company under the agreement "shall be held by the corporation to the use of and be paid to the company, subject, nevertheless, to the deductions of any costs or expenses incurred in respect thereof or due to the corporation in respect of any other matter under this agreement." Then comes clause 4, which is a very important clause: "The company shall pay all costs, charges, and expenses whatsoever of and in connection with the manufacture, supply, and distribution of electricity within the said area and of the collection and recovery of the revenues and receipts arising from the sale of electricity, and all rates, taxes, assessments, outgoings, duties, charges, impositions, and liabilities whatsoever, it being the true intent and meaning

of these presents that (subject to the provisions of clauses 8 and 9 hereof) the corporation are not, by reason of these presents or of anything herein contained or done or omitted hereunder, to be under any obligation to pay any money whatever or to incur any liability to anyone, and are to be in the same position as regards pecuniary liability as fully and effectually as if the order could be and had been lawfully transferred to the company with the consent of the Board of Trade, and the corporation had been discharged from all liability thereunder." Now, if words mean anything, they mean that as between these parties the corporation intended to transfer or to do that which would have the same effect (perhaps that is a better way of putting it) as a transfer with the consent of the Board of Trade. Then we come to clause 5, which I need not read. Clause 6 deals with the consideration that has to be paid. Then there is clause 7, which relates to the giving of a bond, and this is the clause which gives rise to this action. I need not read it now. Then in clauses 8 and 9 there are provisions as to the supply of electricity for public purposes. Clause 9, perhaps, may be important. It runs thus: "The corporation agree to install the electric light in all present and future public and municipal buildings (except the technical institute) erected or to be erected and acquired by them within a period of five years, and to take electricity for the lighting thereof from the company at a price not to exceed 6*d.* per unit." So there, again, the corporation in respect of their public buildings, which, if they carried out the order themselves they could themselves supply, contract with the company to pay for that supply. Then come—clauses 10 and 11. Clause 10 is this: "The price to be charged by the company for lighting purposes is not to exceed 7*d.* per Board of Trade unit, and for power it is not to exceed 4*d.* for each Board of Trade unit. The company shall have the option of charging by any other system allowed by the order and the Board of Trade, provided that the charge under unit system shall not exceed the charges above mentioned. If at any time after the expiration of seven years after the date hereof the corporation or any person or persons makes or make a representation to the Board of Trade that the prices and methods of charge ought to be altered, and if the Board of Trade, after such inquiry as they may think fit, make an order on the corporation and company varying the said prices and methods of charge and substituting another price and method of charge and other prices and methods of charge in lieu thereof, the prices and methods of charge so varied and substituted shall have effect on and after such day as may be mentioned in the order of the Board of Trade," and so on. There, again, the provisional order, and the regulations under it, provide that the undertakers were the persons to charge, but one cannot help seeing that when a provisional order is granted to a local authority, Parliament, in confirming that order, is giving to the public body the discretion as to the amount which shall be charged, of course within certain definite limits; but under this agreement the discretion is transferred to the company. It is the company who are to charge the price for electricity; of course, they must keep within the legal limits, but still it is the company who will fix the price within those limits. Then comes clause 11: "The company shall issue and enforce upon the consumers the usual regulations in respect of conditions of supplying and house-wiring so as to insure regularity and continuity of supply. These regulations shall be mutually agreed upon between the company and the corporation, and in case of difference settled by arbitration in manner herein provided." That, again, is another matter which is by the order left to the discretion of the undertakers. The regulations under which the electricity shall be supplied are, by this agreement, left to the company to make, subject, no doubt, to the consent of the corporation, and to the settling of them, if the corporation and the company do not agree, by a third person agreed as between the parties. Clauses 12 and 13 I need not trouble about. They provide for a lease of certain premises. Clause 14 refers to the breaking up of streets. I do not propose to read it. It is enough to say that clause 14 treats the company as the undertakers, and the corporation as the persons having control of the streets, and puts it into the power of the company to require the corporation to give any notices which may be required. Clause 15 is an endeavour to reconcile the provisions of this agreement with the regulations incorporated in the Electric Lighting (Clauses) Act—regulations which refer to cases in which persons other than the local authority are the undertakers. It is an endeavour to apply that part of those regulations to this agreement, again treating, for the purposes of this agreement, the company as the undertakers, and the corporation as the local authority as opposed to the undertakers. Then, again, there are provisions in clause 18 with regard to the preparation of accounts. That is another attempt to apply to this transaction the regulations incorporated in the Electric Lighting (Clauses) Act, which refer to the case where the undertakers are not the local authority. Then there are a number of clauses of details which are not of importance. Clause 22, however, perhaps is. That clause provides: "The company shall conduct and manage the said business of manufacture, distribution, and supply, so as not to cause any injury, loss, damage, or nuisance, or annoyance to persons or property, whether in the neighbourhood of the works or otherwise, and so as not to render the corporation liable to any injunction or order, and to render the said supply liable to be stopped by any injunction or order," and so on, again treating the business as being that of the company and not of the corporation. Clause 26 is also of importance. That provides: "The corporation hereby authorise the company to give, if necessary, in the name of and as agents for the corporation, all notices which by the order are authorised or required to be given to public and local authorities and to persons, companies, and consumers for the purpose of and in accordance with the order. If any notice has to be served by or through the corporation, the company shall draw up the same and all necessary plans and forward the same to the corporation, and the corporation will then serve the same accordingly, and the company will pay any expense incurred by the corporation in relation thereto." There, again, any power which the corporation have of giving notices is by the clause transferred to the company. The corporation is purely ministerial; it cannot help itself; it has bound itself to give

any notices or serve any claims the company may think necessary. Clause 27 is an attempt by the parties to get out of the difficulty which the whole tenor of the agreement has created. It provides: "Nothing herein contained shall be deemed to constitute this contract as a lease or agreement for a lease or to establish between the corporation and the company the relation of lessor and lessee (except as to the agreement for a lease of the said site of the central station) or partners, or to constitute the company general agents for the corporation, or to transfer to the company any powers, or to create any relationship between the corporation and the company which the company are prohibited from transferring or creating by the order and the Electric Lighting Acts 1882 and 1888, and particularly by sect. 11 of the Act of 1882, the intention being for the corporation to give to the company every facility in their power for carrying out this agreement without transferring or assigning any of their powers or duties under the order." That is what is most relied on by the plaintiffs. It seems to me, if you take the agreement as a whole and see that it does transfer "powers or duties under the order," it is impossible to give any effect to a statement by the parties that nothing shall be deemed to do so. If the agreement does transfer, then it does transfer them. That clause is merely a statement that as between themselves, so far as they are capable of contracting, it shall not be treated as transferring or assigning any of their powers or duties. If the agreement, in fact, does it, I do not think I can give any effect to the declaration that they do not intend to do it. The agreement is a very long one, but there is nothing else I need refer to except the last clause, and only there the provision that the corporation may after a certain time compulsorily purchase, not only the buildings, machinery, lines, plant, and so on, but the goodwill of the business. If anything were wanted to confirm the remarks which I made on the first clause of the agreement it is supplied by this last clause. It is obvious that the idea of both parties was to transfer the entire business of supplying electricity to the town of Sudbury from the corporation, who had obtained parliamentary powers, to the company, and to do so without the consent of the Board of Trade. This makes it unnecessary to consider any further question. This agreement is prohibited by the Act, and cannot be enforced. Therefore the action must be dismissed with costs. *Judgment for the defendants.*

Solicitors: *Belfrage* and *Co.*, agents for *W. Bayly Ransom*, Town Clerk of Sudbury; *Le Brasseur* and *Oakley*.

KING'S BENCH DIVISION.

Wednesday, Aug. 9, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

AGAR (app.) *v.* NOKES AND ANOTHER (resps.) (a)

Public health (London)—Drain communicating with sewer—Nuisance—Taking up and relaying drain—"Reconstruction" or "repair"—By-laws—Metropolis Management Act 1855 (18 & 19 *Vict. c.* 120), *s.* 202.

The London County Council made a by-law that a person who should entirely or partially reconstruct any pipe or drain communicating with a sewer should deposit plans of the proposed work, with the proviso that plans should not be required in the case of any repair which did not involve the entire reconstruction of the pipe or drain; and another by-law as to ventilation, which was to apply to every person who should reconstruct in an existing building any pipe or drain communicating with a sewer.

Premises situate in the metropolis were drained at the rear by a line of pipes which took the surface water drainage of the premises through two gullies in the yard and which communicated with a sewer. This line of pipes was not laid upon concrete and was not ventilated, and, the drain having become a nuisance, notice was served on the owner to abate the same. The owner opened up the ground, took up the pipes, most of which were defective or broken, and relaid the drain in the same line upon a foundation of concrete. He put in four new lengths of pipes and a new gully and connection, replacing in the drain one old pipe and gully only, and leaving in the ground an old pipe which was not defective.

Held, that the work done to the drain was a "reconstruction" of the drain, and not merely a "repair" of it, and that the by-laws applied.

CASE stated by the metropolitan police magistrate sitting at Clerkenwell Police-court.

Two complaints were preferred by Thomas W. Agar (the appellant), one of the sanitary inspectors acting on behalf of the mayor, aldermen, and councillors of the metropolitan borough of Islington, against W. Frederick Nokes and George Nokes (the respondents), one of which (hereinafter called the first complaint) alleged that the respondents did, in or about the month of Nov. 1904, partially reconstruct the drains at No. 13, Caledonian-crescent, Caledonian-road, within the borough, being a means of communicating with a sewer and the traps and apparatus connected therewith, and did not cause a deposit in duplicate to be made with the sanitary authority of the borough of such plans, sections, and particulars of the proposed reconstruction of the drains as were necessary for the purpose of enabling the authority to ascertain whether such reconstruction was in accordance with the statutory provisions relative thereto, and with the by-laws of the London County Council made under the Metropolis Management Act 1855, s. 202, contrary to the by-laws under the statute and the statute in such case made and provided.

The second complaint alleged that on or about the 29th Nov. 1904 the respondents reconstructed

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

a drain immediately communicating with a sewer on the premises No. 13, Caledonian-crescent, and did not comply with the by-laws of the London County Council made under sect. 202 of the Metropolis Management Act 1855, so far as regarded the ventilation of such drain, contrary to the Act and by-laws.

These complaints were by consent heard together by the magistrate on the 30th Dec. and were determined by him on the 13th Jan. 1905, when both complaints were dismissed, and the appellant was ordered to pay two guineas costs on each summons to the respondents.

At the hearing the following facts were admitted or proved:—

The appellant was a sanitary inspector appointed by the mayor, aldermen, and councillors of the borough of Islington, who were the sanitary authority for the borough, and was acting under their direction, and the respondents were the owners, within the meaning of the Metropolis Management Acts and the by-laws made thereunder under which these proceedings were taken, of the premises in question—No. 13, Caledonian-crescent. The by-laws were annexed to the case.

The premises were, prior to Nov. 1904, drained at the rear by a line of pipes which took the surface water drainage of the premises through two gullies in the yard thereof and the waste and slop water from a sink in the wash-house of the premises, and such pipes joined under the water-closet of the adjoining house, No. 14, Caledonian-crescent, and the drain from the water-closet and the combined drain from the point of juncture became a sewer. The sewer was relaid by the council as the sanitary authority, and the sanitary authority did not ventilate the sewer. The line of pipes was not laid in or upon concrete and was not ventilated.

The drain formed by such line of pipes became so defective as to be a nuisance and injurious and dangerous to health, and, in order to remedy such nuisance, the respondents — a statutory notice having been served upon them by the sanitary authority—opened the ground in the yard, broke the socket of a pipe near the point where the drain joined the sewer, and removed from their position the defective pipes and one of the gullies with its connections, and the other gully into which the sink water flowed and the pipe next to it were removed by the respondents from the trench which they had dug and placed on the surface of the adjoining ground until replaced. Some of the pipes were found to be broken; others were broken in opening the drain, and none of such pipes except one were fit to be replaced, and new pipes were substituted for those so broken.

The respondents restored (to use a neutral term) the drain in the trench from which the old pipes had been removed by laying a bed of concrete at the bottom of the trench and laying thereon four new lengths of pipes and a new gully and connection, and replaced in the position shown on the plan one pipe only with the gully attached thereto which had been part of the drain before it was restored, and they connected the new line of pipes with the old pipe which had been left in the ground by a new double socket (which old pipe was never disturbed except as aforesaid and was not defective). The respondents did not in any way ventilate the new line of pipes. The borough council (the sanitary authority) tested the restored line of pipes with the water test, and found it perfect. The restored line of pipes was laid on the same line and on the same level as the old line of pipes. The drain formed by such line of pipes received no soil from any water-closet.

As regards the first complaint, it was contended on the part of the appellant that upon the above facts the respondents had entirely or at least partially reconstructed and had altered at the premises certain pipes and a drain being the means of communicating with a sewer and apparatus connected therewith, and consequently had committed a breach of by-law 2 of the by-laws marked A, inasmuch as they had not deposited the plans, particulars, and sections therein mentioned or any of them, and that inasmuch as the plans, particulars, and sections therein mentioned were required to be such as were necessary for the purpose of enabling the sanitary authority to ascertain whether the entire or partial reconstruction or alteration therein mentioned was in accordance with the statutory provisions relative thereto, and with any by-laws (being the by-laws marked B) made under sect. 202 of the Metropolis Management Act 1855, and inasmuch as such by-laws dealt not only with the line and fall of pipes, but also with the proper trapping of gullies, the materials of drains, the laying of drains on concrete, the jointing of drains, the ventilation of drains, and other matters independent of such line and fall, the deposit of such plans, sections, and particulars was reasonably necessary where the drain was reconstructed or partially reconstructed, although on the same line and at the same fall as the drain which it replaced.

It was contended on behalf of the respondents that upon the above facts there had not been a reconstruction or alteration of the drain, but only a repair, and that only those portions of the drain which were defective were replaced, and that the work which had been done by the respondents as above mentioned amounted only to the repair of the drain which did not involve the alteration or entire reconstruction of any pipe, drain, or other means of communicating with sewers or the traps and apparatus connected therewith, and that therefore the respondents were exempted from the set of by-laws marked A, by virtue of the proviso at the end of the second of such by-laws.

The respondents also contended that the by-laws were unreasonable because no provision was made in them for notice to the person complained against.

The learned magistrate was of opinion, as regards the first complaint, that upon the above-mentioned facts the work done by the respondents was a repair within the meaning of the proviso, and not a reconstruction, and also that the object of the deposit of the plans, sections, and particulars was not to control the materials of which the drains should be made, but to see that the drain was made in a suitable way as regards levels and traps, and that such deposit was not required by the by-laws where the pipes were relaid on the same level and on the same line as the pipes which they replaced.

As regards the second complaint it was contended on behalf of the appellant that within the meaning of the by-law 21 of the by-laws

marked B the respondents had upon the facts above stated reconstructed a pipe or drain or other means of communicating with a sewer and certain apparatus connected threwith, and that therefore by-law 8 of those by-laws, as to ventilation of drains, applied to the respondents, and that they had committed a breach of such by-laws by not providing any means of ventilation for the drain as so laid or reconstructed as above mentioned.

It was contended on behalf of the respondents that upon the facts above stated they had not so reconstructed any pipe or drain or other means of communicating with a sewer or apparatus as above mentioned, and that therefore the by-laws marked B did not apply; the respondents also contended that these by-laws were unreasonable because no provision was made in them for notice to the person complained against.

The magistrate was of opinion that upon the facts above proved or admitted, the contention of the respondents was correct without going into the question of the validity of the by-laws, and he therefore dismissed both the complaints.

The questions for the opinion of the court were: Whether upon the facts above stated and admitted, the respondents committed a breach of any of the by-laws marked A; and whether they committed a breach of any of the by-laws marked B.

If the court should be of opinion that the respondents did commit a breach of the by-laws marked A, then the first summons and complaint was to be remitted to the magistrate for further adjudication. If the court should be of opinion that no such offence was committed, then the dismissal of the complaint was to stand; and so as to the second summons and complaint.

Under the by-laws marked A—which were by-laws made by the London County Council under the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 202, and the Metropolis Management Acts Amendment (By-laws) Act 1899 (62 & 63 Vict. c. 15), and confirmed on the 28th July 1903—by-law No. 2 provided as follows, under the heading "Addition to, partial construction, entire or partial reconstruction, or alteration of, a drainage system":

No. 2. Every person who shall make any addition to, partially construct, entirely or partially reconstruct, or alter any pipes, drains, or other means of communicating with a sewer, or the traps and apparatus connected therewith, shall be deemed to have satisfied the foregoing by-law No. 1 if he shall cause a deposit to be made (in the manner therein provided) of only such plans, sections, and particulars of the proposed addition, partial construction, entire or partial reconstruction, or alteration as may be necessary for the purpose of enabling such authority to ascertain whether such addition, partial construction, entire or partial reconstruction, or alteration is in accordance with the statutory provisions relative thereto, and with any by-laws made under sect. 202 of the Metropolis Management Act 1855, and, if in any case plans and sections have been previously deposited in conformity with the foregoing by-law No. 1, it shall be sufficient for him to give in writing with the deposit the date of the previous deposit, and to show the new work on the plans and sections to be deposited and only so much of the existing work as will enable the sanitary authority to see the relative positions of the new and old work. Provided that this by-law shall not be deemed to require the deposit of any plans, sections, or particulars in the case of any repair which does not involve the alteration or the entire reconstruction of any pipe, drain, or other means of communicating with sewers, or the traps and apparatus connected therewith."

In the set of by-laws marked B (made by the county council under the same section and confirmed in Nov. 1900), by-law No. 8 contained provisions for ventilating the drains of new buildings, and by-law No. 21 provided as follows:

No. 21. These by-laws shall, so far as practicable, apply to any person who shall construct or reconstruct any pipe or drain or other means of communicating with sewers, or any trap or apparatus connected therewith, so far as he shall effect any such works in any building erected before the confirmation of these by-laws, as if the same were being constructed in a building newly erected.

Sect. 202 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120) gives the authority power to make by-laws for "regulating the dimensions, form, and mode of construction, and the keeping, cleansing, and repairing of the pipes, drains, and other means of communicating with sewers, and the traps and apparatus connected therewith."

Sect. 2 of the Metropolis Management Acts Amendment (By-laws) Act 1899 (62 & 63 Vict. c. 15) provides:

The powers of the London County Council for making by-laws under section two hundred and two of the Metropolis Management Act 1855 shall extend and apply to authorise the council to make by-laws for the following purpose: Requiring persons about to construct, reconstruct, or alter the pipes, drains, or other means of communicating with sewers, or the traps and apparatus connected therewith, to deposit with the sanitary authority of the district such plans, sections, and particulars of the proposed construction, reconstruction, or alteration as may be necessary for the purpose of ascertaining whether such construction, reconstruction, or alteration is in accordance with the statutory provisions relative thereto, and with any by-laws made under the said section. Provided that any such by-laws shall not require the deposit of any plan or section in the case of any repair which does not involve the alteration or the entire reconstruction of any such pipe, drain, or other means of communicating with sewers, or the traps and apparatus connected therewith.

Danckwerts, K.C. (*Courthope-Munroe* with him) for the appellant.—The magistrate was wrong in holding that what was done was a "repair" only within the meaning of the proviso in by-law No. 2. The work done to this pipe was practically a reconstruction of the whole pipe. The old pipes were almost all defective, and it was necessary to replace them with new pipes. The line of pipes before this work was done was not laid in concrete. The respondents renewed the whole drain upon a different principle, laying the pipes upon a concrete foundation. The respondents entirely reconstructed a new drain within the meaning of these by-laws. He referred to

Kingsland v. *Haben*, 90 L. T. Rep. 449;
Metropolitan Industrial Dwellings Company v. *Long*, 68 J. P. 113.

Lush, K.C. (*S. A. Kyffin* with him) for the respondents.—The sole question is whether there was any evidence upon which the magistrate could find as he did, and whether he has gone wrong upon any point of law. If there is any difference between repair and reconstruction it is

a question of degree, and therefore a question for the magistrate. There may be work done which involves the relaying of every single pipe; that might be reconstruction within by-law 2. But the mere fact that a person is putting in a new pipe for an old one does not involve as a matter of law the consequence that that person is reconstructing the drain; if it involved that consequence, persons would be very slow to put in new pipes, as in such case they would be brought within the operation of these by-laws. It does not of necessity involve reconstruction, though in some cases it may do so; and the court cannot interfere unless they go the length of saying that the substitution of a new pipe for an old one is in every case as a matter of law the reconstruction of a new drain. The first summons was for partially reconstructing the drain, but by the proviso to by-law 2—which controls the operation of the by-law—that is taken out of the operation of the by-law, inasmuch as it is "repair" not involving the entire reconstruction of the drain. Then, with regard to the second summons, to bring the case within by-law 8, as to ventilation of new buildings, there must be, under by-law 21, a reconstruction of the drain. The respondents were not erecting a new building and therefore by-law 8 does not apply; and by-law 21 does not apply, because there was not a reconstruction of a drain.

Danckwerts, K.C. in reply.

Lord ALVERSTONE, C.J.—This case cannot be said to be free from difficulty, and if the learned magistrate had really found that in his opinion what was done to these pipes in this case was as a matter of fact "repair," as distinguished from "reconstruction," I think counsel for the respondents would have been right in contending that this court could not deal with the matter. But I do not think that that is what the magistrate meant to state for our opinion. He has stated all the facts, and has then stated the contentions of the appellant and of the respondents respectively, and at the end of the case he states: "I was of opinion that upon the facts above proved or admitted the contention of the respondents was correct." That is not a finding which would put the appellant out of court, and therefore it is necessary for us to consider the matter further. As far as the by-law dealing with ventilation is concerned—by-law No. 8—it seems to me almost impossible to say that what was done in this case was not reconstruction. Then by-law No. 21, which is not complicated by any proviso, provides that that set of by-laws shall, as far as practicable, apply to a person who shall construct or reconstruct any pipe or drain or other means of communicating with sewers, or any trap or apparatus connected therewith, in the case of an old building, as if the same were constructed in a newly erected building. Now, what was done in this case was that through the whole of the respondents' premises this drain was relaid on concrete, there being no concrete before, and new pipes were put in with the exception of the old pipe and gully at the south end, which were replaced, and one or two old pipes which were left in at the other extremity of the drain. Now, unless counsel for the respondents can contend under this by-law that the use of the old pipes prevents the work from being reconstruction of those pipes, we have got to consider whether, construing the by-law fairly, what was done in this case amounts to reconstruction. It seems to me that the whole drain from the two gullies down to the old pipe which communicated with the sewer was reconstructed. The drain does communicate directly with the sewer, and, having regard to the importance of such matters, I should have thought that this by-law for ventilation ought to apply to the case where a person has reconstructed in this sense the whole of the drains upon his premises. I therefore come to the conclusion that in this case there was a reconstruction of the drain within by-law 21; and in doing so I am not putting my decision on a single new pipe having been laid. I think the criticism of counsel for the respondents is quite a right one, that the putting a single new pipe into a drain is not reconstruction. To bring a case of the kind within these by-laws the pipe must be a pipe which communicates with a sewer and is used as an alternative for a drain; but this is not the case of a broken pipe being replaced by a new one, and then the whole thing being called reconstruction. It is, in fact, the case of the reconstruction of this drain from the point where the surface water comes into it until it meets the old pipe. With regard to the summons under by-law 2 of the other set of by-laws—marked A—for not depositing plans, the matter seems to me to be much more difficult, but from the point of view of reconstruction I think that the case comes within that by-law also as reconstruction. Counsel for the respondents relied mainly upon the words in the proviso: "Provided that this by-law shall not be deemed to require the deposit of any plans, sections, or particulars in the case of any repair which does not involve the alteration or the entire reconstruction of any pipe, drain, or other means of communicating with sewers or the traps and apparatus connected therewith." I think it is quite clear, as counsel for the respondents very properly put it, that the mere putting in of one or more new pipes into an old drain would not be reconstruction of the drain. On the other hand, work of this kind done to a drain does not, in my judgment, cease to be reconstruction because the respondents in doing the work which they did do in this case used the old pipe and gully. In my opinion we ought to look at the real and substantial work that has been done. The drain has been pulled up; concrete has been put in as a foundation, and new pipes have been laid upon that foundation; one old pipe and one old gully have been used, and that seems to me to be entire reconstruction of the drain. It therefore seems to me that the appeal must succeed upon both points.

LAWRANCE, J.—I agree.

RIDLEY, J.—I agree, though I must say that I felt some difficulty in the matter.

Appeals allowed. Case remitted to the magistrate.

Solicitor for the appellant, *A. M. Bramall.*

Solicitors for the respondents, *Stanley Evans* and *Co.*

Thursday, Aug. 10, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

HOWARD (app.) *v.* DANIELS (resp.). (*a*)

Metropolis — Privy — Emptying of — "Street or public place"—Privy on private property adjoining public road—Emptying of, during prohibited hours—Offence—Metropolitan Police Act 1839 (2 & 3 *Vict. c.* 47), *s.* 60, *sub-s.* 4.

Sect. 60 *of the Metropolitan Police Act* 1839 *provides that "Every person who in any street or public place within the limits of the metropolitan police district shall be guilty of any of the following offences shall be liable to a penalty"—that is to say,* (4) *"Every person who shall empty . . . any privy between the hours of six in the morning and twelve at night."*

Held, that the provision in sub-sect. 4, *as to the emptying of privies, is not limited to the case of privies which are actually in "any street or public place," but applies to and includes the case of privies which are in private property, but which closely adjoin "any street or public place"; and, therefore, a person may be convicted under the sub-section who, during the prohibited hours, empties a privy situate on private property some forty yards from the nearest street or public place.*

CASE stated by justices of the peace for the county of Middlesex, sitting at Uxbridge and acting in and for the petty sessional division of Uxbridge.

An information was preferred on the 16th Jan. 1905 by William Daniels, of Uxbridge, police inspector (the respondent), under 2 & 3 Vict. c. 47 (the Metropolitan Police Act 1839), s. 60, sub-s. 4, against George Howard (the appellant), of Hayes, in the county of Middlesex, a labourer, for that he, the appellant, on the 5th Jan. 1905, at the parish of Hayes, in the county of Middlesex, and within the metropolitan police district, did unlawfully empty a privy at Clayton-road between the hours of six in the morning and twelve at night —namely, at 9.20 p.m.—contrary to the statute. This information was heard and determined by the justices at a petty sessions on the 23rd Feb., and upon such hearing they convicted the appellant of the offence, and fined him the sum of 10*s.*, including costs.

The Metropolitan Police Act 1839 (2 & 3 Vict. c. 47) provides:

Sect. 60. Every person who, in any street or public place within the limits of the metropolitan police district, shall be guilty of any of the following offences shall be liable to a penalty not more than forty shillings for every such offence (that is to say): (1) Every person who in any thoroughfare shall burn, dress, or cleanse any cork or hoop, cleanse, fire, wash, or scald any cask or tub, or hew, saw, bore, or cut any timber or stone, or slack, sift, or screen any lime. (2) Every person who shall throw or lay in any thoroughfare any coals, stones, slates, shells, lime, bricks, timber, iron, or other materials (except building materials or rubbish thereby occasioned, which shall be placed or inclosed so as to prevent any mischief happening to passengers). (3) Every person who in any thoroughfare shall beat or shake any carpet, rug, or mat (except door mats before the hour of eight in the morning) or throw or lay any dirt, litter, or ashes, or any carrion, fish, offal, or rubbish, or throw or cause any such thing to fall into any sewer pipe or drain, or into any well, stream, or watercourse, pond, or reservoir for water, or cause any offensive matter to run from any manufactory, brewery, slaughter-house, butcher's shop, or dunghill, into any thoroughfare or any uncovered place, whether or not surrounded by a wall or fence. . . . (4) Every person who shall empty or begin to empty any privy between the hours of six in the morning and twelve at night, or remove along any thoroughfare any night soil, soap lees, ammoniacal liquor, or other such offensive matter, between the hours of six in the morning and eight in the evening. . . . (5) Every person who shall keep any pigsty to the front of any street or road in any town within the said district, not being shut out from such street or road by a sufficient wall or fence, or who shall keep any swine in or near any street or in any dwelling so as to be a common nuisance.

Upon the hearing of the information the following facts were admitted or proved before the justices: (*a*) That between 9.20 p.m. and twelve midnight on the 5th Jan. 1905 the defendant was seen by a police constable to be engaged in emptying a privy cesspool on inclosed ground, being the private works of Messrs. Arthur Lee and Brothers Limited, which works abutted on Clayton-road, in the parish of Hayes. Clayton-road was a public place within the meaning of 2 & 3 Vict. c. 47, s. 60. (*b*) The spot occupied by the privy cesspool and at which it was emptied was situated on the private property of Messrs. Arthur Lee and Brothers Limited, and was forty yards and upwards from the nearest street or public place—namely, Clayton-road. (*c*) The contents of the cesspool were deposited into a regulation nightcart, and conveyed through the entrance gates of the works and thence across the Clayton-road into a field on the opposite side of the road.

It was contended on behalf of the appellant that no offence had been committed, inasmuch as the statute required the act complained of to be committed in a street or public place.

The justices were of opinion that, having regard to the wording of the various sub-sections to sect. 60 of 2 & 3 Vict. c. 47, the preliminary words of sect. 60—namely, "That every person who in any street or public place within the limits of the metropolitan police district shall be guilty of any of the following offences shall be liable to a penalty not more than forty shillings for every such offence (that is to say)," did not govern the whole of the sub-sections to such section, and that if all the offences contained in the various sub-sections must be committed in a "street," or "public place," then the word "thoroughfare" used in sub-sects 1, 2, and 3 would be superfluous. They were also of opinion that the intention of the Act was to prevent annoyance to the residents and to the public by prohibiting the emptying of privies before twelve o'clock at night, whether in a street or public place or not, and that therefore the appellant was guilty of an offence under the Act in emptying the privy cesspool between the hours of 9.20 p.m. and twelve midnight.

If, contrary to their view, the words "in any street or public place" govern all the sub-sections, they were of opinion that, having regard to their language, and especially the language of sub-sects. 5 and 8, the words might be read in the sense of "adjoining any street or public place," as a house

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

situate on private land abutting on a street might be described as situate "in a street." The privy was situate on private ground abutting on a public place—namely, Clayton-road—and they were of opinion that it was in fact sufficiently near the road to come within the purview of sect. 60, sub-sect. 4.

The question for the decision of the court was whether upon the foregoing facts the justices came to a correct determination in point of law and on the construction of the statute. If yea, the conviction was to stand; if nay, to be quashed.

Schiller for the appellant.—The justices were wrong in law in holding that the words in the beginning of sect. 60, "in any street or public place," do not govern the words in sub-sect. 4, under which this summons was taken out. The particular offence charged here was for unlawfully emptying a privy between six o'clock in the morning and twelve o'clock at night, contrary to the statute. The statute in sect. 60 expressly says that every person who "in any street or public place" is guilty of any of the offences subsequently specified shall be liable to a penalty. To constitute an offence under this section the offence must be committed in a street or public place. In this case the place where the privy was emptied was on private ground, so that the particular offence charged was not within the section at all, and the section does not apply to it. Nothing was done in a "street or public place," except the carting of the contents across the street, and that was not done except in a regulation cart, and was not done within prohibited hours. The whole process of emptying was done before the appellant got to any street at all; and if the preamble at the beginning of the section is not to apply to sub-sect. 4, then it is difficult to see what power the justices have to inflict any penalty under the section, because it is difficult to see how one portion of the words in the preamble can apply and another portion not apply. Then with regard to the opinion of the justices that the words "in a street" would be satisfied by "adjoining" a street, the answer is that when the section means "near" a street it says so, as in sub-sect. 5, where it uses the words "in or near" any street, thereby contrasting "in" a street with "near" a street. So, in sub-sect. 8, the words are "in or adjoining" any thoroughfare, showing that "in" a thoroughfare is different from "adjoining" a thoroughfare. What the section applied to is this, that if a person is going to empty a cesspool in such a way as necessitates it being emptied from the cesspool into a cart in the public street, he cannot do that within the prohibited hours.

A. E. Gill for the respondent.—The decision of the justices was right. The correct answer to the appellant's contention is that given by the justices at the end of the case, where they say that the words "in any street or public place" may be read in the sense of "adjoining any street or public place." This section is the only section which deals with the emptying of privies, and therefore, if the respondent's contention is not correct, it would follow that if a privy were one yard only from the public street it could be emptied at any time. It is impossible to give any meaning to the words unless they are read in the sense of "adjoining" the street, as privies are not in the street properly so called. In ordinary language it is said that a house is "in" a certain street, whereas in fact it is in private property adjoining the street, and so a privy may be said to be in a street although in fact it is in private property adjoining the street, and just as it is said that the houses are in the street so it may be said that the privies are in the street. That the section is dealing with private property is clear from the words in sub-sect. 5, "or in any dwelling," and from the words in sub-sect. 8. A person may be convicted of indecency in a public place if the act be done in a place where many persons may see it, although the act itself is done on private property and not in a room:

Reg. v. *Thallman*, 9 L. T. Rep. 425; 33 L. J. 58, M. C.

Schiller in reply.—Sub-sect. 4 has nothing to do with private property, but merely prevents a person from emptying the contents of a privy in a street except between certain hours, and from carting those contents along any thoroughfare except during certain hours. The distinction in the wording of the sub-sections is between a street which is not a thoroughfare and a street which is.

Lord ALVERSTONE, C.J.—I think we ought not to interfere in this case. The section which we have to construe in this Act, which was passed in 1839, is curiously worded; but counsel for the appellant, in order to succeed, must make out that the words "in any street or public place" are words of limitation. On the other side it was argued that the words are words of description, and that they were inserted in order to exclude private property which had no relation to a street, and that they were not intended to limit the offence to something done in the street. Now, no one would suggest that a privy was in a street or a public place, and counsel for the appellant has ingeniously suggested that the words were meant to cover the case of carts standing in the street and drawing up the sewage from the cesspool by means of a pipe. That is a very ingenious explanation, but it would cover only a very small percentage of the cases occurring in connection with the cesspools emptied since the passing of this Act in 1839. But, however that may be, I think we ought not to construe this section by confining its operation to a limited class of methods of emptying cesspools to which it might apply. Looking at other passages and words in this long section, it is quite plain that some of them, at any rate, cannot be held to apply to things done in the street or in a public place. I think, therefore, that with reference to this particular sub-section, the words "in any street or public place" were meant to include things done in a street or in a place abutting upon a street, the words "in any street" being used in the same sense as when we speak of a house being in a street when it really adjoins the street. In this case the justices have found that the place in question abutted on the street—Clayton-road. It seems to me, therefore, that the magistrates were right in adopting the view which has been urged before us by counsel for the respondent, that for the purpose of this offence the sub-section does not mean a privy actually in the street, but means one which so closely adjoins the street as that it may be said

to be in the street. The only effect of that is that a person cannot empty it except within the hours specified in the sub-section—that is, between twelve in the night and six in the morning. I was at first impressed by the argument that, as carting the contents was allowed between eight in the evening and six in the morning, there was no reason why emptying should not also be allowed. That goes too far, because the provisions of the sub-section as to carting are quite independent of those relating to the emptying. It is quite plain that the actually offensive act of carrying the contents along a street might be done independently of the place where those contents came from. I come to the conclusion that the provision that the emptying of privies must be done within the hours mentioned is not cut down by applying to it the strict words "in any street or public place" in the way suggested, and that the magistrates were right in holding that the receptacle or privy in this case was one the emptying of which within the prohibited hours brought the appellant within the sub-section. I think, therefore, that the appeal must be dismissed.

LAWRANCE, J.—I agree.

RIDLEY, J.—I agree.

Appeal dismissed.

Solicitors: for the appellant, *Harvey* and *Green*, Uxbridge; for the respondent, *Wontner* and *Sons*.

Thursday, June 29, 1905.

(Before Lord ALVERSTONE, C.J., PHILLIMORE and JELF, JJ.)

REX *v.* MOWATT; *Ex parte* HOLBORN UNION. (*a*)

Metropolis — Poor—Provision of casual wards —Metropolitan Common Poor Fund—Land on which wards built—Payment for lands.

The H. Union acquired in 1838 *and* 1849 *certain land upon which were erected casual wards, the money for their erecting having been borrowed, which was repaid by instalments out of the Metropolitan Common Poor Fund. The H. Union sought to recover the value of the land out of the Metropolitan Common Poor Fund in the half year ending Michaelmas* 1903.

Held, that this sum could not be recovered in one half year, and rules nisi, *directed to the auditor who had disallowed the item, for a* certiorari *to quash the disallowance, and for a* mandamus *to grant a certificate of allowance, accordingly quashed.*

Quære, *whether the H. Union were not entitled to the fair value of the land for the half year out of the Metropolitan Common Poor Fund.*

CAUSE shown against rules *nisi* for a writ of *certiorari* and for a writ of *mandamus* obtained by the Holborn Union to quash a certain disallowance by the district auditor and to compel him to give a certificate of allowance of the item so disallowed.

The Holborn Union is wholly situate within the metropolis, and was formed by order of the Poor Law Commissioners, dated the 29th March 1836, made under sect. 26 of 4 & 5 Will. 4, c. 76. By such order it was directed that the parish of St. Andrew, Holborn-above-Bars, united with St. George the Martyr, and the liberty of Saffronhill, Hatton-garden, Ely-rents, and Ely-place, should be and should remain united for the administration of law and for the relief of the poor by the name of the Holborn Union, and should contribute and be assessed to a common fund for purchasing, building, hiring, or providing, altering, or enlarging any workhouse or any other place of reception and relief of the poor of such parishes and places, or for the purchase of any lands or tenements under and by virtue of the provisions of the Act of 4 & 5 Will. 4, c. 76, for such union, and for the future upholding and maintaining of such workhouse or places aforesaid, and for the payment and allowance of the officers of such union, and the providing of utensils and materials for setting the poor on work therein, and for any other expense to be incurred for the common use or benefit or on the common account of such parishes and places in the proportion of the several sums respectively set opposite to the names of each parish and place in the margin of the order, such sums having been ascertained by the inquiry of the Poor Law Commissioners to be the annual average expense incurred by each such parish and place for the relief of the poor belonging thereto for the three years which ended on the 25th March next preceding such inquiry.

By a subsequent order of the Poor Law Commissioners, dated the 19th July 1839, the average expenses of the parishes and places in the Holborn Union were varied.

In pursuance of an order dated the 29th April 1836, reciting the order of the 29th March 1836 and made under 4 & 5 Will. 4, c. 76, it was directed in sect. 1 thereof that the guardians of the poor of the Holborn Union should have the direction and control within the Holborn Union of all relief of the poor, of the building, hiring, providing, altering, and improving and enlarging of any workhouse, poor house, or other premises for the reception and maintenance of paupers, and of the hiring or purchasing of land for such workhouse, or for the employment of paupers, and the government and management of such workhouse premises and land, of the making and entering into contracts in all matters relating to the management and relief of the poor and of expenditure for the relief of the poor, and by sect. 7 of such order it was further directed that every workhouse belonging to any parish or parishes in the union which under the provisions of the Poor Law Amendment Act should be for the common use of the parishes in the union should be surveyed and valued, and the valuers with the assistance of an umpire, if necessary, should fix the sum which in their or his estimation such workhouse was fairly worth to be sold, and also the sum which in their or his estimation such workhouse was fairly worth to be let by the year, and should give in their estimate to the guardians, who should report the same to the Poor Law Commissioners for their information and guidance in awarding the amount of compensation for the use of such workhouse.

Prior to the order of the 29th March 1836 the governors and directors of the united parishes of St. Andrews, Holborn-above-Bars, and St. George the Martyr were possessed of a parish workhouse, and after the date of such order the workhouse became converted to the common use of such

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

union; and by an order dated the 8th Oct. 1840 the guardians were directed to pay to the governors and directors of the united parishes of St. Andrew and St. George as compensation for the use and occupation of such parish workhouse by half-yearly payments during such time as the workhouse should continue to be used and occupied for the purposes of the union at and after the rate of 340*l.* per annum. These payments were made in accordance with such order up to midsummer 1902, when such workhouse ceased to be utilised for the purposes of the union, and, the consent of the Local Government Board having been obtained, possession of the workhouse was given up to the governors and directors of the united parishes.

In 1836 a sum of 9000*l.* was spent by the guardians of the poor of Holborn Union as then constituted on alterations and enlargements of the workhouse, including the purchase for 2170*l.* of certain adjoining land, the fee simple of which land was conveyed to the guardians, their successors and assigns, for ever, by a deed of conveyance dated the 31st May 1838.

In 1845 the parish of St. Sepulchre was by order of the Poor Law Board (now the Local Government Board) united to and became a part of the Holborn Union for the administration of the laws for the relief of the poor, and in 1849 a sum of 2000*l.* was spent by the guardians of the poor of the union as then constituted in further alterations of and enlargements to the workhouse including the purchase for 1840*l.* of certain adjoining land, the fee simple of which last-mentioned land was conveyed to the guardians, their successors, and assigns for ever, by a deed of conveyance dated the 6th Sept. 1849.

In 1856 Furnival's-inn and Staple-inn were by order of the Poor Law Board, and in 1869 the parishes of St. John, Clerkenwell, St. James, and St. Luke, Middlesex, were by order of the Local Government Board, respectively, united to and became portions of the Holborn Union for the administration of the laws for the relief of the poor.

In 1877 the parish of Charterhouse and in 1901 the parish of Glasshouse-yard were by order of the Local Government Board united to and became portions of the Holborn Union for the administration of the laws for the relief of the poor.

Upon each of the extensions of the union compensation was made to the ratepayers of the area comprised within the union immediately before the extension by certain adjustments of account, including the adjustment of the rates leviable subsequently for the relief of the poor in such area and in the area added to the union respectively in respect of the share acquired by the ratepayers of the added area in the property which was vested in the guardians at the time of the extension on behalf of the ratepayers of the union.

In the year 1888 a small portion of the adjoining land purchased in 1836 was sold, with the consent of the Local Government Board, by the guardians to the Metropolitan Board of Works, such portion of land being required by that body to carry out their scheme for the widening of Gray's-inn-road. The proceeds of such sale were, under order of the Local Government Board dated the 7th March 1891, applied by the guardians towards defraying the costs of certain additional buildings erected at the Holborn Union workhouse, situate at Mitcham.

In or about 1895 a joint committee of the board of guardians of the poor of Holborn Union and the board of governors and directors of the united parishes of St. Andrew and St. George was appointed to consider and report upon certain questions relating to the workhouse premises in Gray's-inn-road, and (*inter alia*) as to the disposal of the site of the workhouse and the lines of ownership of the respective boards in the workhouse premises, and such joint committee having made due inquiry and examination of the records, and having communicated with the Local Government Board by correspondence and interview, reported in July 1895 that as the result of their inquiries they found that the portion of the land belonged to the governors and directors of the united parishes of St. Andrew and St. George, and the remainder of the land belonged to the guardians, and the joint committee recommended that their finding as to the lines of ownership of the boards of guardians and governors and directors be adopted by the respective boards, and such recommendation and finding were adopted by the respective boards accordingly.

Since the passing of the Local Government Act 1899 and the creation of the Holborn Borough Council and Finsbury Borough Council inquiries have been held pursuant of such Act by the commissioners appointed thereunder and on such inquiries certain lands were treated by the representatives of the various local authorities, parishes and districts interested as being the common property of the union and as vested in the guardians of the Holborn Union on behalf of the ratepayers of the whole union.

In 1903 a portion of the land was sold by the guardians to the trustees of Thos. Hartnoll, deceased, adjoining owners of property. The Local Government Board have not yet given any order of direction as to the application of the proceeds of such sale.

The fee simple of the remainder of the lands is now vested in the guardians, and the lands are held by the guardians as trustees for and on behalf of the ratepayers of the Holborn Union as now constituted.

Where no adequate accommodation exists in a union, sect. 5 of the Metropolitan Houseless Poor Act 1864 (which is made perpetual by sect. 1 of the Metropolitan Houseless Poor Act 1865) requires that the guardians shall provide within their union such wards or other places of reception for destitute wayfarers and foundlings as the Poor Law Board (now the Local Government Board), having regard to the number of persons likely to require relief therein, shall direct. The section further enacts that in default of making such provision and until the same has been made the guardians of the union making default shall not be entitled to the benefit of the Act. Under sect. 9 of the Pauper Inmates Discharge and Regulation Act 1871 (34 & 35 Vict. c. 108) it is the duty of the guardians of every union to provide within their union such casual wards with such fittings and furniture as the Poor Law Board (now the Local Government Board) in their judgment, regard being had to the number of casual paupers likely to require relief therein, shall consider necessary.

In or about 1896 the guardians were directed by the Local Government Board to provide additional casual ward accommodation within their union, and accordingly made diligent inquiry, and at intervals issued advertisements for suitable sites for the erection of casual wards within the Holborn Union. They selected certain sites, in due course submitted particulars thereof to the Local Government Board, which board for various reasons refused to approve the purchase thereof for casual ward purposes. In 1899 the guardians received from the Local Government Board a letter in which that board informed them that the London County Council would not require a certain piece of land which included the site represented by the then remaining portions of the lands for a contemplated improvement scheme, and they recommended the user of such last-mentioned lands by the guardians for the erection of casual wards. The guardians, for reasons which they had previously submitted to the Local Government Board, objected to the user of the site recommended by that Board for such purpose, but ultimately, as they were satisfied that no suitable site other than one of those they had recommended to the Local Government Board for approval, and which that board had refused to sanction, was to be found within the union, the guardians adopted the recommendation of the Local Government Board, and resolved that the site represented by the remainder of the lands should be utilised for the purpose of erecting casual wards for the union thereon.

Pursuant of such resolution new casual wards were erected, but only certain portions of the lands were utilised. The cost of erection, including the cost of the fittings and furniture, but not including the value of the lands, was 13,030*l.* 3*s.* 3*d.*

A small portion of the land was sold to adjoining owners by the guardians in 1903.

The new casual wards were opened for the reception of the houseless poor on the 1st Jan. 1903, and the guardians applied to the Local Government Board on that date for a compensation rental to be fixed for the user of the site for houseless poor purposes.

On the 14th Sept. 1903 the Local Government Board wrote to the guardians refusing to grant their application, and the guardians thereupon resolved to claim repayment of the value of the land which had been utilised by them for the erection of new casual wards.

Sect. 69 of the Metropolitan Poor Act 1867 enacts (*inter alia*) that expenses incurred for the relief of destitute persons certified by the auditor and provision of temporary wards or other places of reception approved of by the Poor Law Board (now the Local Government Board) under the Metropolitan Houseless Poor Acts of 1864 and 1865 shall be repaid out of the common fund established under sect. 61 of the Metropolitan Poor Act 1867.

By sect. 70 of the last-mentioned Act, after each half yearly audit the auditors shall, within such time and in such manner as the Poor Law Board (now the Local Government Board) from time to time directs, certify to that board the amount actually expended by each union or parish in respect of expenses which are to be repaid out of the common poor fund. And the Poor Law Board (now the Local Government Board) shall by precept under the seal of the board direct the receiver to repay out of the fund to the guardians of the unions and parishes the several sums so expended, and the amount repaid shall be applied by them in aid of the fund chargeable with the relief of the poor.

Prior to the erection of the new casual wards the guardians had used for the purpose of casual wards and the reception of destitute wayfarers therein, certain premises in Vine-street, in Holborn Union, of which premises they were lessees. During the whole time such premises were so used the guardians were repaid out of the Metropolitan Common Poor Fund, pursuant to sect. 69 of the Metropolitan Poor Act 1867, the rent paid by them in respect of such premises.

In order that the guardians may obtain on behalf of the ratepayers of their union repayment out of the Metropolitan Common Poor Fund of the value of the land utilised by them for the erection thereon of the new casual wards, the guardians caused the land upon which the new casual wards were erected to be valued by a competent surveyor, and inserted the value of the land so ascertained—viz., 8829*l.*—in their accounts for the half year which ended at Michaelmas 1903.

In the general ledger of their union the guardians debited the "Land Casual Ward Account" and credited the "Union Property Account" with the sum of 8829*l.* as the value of the land. They also caused the sum to be transferred from the "Land Casual Ward Account" in the ledger and debited to an account therein called the "Metropolitan Common Poor Fund Account," and in the balance-sheet of the ledger they caused the sum of 8829*l.* to be debited against the "Metropolitan Common Poor Fund Account," and to be credited to the "Union Property Account."

The following are copies of the entries made in the said ledger as aforesaid:

LAND CASUAL WARD ACCOUNT.

Fo. 124. Dr.

Union Property Account.
Provision of site for wards.
Value of land 11,775ft. sup. £8829

Cr.

Metropolitan Poor Fund.
Site of casual ward, Little Gray's-inn-lane £8829

METROPOLITAN COMMON POOR FUND ACCOUNT.

Fo. 68. Dr.

Loan (Casual ward).
Value of site utilised in providing wards £8829

Cr.

Balance £8829

UNION PROPERTY ACCOUNT.

Dr.

£8829

Cr.

Land (Casual Ward) Account.
Plot of land 11,775ft. sup. utilised for site of Casual wards £8829

BALANCE-SHEET.

Dr.

Metropolitan Common Poor Fund.....£8829

Cr.

Union Property Account £8829

Upon the audit of the accounts of the guardians for the half-year ended the 29th Sept. 1903 F. H. Mowatt, the assistant district auditor of the

metropolitan (poor law) audit district, disallowed and struck out the entries appearing on the face of the balance-sheet in the guardians' ledger of a debit of 8829*l.* to the Metropolitan Common Poor Fund and of a credit of the same amount to the Union Property Account, and stated his reasons for so doing in the ledger as follows, viz:—

In the general ledger for the half-year ended at Michaelmas 1903 of the Guardians of the Holborn Union the following entries appeared:—

1. Land Casual Ward Account was debited and Union Property Account was credited with a sum of 8829*l.* as value of a plot of land 11,775ft. sup. utilised for site of the casual wards.

2. The said sum of 8829*l.* was transferred from the Casual Ward Account and debited to an account called the Metropolitan Common Poor Fund.

3. The said sum of 8829*l.* was entered on the face of the balance-sheet in the said ledger as a debit against the Metropolitan Common Poor Fund and as a credit to the union proper account. The land in question is situated in or abutting upon the Gray's-inn-road, and was purchased by the predecessors of the guardians of the said union in the years 1838 and 1849 for the purpose of erecting a workhouse thereon, and the land has in fact been used for that purpose. In recent years the workhouse, known as Gray's-inn Workhouse, was demolished, and the land in question, which formed a part of the site of the said workhouse, was no longer required for its original object. Under the direction of the Local Government Board the guardians resolved to erect thereon certain casual wards for the relief of the houseless poor of the metropolis. The sum of 8829*l.* represents the market value of the fee simple of the said land according to the opinion of the guardians' own valuer, and not the amount expended by the said guardians or their predecessors in acquiring the said land. Whereas at the audit of accounts for the half-year ended at Michaelmas 1903, the undersigned H. Mowatt, assistant district auditor to the Metropolitan (Poor Law) District, appointed to assist H. D. Gordon, the district auditor of the said district, and having at the time of the completion of the audit the same powers and duties as the said district auditor, undertook the audit of the said accounts during the absence from duty in consequence of illness of the said auditor, and whereas I disallowed and struck out the said entries appearing on the face of the balance-sheet in the said ledger of a debit of 8829*l.* to the Metropolitan Common Poor Fund and of a credit of the same sum to union property account, and whereas the guardians of the said union have required me to state my reasons for making the said disallowance. Now, therefore, I do hereby state that I made such disallowance for the following reasons: (1) Because the said entries do not represent any financial transactions of the said guardians; (2) because the said entries cannot properly be made until the auditor has certified such sum due from the Metropolitan Common Poor Fund; (3) because the said guardians neither received nor expended the said 8829*l.*; (4) because the said guardians are not entitled to take credit to themselves for the said sum as an asset recoverable from the Metropolitan Common Poor Fund; (5) because the said guardians have no authority in law to debit the said sum in their accounts as an amount due from the Metropolitan Common Poor Fund; and (6) because the said sum of 8829*l.* has not been expended by the said guardians, and they are not authorised to be paid out of the Metropolitan Common Poor Fund any sum not actually expended.

The guardians also included in the statement of their claim for repayment out of the Metropolitan Common Poor Fund for the half year ended at Michaelmas 1903 the sum 8829*l.* as a part of the cost of provision of temporary wards or other places of reception approved by the Poor Law Board under the Houseless Poor Acts. The assistant district auditor struck out the sum from the claim for the reasons stated by him on the claim, and struck out so much of the item in the summary of amounts paid by the guardians during the half-year to be repaid out of the Metropolitan Common Poor Fund as represented the sum 8829*l.*, and refused to include the sum 8829*l.* in the sums certified by him pursuant to sect. 70 of the Metropolitan Common Poor Act 1867 as a sum which the guardians are entitled to be repaid from the Metropolitan Common Poor Fund under the provisions of the Metropolitan Poor Act 1867 and the Acts amending the same, the reasons stated by him for so doing being as follows:

And whereas the said guardians entered in their statement of claim for the half-year ended at Michaelmas 1903 for repayment out of the Metropolitan Common Poor Fund of the said sum of 8829*l.* as a part of the cost of provision of temporary wards or other places of reception approved of by the Poor Acts, and whereas I struck out the said entry and whereas the said guardians have requested me to state my reasons for so doing. Now, therefore, I hereby state that I struck out the said sum from the claim of the said guardians for the half-year ended at Michaelmas 1903 for repayment of the Metropolitan Poor Fund for the following reasons: (1) Because the said sum does not represent any item of the expenditure by the said guardians. (2) Because the said guardians did not within the half year in question actually expend the said sum or any sum in the acquisition of a site for the provision of wards or places of reception under the Houseless Poor Acts. (3) An auditor has no equitable jurisdiction, and is bound by the provision of the statute. The statute 30 Viet. c. 6, s. 70, declares that after each half yearly audit the auditors shall within such time and in such manner as the Poor Law Board from time to time direct certify to the Poor Law Board the amount actually expended by each union or parish in respect of expenses, which are to be paid out of the Common Poor Fund, and the Poor Law Board shall by precept under the seal of the board direct the receiver to repay out of that fund to the guardians of the unions and parishes the several sums so expended, and the amount repaid shall be applied by them in aid of the fund chargeable with the relief of the poor. The guardians of this union have actually expended nothing in respect of such expenses, having used for the purposes of erecting a casual ward a piece of land which they had inherited from the representatives of a different set of ratepayers, who had purchased it, part in the year 1838 and part in 1849, not for the purposes of the Houseless Poor Act, but to build a workhouse on. The Metropolitan Poor Act 1867 (30 & 31 Viet. c. 6, s. 69, says: Expenses incurred for the following purposes after the 29th Sept. 1867 shall be repaid out of the Metropolitan Common Poor Fund (sub-sect. 9) for relief of destitute persons certified by the auditor, and provision of temporary wards or other places of reception, &c. (4) Because the said guardians are not entitled to be repaid the said sum from the Metropolitan Common Poor Fund.

The guardians contended that the disallowance by the assistant district auditor of the sum of 8829*l.* in their accounts was contrary to law, and that the reasons stated by him therefore could not be sustained. They also contended that the assistant auditor was wrong in refusing to include the sum 8829*l.* in his certificate under sect. 70 of the Metropolitan Poor Act 1867 as the amount actually expended by them in respect of expenses

which are to be repaid by them out of the Metropolitan Common Poor Fund.

On the 31st Aug. 1904 the guardians duly resolved that application be made on their behalf under 7 & 8 Vict. c. 101, s. 35, for a writ of *certiorari* to remove into the court the aforesaid disallowance of the assistant district auditor, and the guardians duly resolved that application should be made on their behalf to the court for a writ of *mandamus* commanding the assistant district auditor to include the 8829*l.* in his certificate for the amount actually expended by them in respect of expenses which are to be repaid out of the Metropolitan Common Poor Fund.

By the Metropolitan Houseless Poor Act 1864 (27 & 28 Vict. c. 116):

Sect. 3. The relief to which this Act shall apply shall include food and articles of necessity supplied by the said guardians, or by their relieving officer or other officer, or by any metropolitan police constable authorised by them in such behalf, and also the cost of lodging or shelter hired or temporarily provided for any such poor person, but not money given to him.

Sect. 4. Where the guardians shall have supplied proper wards or other places of reception for this class of poor, and the same shall have been approved of by the Poor Law Board, they may include as part of the expense incurred by them in the relief of these poor persons such sum in respect of each pauper as the Poor Law Board shall from time to time allow for the cost and expense of temporarily providing and maintaining such wards or other places.

Sect. 5. Where no adequate accommodation exists, the guardians shall provide within their respective unions or parishes such wards or other places of reception for destitute wayfarers or foundlings as the Poor Law Board, having regard to the number of persons likely to require relief therein respectively, shall direct. In default of making such provision, and until the same has been made, the guardians of the union or parish so making default shall not be entitled to the benefit of this Act.

By the Metropolitan Houseless Poor Act 1865 (28 & 29 Vict. c. 34):

Whereas it is expedient that the provisions of the Metropolitan Houseless Poor Act 1864 should be made perpetual, be it enacted as follows:

Sect. 1. That the provisions of the said Act shall be extended to the expenditure for relief of destitute wayfarers, wanderers, and foundlings, or other destitute persons, in the several unions and parishes referred to in the said Act relieved and to be relieved from and after Lady Day 1865, and that section 6 of the said Act is hereby repealed.

By the Metropolitan Poor Act 1867 (30 & 31 Vict. c. 6):

Sect. 61. There shall be a fund, called the Metropolitan Common Poor Fund, raised according to the provisions of this Act by contributions from the several unions, parishes, and places in the metropolis.

Sect. 69. Expenses incurred for the following purposes after the 29th day of Sept. 1869, shall be repaid out of the Common Poor Fund: (9) For the relief of destitute persons certified by the auditor, and provision of temporary wards or other places of reception approved by the Poor Law Board, under the Metropolitan Houseless Poor Acts 1864 and 1865.

Sect. 70. After each half-yearly audit the auditors shall, within such time and in such manner as the Poor Law Board from time to time direct, certify to the Poor Law Board the amount actually expended by each union or parish in respect of expenses which are to be repaid out of the Common Poor Fund; and the Poor Law Board shall, by precept under the seal of the board, direct the receiver to pay out of that fund to the guardians of the unions and parishes the several sums so expended; and the amount repaid shall be applied by them in aid of the fund chargeable with the relief of the poor.

By the Pauper Inmates Discharge and Regulation Act 1871 (34 & 35 Vict. c. 108):

Sect. 9. The guardians of every union shall provide within their respective unions such casual wards, with such fittings and furniture as the Poor Law Board, in their judgment, regard being had to the number of casual paupers likely to require relief therein, shall consider necessary.

By the Poor Law Amendment Act 1844 (7 & 8 Vict. c. 101):

Sect. 35. If any person aggrieved by any allowance, disallowance, or surcharge by any such auditor require such auditor to state the reasons for the said allowance, disallowance, or surcharge, the auditor shall state such reasons in writing in the book of account in which the allowance, disallowance, or surcharge may be made; and it shall be lawful for every person aggrieved by such allowance, disallowance, or surcharge, if such last-mentioned person have first paid or delivered over to any person authorised to receive the same all such money, goods, and chattels as are admitted by his account to be due from him or remaining in his hands, to apply to the Court of Queen's Bench for a writ of *certiorari* to remove into the said court the said allowance, disallowance, or surcharge, in the like manner and subject to the like conditions as are provided in respect of persons suing forth writs of *certiorari* for the removal of orders of justices of the peace, except that the condition of such recognisance shall be to prosecute such *certiorari*, at the costs and charges of such person, without any wilful or affected delay, and if such allowance, disallowance, or surcharge be confirmed, to pay to such auditor or his successor within one month after the same may be confirmed, his full costs and charges, to be taxed according to the course of the said court, and except that the notice of the intended application, which shall contain a statement of the matter complained of, shall be given to such auditor or his successor, who shall on return to such writ return a copy under his hand of the entry or entries in such book of account to which such notice shall refer, and shall appear before the said court, and defend the allowance, disallowance, or surcharge so impeached in the said court, and shall be reimbursed all such costs and charges as he may incur in such defence out of the poor rates of the union or parish respectively interested in the decision of the question, unless the said court make any order to the contrary; and on the removal of such allowance, disallowance, or surcharge the said court shall decide the particular matter of complaint set forth in such statement, and no other; and if it appear to such court that the decision of the said auditor was erroneous, they shall, by rule of the court, order such sum of money as may have been improperly allowed, disallowed, or surcharged to be paid to the party entitled thereto by the party who ought to repay or discharge the same; and they may also, if they see fit, by rule of the court, order the costs of the person prosecuting such *certiorari* to be paid by the parish or union to which such accounts relate as to such court may seem fit; which rules of court respectively shall be enforced in like manner as other rules of the said court are enforceable.

Danckwerts, K.C. and *Wallis Grain* showed cause.—The question here is whether this is an expense that can be charged against the Metropolitan Common Poor Fund. The union seeks to recover as an expense what they had never expended. They referred to

Metropolitan Houseless Poor Act 1864 (27 & 28 Vict. c. 116), ss. 3, 4, 5, 6;

Metropolitan Houseless Poor Act 1865 (28 & 29 Vict. c. 34), s. 1;
Metropolitan Poor Act 1867 (30 & 31 Vict. c. 6), ss. 61, 69, 70;
Pauper Inmates Discharge and Regulations Act 1871 (34 & 35 Vict. c. 108), s. 9.

The Acts of 1864, 1865, and 1867 refer to temporary wards. These permanent casual wards are erected under the Act of 1871, and the expenses are not recoverable from the Metropolitan Common Poor Fund. Even if they are recoverable, they cannot be recovered in one half year.

Macmorran, K.C. and *R. Cunningham Glen*, in reply.—These premises are not temporary, but permanent casual wards. The word "temporary" only refers to the purposes for which the wards are to be used. If the money had been borrowed by the union, the repayments would have to have been made out of the Metropolitan Common Poor Fund, and, we submit, that the union are entitled to recover the value out of the same fund.

Lord Alverstone, C.J.—The only difficulty in this case has been that the argument in showing cause against the rules covers much wider ground than was really necessary. We were invited by Mr. Danckwerts, and by Mr. Grain too, to say that there could be no claim at all by the Holborn Union for any payment in respect of what I will call the devotion of this land for the purpose of casual wards, or to the use and occupation of the land by the casual wards. As to that, as I have already indicated, I do not intend to express anything more than an opinion to show that there is a case to be argued which does not arise to-day. We have not heard on that point the Local Government Board, and we have no right to decide behind their backs. We have not heard what I may call the whole of the case from that point. I only desire to say it seems to me, and it did seem to me, in the course of Mr. Danckwerts' argument, that it may be that the Holborn Union are entitled to receive by means of the half-yearly accounts a return or recompense in respect of the fact that they have devoted a part of their property for the purposes of the Metropolitan Poor Act during that six months in a year, or from six months to six months, and in that way have contributed in kind for the purposes for which they are entitled to take their contribution. I do not want to say more than that, because it seems to me we should be deciding the point without knowing really on what ground it is that the Local Government Board are said to have refused to recognise anything in the nature of an annual rent. There may be some ground which we do not understand, it may be some *quid pro quo*, or it may be that there is something in the way these wards are provided which is not now before us, but as far as the case has been argued I cannot see why, if it be a purpose in respect of which they would be entitled to receive a contribution, if it were an annual expenditure, if for instance they have bought furniture as Mr. Macmorran said, or if they have erected buildings and borrowed money, I cannot see any reason simply because it does happen to be their own land why they should not be entitled to have that taken into consideration by the proper authorities in considering the amount they ought to be repaid. It is so obviously to the interest of public bodies that the land should be provided in the most economical way, and to send the Holborn Union seeking for land simply because they decline to make an allowance to them would be unreasonable. I am not justified in saying more than that, and I feel it right to say that. Of course, there is a difficult question as to the actual scope of sub-sect. 9 of sect. 69 of the Act of 1867, which runs: "For relief of destitute persons certified by the auditor and provision of temporary wards or other places of reception approved by the Poor Law Board under the Metropolitan Houseless Poor Acts of 1864 and 1865." There is a difficult question as to what that originally covered, and how far this sub-section has made any difference. I am particularly anxious that I should not be thought to have expressed an opinion on the merits against Mr. Macmorran's contention that the local authority, the Holborn Union, are entitled to some allowance. It seems to me they may very well be entitled to some allowances, and I only want not to go too far, because I have said more than once that the Local Government Board are not before us, and I do not know on what ground they thought no allowance should be made. I now come to this particular application which forms the difficulty which I have had. We are obliged to confine applications for *certiorari* and *mandamus* within the real limits of the rules that are moved. The *certiorari* simply is to quash this disallowance—that is, to restore the 8829*l.* and nothing else. It cannot be suggested that on the *certiorari* there could be anything more than a restoration of the figure, and the *mandamus* is to order them to restore and include the 8829*l.* I do not go so far as to say that if there be, on such an application for *mandamus*, evidence before the court that they have got the materials whereby they can order another sum to be entered instead, that they would not do it, but *primâ facie* the people who come for a *mandamus* have to state their case when they move the rule and to ask for what they want. And while the hand of the court is not tied or fettered within the fair ambit of the application we are not entitled to send a *mandamus* at large either to the auditor to do something or order the Local Government Board to take some steps we think they ought to have taken. My difficulty is that it does not seem to me possible on this rule to give effect to remedies which Mr. Macmorran asks for even if I am right in the view of what the probable rights of his clients would be. When we look at the grounds of the disallowance, which when one gets the papers into order are very clearly stated, it seems to me that in substance that is what the auditor has said. I will not go through them all. They admit that the guardians have utilised the land for this purpose, and they say that there has been the consent of the Local Government Board to the use of the land for the purpose of a casual ward. Then they allege that the land has been valued at a certain amount. In reply to that, the auditor says: "There has been no money expended in that half-year at all; there has been no receipt of money and no expenditure of money; it simply has been a valuation of the capital value of the property. I think that is not an amount that I can certify under sects. 69 and 70." It seems to me that so stated the disallowance is right. It seems to me that though the case

which Mr. Macmorran makes might have justified another figure it does not justify the Holborn Union in saying: "Do not ascertain what we have really lost during that half year, do not ascertain what the fair value of the land was during the half-year or during the time when it was devoted to this purpose, do not even treat it as a series of instalments, treating it as money borrowed for land, do not apply the ordinary machinery which is applicable to the half yearly audit, but give us in this half year the capital value of the particular piece of property we possess." Assuming everything in Mr. Macmorran's favour, it seems to me that that disallowance cannot be said to be wrong. It seems to me that we cannot order the auditor to include as a proper six months' expenditure by the Holborn Union the value of all the land that they possess as applied to this purpose the capital value, and I doubt myself whether value is the proper test at all. It seems to me that it must be either expenditure or what would be a fair amount for that land for that six months, but whatever be the right way of arriving at it, in my judgment this is not a case in which we have ground for saying that this particular disallowance was wrong, or that this particular item ought to be restored. As I cannot see my way to mould the *mandamus* in a way to enable Mr. Macmorran to get what may be his rights, I think, therefore, our only course is to discharge the rule.

PHILLIMORE, J.—I agree with all that my Lord has said.

JELF, J.—If the land for which the Holborn Union has paid 8000*l.* has by virtue of what has occurred been irrevocably transferred to the general body representing other unions as well as this union, it seems to me that in some shape or other there must be a means of adjusting the rights of the parties so that there should go back into the pocket of the Holborn Union something in respect of that land which has so passed out of their hands. The difficulty, I think, which arises here is what one may call, more or less, a technical difficulty. If *certiorari* and *mandamus* were merely means of bringing forward a case that required to be adjusted to give power to the court to adjust difficulties of that kind, then I should say that probably we should have had to go much more deeply into this case. But it is a *mandamus* to allow a particular sum, or, rather, to do away with the disallowing of a particular sum. Under these circumstances I do not see any way to differ from what my Lord has laid down in answer to this case. *Rules discharged.*

Solicitors: *Huxtable; Sharpe, Parker,* and *Co.*

Wednesday, Oct. 25, 1905.

(Before Lord ALVERSTONE, C.J., WILLS and DARLING, JJ.)

STANBURY v. MAYOR, &c., OF EXETER. (*a*)

Local government — Veterinary inspector—Liability of local authority for negligence of—Diseases of Animals Act 1894 (57 & 58 *Vict. c.* 57)—*Sheep-scab Order* 1898.

A local authority that has appointed an inspector under sect. 35 (1) *of the Diseases of Animals Act* 1894 *is not responsible for negligence on the part of the inspector in acting under the Sheep-scab Order* 1898.

APPEAL from His Honour Judge Lush Wilson, sitting at the Exeter County Court.

The action was brought by the plaintiff against the defendants to recover damages for the alleged negligence of their veterinary inspector.

By sect. 22 of the Diseases of Animals Act 1894:

The Board of Agriculture may make such orders as they think fit subject and according to the provisions of this Act for the following purposes. . . . (xiii.) For prescribing and regulating the seizure, detention, and disposal of a diseased or suspected animal, exposed, carried, kept, or otherwise dealt with in contravention of an order of the board.

By sect. 2

The local authorities in this Act described shall execute and enforce this Act and every order of the Board of Agriculture as far as the same are to be executed or enforced by local authorities.

By sect. 35:

(1) Every local authority shall appoint so many inspectors and other officers as the local authority think necessary for the execution and enforcement of this Act, and shall assign to those inspectors and officers such duties, and salaries or allowances, and may delegate to any of them such authorities and discretion as to the local authority seem fit, and may at any time revoke any appointment so made; (2) every local authority shall keep appointed at all times at least one veterinary inspector, and shall appoint, and at all times keep appointed, so many other veterinary inspectors as the Board of Agriculture, having regard to the extent and circumstances of the district of the local authority, direct.

The Board of Agriculture, under the powers conferred on them by the Diseases of Animals Acts 1894 and 1896, made the Sheep-scab Order of 1898, which (*inter alia*) provided—

Clause 2:

An inspector of a local authority, on receiving in any manner whatsoever information of the supposed existence of sheep-scab, or having reasonable ground to suspect the existence of sheep-scab, shall proceed with all reasonable speed to the place where such disease . . . exists, or is suspected to exist, and shall there and elsewhere put in force and discharge the powers and duties conferred and imposed on him as inspector by or under the Act of 1894 and this order.

Clause 14:

Where a sheep is exposed or otherwise dealt with in contravention of the last preceding article, the inspector of the local authority, or other officer appointed by them in that behalf, shall seize, and remove and detain it, and also, where the sheep is exposed in a market fair, sale-yard, or place of exhibition, all other sheep in or on such

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

market, fair, sale-yard, or place of exhibition, being or having been in the same flock or in contact with the sheep affected with, or suspected of, sheep-scab, and the sheep so seized shall be dealt with in accordance with the following provisions. . . .

The veterinary inspector appointed by the defendants, who were the local authority within the meaning of the above sections and order, had detained a ram belonging to the plaintiff on what turned out to be a mistaken suspicion that it was suffering from sheep-scab, and the plaintiff alleged he had suffered damage thereby.

The learned County Court judge held that he was not the servant of the local authority in what he did, but was acting under an order of the Board of Agriculture, and gave judgment for the defendants.

The plaintiff appealed.

Foote, K.C. and *W. T. Lawrance* for the appellant. The veterinary inspector was the servant of the respondents, and they are therefore liable for his negligence. The respondents as the local authority have to carry out the Act and the orders of the Board of Agriculture, and therefore the inspector, who has been appointed under sect. 35 (1) of the Diseases of Animals Act 1894, is their servant or agent. They have power to dismiss him under that sub-section, and under sub-sect. 3 the Board of Agriculture have only power to direct the local authority to dismiss. We submit that art. 14 of the Sheep-scab Order 1898 is conclusive in showing that the inspector is the servant of the local authority.

Clavell Salter, K.C. and *Hawke* for the respondent.—The inspector here was carrying out the duties which the statute and order require him to carry out. In no case can he be said to be the servant of the respondents, but he is in the same position as a policeman, who, though he may be appointed by the local authority, is merely appointed to carry out statutory duties, and the local authority cannot be responsible for the way in which those duties are carried out. They referred to:

McKay v. *City of Buffalo*, 9 Hun. N. Y. 401;
Forsyth v. *Canniff and City of Toronto*, 20 Ont. R. 478;
Garlick v. *Nottingley Urban District Council*, 2 L. G. R. 1345.

Lord ALVERSTONE, C.J.—I am of opinion that the decision of the learned County Court judge is right, and now that I understand the way in which the case was argued before him I think that he has correctly stated the distinction that ought to be drawn in this case, though his language requires a little amplification, and one wants to understand exactly how the point was raised before him. The action was brought against the corporation of Exeter in respect of an act which is to be assumed for this purpose to be negligent of the cattle inspector, who was detaining some sheep under the suspicion of scab. If, apart from any question which arises under the statute, it had been an ordinary case of a delegation by the corporation of duties which they, the corporation, had to perform, or of powers which they were entitled to perform, the ordinary rule of principal and agent or master and servant would arise, and the doctrine of *respondeat superior* would apply. But in this case, when the position of the parties is looked at and the legislation and orders made thereon regarded, it is, in my opinion, very analogous to the case of police and many other officers of corporations who have statutory duties to perform, and although they owe a duty to their employers and appointors, the corporations, still there is no ground for contending that the corporations are responsible in respect of the negligent conduct of the respective persons they have appointed. The Act of 1894 undoubtedly did throw upon the local authority the duty of executing and enforcing the order, and every order of the Board of Agriculture so far as they are to be executed or enforced by local authorities, and I still think that there may be duties which have to be performed by local authorities even though the actual act which has to be done must be done by one of their agents. To that extent I think the question cannot be determined simply by regard to the words of a particular section or a particular order imposing or directing some duty to be done either by the corporation or one of its servants. In some cases, notwithstanding that a person is named, it may possibly be the duty of the corporation to do the act which is going to be done by one of their officers. But in this particular case the Board of Agriculture having power to make the orders under sect. 22, the local authority have had imposed upon them the duty of appointing inspectors and other officers such as the local authority think necessary for the execution and enforcement of the Act. It is not unimportant, with reference to the position of the board, that the board may remove an inspector if he is incompetent, or if he has been guilty of misconduct or negligence—that is to say, it is a superior authority over the corporation. None of those matters are conclusive in any way of the present point to my mind. They only indicate the general nature and position of the authority and the officer who is acting in pursuance of an appointment that has been made by the local authority under that Act and under the orders. Then the order of 1898, made subsequently to the Act of 1894, imposed upon the inspector of the local authority the duty of seizing and removing a sheep where it is exposed or dealt with otherwise than in the last preceding Act for this purpose—that is, a sheep suspected of being infected or suffering from scab. The main argument has dealt with those words: "The inspector of the local authority shall seize, remove, and detain." Is the local authority responsible if the inspector negligently seizes, removes, and detains? In my opinion it is not. In my opinion—to adopt the language of the learned County Court judge—inasmuch as the inspector was not acting in pursuance of duties imposed by statute upon the defendants, in other words, it was not he, performing as agent, delegated duties which were imposed upon the corporation and delegated by the corporation to him, but he was acting in discharge of duties imposed upon him as inspector. Therefore if the words had stood alone, "The inspector of the local authority shall seize, remove, and detain," it seems to me that it is a case in which the person appointed by the local authority to fulfil certain duties has imposed upon him certain responsibilities and duties by virtue of the Act of Parliament and the order made thereunder, and the manner of discharging those duties is not controlled for the purpose of the appointment under discussion by the corporation, but is controlled by the superior and paramount authority.

Then Mr. Foote relied upon the following words, "or other officer appointed by them in that behalf." In my opinion, those words only clearly indicate that the local authority has got the power of not only appointing inspectors, but of appointing other officers who may be proper persons to carry out statutory duties. Those words, in my judgment, do not afford any argument for making this an exception and for saying in such a case, because they, the corporation, may direct the duties to be performed by some person who is not the inspector, that the onus and liability of his acts is greater in the case of an officer discharging those duties, simply because some other person might have been appointed to discharge them. I think, therefore, this is a case in which there is a duty imposed on the inspector as such. Whatever may be the remedy of the person aggrieved against him in respect of negligence or improper acts, I think the learned County Court judge was right in holding that no action would lie against the corporation, and therefore the appeal must be dismissed.

WILLS, J.—I am of the same opinion. It is to be observed that the particular duty, the negligence in the performance of which is the supposed ground of action in the present case, never came into existence until the order of the Board of Agriculture was passed, and came into existence at the moment when the order of the Board of Agriculture was passed. It therefore is a case of necessity in which there is no question of delegation of authority to the inspector, because the order of the Board of Agriculture does not give the local authority and does not require them to perform the duties which are to be performed by the inspector. It is therefore a case, to my mind, almost exactly analogous to the case of the police. There have to be police officers in every jurisdiction, and in boroughs certainly. One illustration is as good as another, and one suffices. But in all boroughs, under Acts of Parliament, the watch committee has to appoint, remove, and control the police officers, and nobody ever heard of the corporation being made liable for excessive duty, or defective duty, or negligent performance of duty by an officer of the police force. I should think that the reason why that is the case, although it does not seem to be touched by anything which has been cited to us from any English authorities, is not badly expressed in the passage which appears to have been collected from some of the American authorities in Mr. Beven's book—viz., that if the duties which have to be performed by the officer designated are of general nature, and have no special local characteristics so as to belong to that locality, and that locality only, with the discharge of which the illustration is concerned, then it is really a branch of the public administration for the purpose of preserving order and effecting the purpose of general utility and general protection which apply to the whole of the kingdom. Under those circumstances it does not seem unreasonable that the corporation who appoint the officer should not be made responsible for acts which are the consequence of misfeasance on his part. For these reasons I have come to the conclusion that the learned County Court judge was quite right, and that the corporation are not liable in this case.

DARLING, J.—I am of the same opinion. What was sought here was to make the corporation of Exeter as the local authority responsible for the act of an inspector who was appointed by them. He was appointed by them because sect. 2 of the Diseases of Animals Act 1894 enacted that "a local authority in this Act described shall execute and enforce this Act and every order of the Board of Agriculture so far as the same are to be executed or enforced by local authorities." Another section, sect. 35, says that every local authority shall appoint so many inspectors or other officers as the local authority shall think necessary for the execution and enforcement of the Act. Then it is provided in the third sub-section of that section that the Board of Agriculture, if satisfied on inquiry that the inspector of a local authority is incompetent or has been guilty of misconduct may dismiss him, and that without any kind of regard to the opinion of the local authority. The local authority appointed an inspector, Mr. Heath. How came they to do it? To my mind, the question to be solved in order to find out whether they are liable for these acts depends upon this: Was the act which he did done by virtue of a corporate authority, or was it something which was imposed upon them as a public obligation, not to be performed by themselves, but by the officer whom they were ordered to appoint? This was a thing they could not do themselves. It was no part of the duty of the corporation of Exeter to do these things. They were not to do them—in fact, I think it is wrong to say they were to do them. They were to carry out the Act, but they were only to do it in a particular way. They were to appoint an officer, and, when that officer was once appointed, he was to be guided by instructions given to him, not by the corporation, but by the Board of Agriculture, and the corporation had to perform its duties in a particular way. It seems to me he could have replied: "I am not going to do it. All you have to do is to appoint me, and, when you appoint me, I have to carry out the instructions of the Board of Agriculture." I am not going to cite it (it has often been cited in the course of the argument), but there is an order of the Board of Agriculture as to what he was to do, and it was in the doing of that which the Board of Agriculture ordered him to do that Mr. Heath is said to have given a cause of action against the corporation. Now, I think it is worth noticing that this very statute contemplates two kinds of inspectors. It sets out two kinds of inspectors. One kind of inspectors is to be appointed by the Board of Agriculture themselves administering the Act. They are to administer it over a wider area than the limited area which is to be controlled by the inspector appointed by the local authority, but no one contends for a moment that if it were one of the inspectors appointed by the Board of Agriculture any action would lie against anybody but the inspector himself. One would ask, Why should the corporation of Exeter be liable for the act of an inspector when the Board of Agriculture would not be liable? It seems to me *à fortiori* that the inspector appointed by the local authority would not be liable, because the inspector of the Board of Agriculture is bound to do as the Board of Agriculture tells him, and

no one else. But that is exactly the position of the inspector appointed by the corporation of Exeter. He is bound to do what the Board of Agriculture tells him when once he has been appointed by the Exeter Corporation; and if he does not satisfy them, however much satisfaction he may give to the people who it is said now are liable for his conduct, the corporation of Exeter would have to appoint another person. It appears to me, therefore, that these were acts which were not done by any servant of theirs. They were acts which were done as a part of having to exercise the corporate authority of the Exeter Corporation. They were acts of a public kind done by a person who was appointed for some reasons of convenience which the Legislature has seen, and appointed by the local authority for those purposes. In this case, therefore, I think the judgment of the learned County Court judge was perfectly right.

Appeal dismissed.

Solicitors: *Stow, Preston,* and *Co.*, for *Friend* and *Tarbet*, Exeter; *Geare* and *Pease*, for *George R. Shorto*, Exeter.

Wednesday, Nov. 1, 1905.

(Before Lord ALVERSTONE, C.J., WILLS and DARLING, JJ.)

CORPORATION OF CHICHESTER *v.* FOSTER. (*a*)

Highway — Locomotive — Use of, on highway— Excessive weight of locomotive—Damage to water main under road — Absence of negligence — Liability of owner of locomotive—Locomotives Acts 1861 (24 *&* 25 *Vict. c.* 70), *s.* 13, *and* 1865 (28 *&* 29 *Vict. c.* 83), *s.* 12.

The plaintiffs were the road authority and also the owners of the water system in a certain district and of a water main laid underneath a public road. The main was laid many years ago without cement in a trench some 20in. beneath the crown of the road, and was still substantially strong enough to withstand the pressure of the ordinary traffic of the district. The main and a service pipe attached thereto were broken by a large traction engine—weighing some thirteen tons—passing along the road and over the pipes. The engine by its weight was likely to damage the pipes in the way in which they were laid, and the damage was in fact caused by the great weight of the engine, but there was no negligence or want of reasonable skill or care on the part of the owner of the engine, either as to the construction or user of the engine. The road was a main road, and traction engines had used it for many years, though such heavy engines were not part of the ordinary traffic of the district. There was no default on the part of the plaintiffs as the road authority in keeping the road fit for the ordinary traffic of the district.

Held, that the owner of the engine was liable to the plaintiffs for the damage to the pipes, although there was no negligence on his part.

APPEAL by the defendant from the Chichester County Court, in an action brought by the plaintiffs, the corporation of Chichester, to recover from the defendant the sum of 2*l.* 10*s.* damage to a water main by a traction engine belonging to the defendant.

On the afternoon of Saturday, the 17th Dec. 1904, two traction engines belonging to the defendant, who was a haulier and timber merchant, were passing along the main road near Chichester. The first was about eleven tons in weight and the second was about thirteen tons, with wheels about 20in. in width, and each had a timber carriage and two trucks loaded with timber.

The driver of the larger engine, which was behind, had stopped on the road for some three or four minutes, and soon after the engine had gone on it was found that at a spot in the direct track of the 20in. gauge water was coming up in considerable quantities through the ground from the main underneath.

The weight of the engine had made a dent in the road, and caused the ground under the wheel to go down about 2in., and, upon opening up the ground at the place it was found that the pressure of the wheel had broken away a service pipe from the union with the main, and had fractured the main, which was laid in a trench about 1ft. 9in. or 2ft. beneath the crown of the road, and had caused a large escape of water.

The road is the main road from Brighton to Portsmouth; a good many engines come through Chichester along the road which is used by traction engines without interference, the traction engines being generally about nine or ten tons in weight.

The defendant stated that his two engines were duly licensed, and that he had constantly seen ploughing engines on this road, weighing from twelve to seventeen tons and with narrower wheels; that his wheels were 20in. wide—the regulation width for thirteen tons being only 16in. —all on springs made for going over soft ground, and that there were several other engines about of the same size.

It was submitted for the defendant that the action would not lie without proof of negligence, and that there was no evidence of negligence on the part of the defendant. The learned County Court judge reserved his judgment, and the facts as found by him and his conclusions thereon appeared from his judgment as follows:—

This action is brought on the ground that engines, such as traction engines, are dangerous things within the principle of the rule of law in *Rylands* v. *Fletcher* (19 L. T. Rep. 220; L. Rep. 3 H. L. 330), and that outside his own domain the owner is liable for any damage caused to the property of another, even though there is no negligence. The facts in this case are these. The plaintiff corporation were owners of the water system in Chichester, and in particular of water mains in St. Pancras, the subject of this action. These mains were laid many, probably thirty, years ago. They were not, judged of by the standard of to-day, of the best construction, being cast in such a way that on one side of the elliptical tube the metal was considerably thinner than on the other. They were laid in the soil or earth without cement or other special preparation, and at a depth which left a space of about 20in. between the crown of the pipe and the crown of the road. On the other hand, though they had been so long in the ground, the pipes

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

were not corroded or decayed, and were substantially still fit to withstand ordinary pressures. The main in question was broken by the weight of a traction engine belonging to, and being at the time used by, the defendant, passing over the main at a spot where a supply pipe was connected with the main by a union screwed into the main on its top side—the probable immediate cause of fracture being that the union became deflected under the pressure and so exerted a leverage on the pipe greater than the pipe could stand. The County Court judge found that there was no negligence or want of reasonable skill or care on the part of the defendant or his workmen, as regards either the construction or user of the engine, and the damage done was caused simply by the great weight of the engine, which weighed ten tons and upwards. He also found that the pipes in question were at the date when they were broken sufficiently strong and well laid to withstand the pressure of the ordinary traffic of the district. He also found that the defendant's engine was by reason of its weight likely to damage pipes constructed and laid in a manner in which the pipes in question were constructed and laid. The County Court judge was of opinion that it followed from these findings that the defendant was *primâ facie* liable for the damage done by the engine to the pipes on the principle that the engine was, under the circumstances, a dangerous thing, and that the defendant was liable for any damage caused to the plaintiffs' property by the use of that dangerous thing upon the highway. The question whether a given machine when used on a highway was dangerous or not had to be considered in relation to the actual condition of things on, or under, or adjacent to the highway existing at the time of user, assuming that there was nothing in the condition of things of an unusual or exceptional character, or arising from the illegal or negligent conduct of persons other than the person using the dangerous machine. If the water pipes had been constructed of such strength, or laid at such a depth or in such a protective bed of concrete or otherwise, so as to withstand the pressure of a weight of ten or more tons passing over them, the defendant's engine would not have been dangerous in relation to those pipes, but under the actual circumstances which the County Court judge found did exist in this case, he was of opinion that it was dangerous. It was contended for the defendant that the plaintiffs' pipes were badly and negligently constructed and laid. If that was the case the pipes were the cause of the damage. He could not agree to that. He found on the evidence that the pipes were sufficient in strength and sufficiently well laid in relation to the ordinary and lawful traffic existing at the time when they were laid, and he did not think that there was any duty on those who laid the pipes, or on the plaintiff corporation, to take into account or reconstruct their water system so as to withstand exceptional pressures arising from the use of these ponderous road engines, which had only within recent years become at all common, and could not even now be considered ordinary traffic of the country. Reliance was placed by both sides upon the Locomotives Acts 1861 and 1865, legalising and regulating the use of locomotives on ordinary highways, and by the defendant on the fact that his engine was duly licensed by the proper authority; but the judge pointed out that the Acts in question made it clear that everyone using a locomotive on the roads under the authority of the Acts did so at the risk of being liable for any injury which might be caused to others by such user, where at common law he would be liable under the same circumstances if the Acts had not been passed—for instance, if the engine was a dangerous thing within the principle of *Rylands* v. *Fletcher* (*ubi sup.*), and damage was caused to the persons or property of others lawfully and without negligence being in, under, or adjacent to the highway. The County Court judge considered that the case of *Gas Light and Coke Company* v. *Vestry of St. Mary Abbott's, Kensington* (53 L. T. Rep. 457; 15 Q. B. Div. 1) was practically decisive of the case. He found that there had been no default or neglect of a duty to repair upon the part of the plaintiffs. The road surfaces were not alleged to be out of repair, and, as regards the water main and the way in which it was laid, he found that there was no negligence in the original construction or the laying of it, and that the main itself was not decayed by rust or age; and that, unless he was to hold that it is the duty of bodies in the position of the plaintiffs to take steps from time to time to strengthen or relay pipes so as to enable them to withstand increased pressure arising from the use of any new and heavier vehicle which individuals may from time to time find it to their advantage to put upon the road—a duty for which he could find no warrant—there had been in this case no default on the part of the plaintiffs contributing to the damage which had occurred.

In the result the County Court judge gave judgment for the plaintiffs for the damages claimed, with costs on Scale C.

The defendant appealed.

Sect. 13 of the Locomotive Act 1861 (24 & 25 Vict. c. 70) provides:

> Nothing in this Act contained shall authorise any person to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance; and every such person so using such engine shall, notwithstanding this Act, be liable to an indictment or action, as the case may be, for such use, where, but for the passing of this Act, such indictment or action could be maintained.

Sect. 12 of the Locomotives Act 1865 (28 & 29 Vict. c. 83) provides:

> Nothing in this Act contained shall authorise any person to use a locomotive which may be so constructed or used as to be a public nuisance at common law, and nothing herein contained shall affect the right of any person to recover damages in respect of any injury he may have sustained in consequence of the use of a locomotive.

E. B. Charles for the defendant.—The defendant was not liable for the damage. This was the main road, and it has been used by traction engines without any hindrance for over twenty years, and without any damage being done. The action cannot be sustained without proof of negligence, inasmuch as this was an ordinary user of the road. The modern authorities show that the public authority, which has charge of the roads, must keep pace from time to time with the different kinds of traffic on the road, and the plaintiffs, as the road authority, were bound either to put more metal on the road or to strengthen

their pipes. There was no negligence on the defendant's part in the way in which the traction engine was used, and, having regard to the fact that traction engines have used this road for many years, it cannot be said that the user was other than an ordinary user of the road, or that this traction engine was a dangerous thing on the road. As the nature of the traffic on a road changes, the road authority must adapt and make up the road to suit the requirements of the ordinary traffic:

Attorney-General v. *Scott*, 93 L. T. Rep. 249; (1905) 2 K. B. 160.

The County Court judge based his decision on the case of *Gas Light and Coke Company* v. *Vestry of St. Mary Abbott's, Kensington* (53 L. T. Rep. 457; 15 Q. B. Div. 1), but that case is not applicable here. That case was really based upon negligence, as we see from the judgment of Field, J. (1 C. & E. 368). Field, J. says (at p. 369): "Now, the plaintiffs' case is stated in the pleadings as resting upon negligence, which means, wherever it is used in law, the breach by one man of some duty which he owes towards another." There had been in that case successive breakages of pipes, and there was negligence in the use of the steam roller. That distinguishes the case from the present case, where it is found that there was no negligence, and where there was only one fracture. There was no evidence that this traffic was other than ordinary traffic. Traction traffic was ordinary traffic on this main road. No claim had ever been made for user by traction engines, and there had been no cutting up of the road. The engine, which was duly licensed, was not heavier than other engines using this road; there was no evidence of any wrongful act, and therefore the action does not lie. If the damage was caused by the engine stopping—and it is admitted that it is not improper for an engine to stop four or five minutes—then, by *Attorney-General* v. *Scott* (*ubi sup.*), the damage must fall on the plaintiffs for neglect to maintain the road in a condition fit to bear "ordinary traffic." At the date of this occurrence the road was scheduled for repairs, showing that it was not in a condition to bear ordinary traffic.

G. F. Hohler for the plaintiffs.—The judgment in favour of the plaintiffs was right. On the evidence and findings of the County Court judge the question as to any defect in the road is not in point. The findings that these pipes were properly laid and were able to withstand the pressure of any ordinary traffic on the road, and that there was no default or neglect of duty on the part of the plaintiffs, as the road authority, to repair, are really conclusive of the case. It must be taken upon those findings that the road was fit in all respects for the traffic, and, that being so, the case comes directly within and is governed by

Gas Light and Coke Company v. *Vestry of St. Mary Abbott's, Kensington* (*ubi sup.*).

The pipes were properly laid down and the road was in good order and in a proper and effective state for the ordinary traffic on it, and there is no suggestion, no evidence, and no finding that this road required any repair. The case is, therefore, clearly brought within the principle that, the pipes being properly there and the road being in proper repair, any person who does damage to the pipes is liable. The cases of *Rylands* v. *Fletcher* (19 L. T. Rep. 220; L. Rep. 3 H. L. 330) and *Jones* v. *Festiniog Railway Company* (18 L. T. Rep. 902; L. Rep. 3 Q. B. 733), though somewhat different cases, support the plaintiffs' contention. In the latter case a railway company, which had no statutory powers to use locomotive steam engines, were held to be liable for damage done by sparks from an engine, even though negligence was negatived. In the present case the finding of the judge that the weight of the engine was calculated to cause damage, the road being in ordinary repair, is sufficient, and the true inference from the evidence really is that this excessive weight and the struggle to get the engine into motion did this damage. Before the defendant can succeed he must show that there was some breach of duty by the plaintiffs as the highway authority, and there is no evidence of that. The reasoning of the County Court judge and the authorities he referred to, particularly the case of *Gas Light and Coke Company* v. *Vestry of St. Mary Abbott's, Kensington* (*ubi sup.*), show that he was right in his judgment.

E. B. Charles in reply.—The case of *Jones* v. *Festiniog Railway Company* (*ubi sup.*) has no application here. The decision in that case was based upon the fact that the railway company had no Parliamentary authority to run their locomotives in the place where the damage was done, and that, that being so, they were liable apart from the question of negligence.

Lord ALVERSTONE, C.J.—I cannot entertain any doubt that the judgment of the County Court judge in this case was perfectly right. The fact that there was only one breakage caused by this particular defendant is only one of the facts to be considered in the case. A traction engine is not entitled to break its first pipe as a dog is entitled to its first bite. That there was only one breakage is, however, one of the things to be considered in determining the question of fact as to whether the damage to the pipe was caused by something for which the defendant, as being the owner of the traction engine, was responsible. The County Court judge could have found that, notwithstanding the weight of the engine, the damage was caused by the pipe in the position in which it was placed not being reasonably safe to bear the ordinary traffic, including traction engines, which might be expected to pass over it as it lay underneath the road. That was clearly recognised by Lindley, L.J. in *Gas Light and Coke Company* v. *Vestry of St. Mary Abbott's, Kensington* (*ubi sup.*). The County Court judge, however, has not found that. There is no statutory protection given in this case, and the question, then, is upon whom the loss or damage caused by the breakage of the pipe by the defendant, who was not exercising any statutory power or duty, is to fall. Is it to fall on the owners of the pipe or on the owner of the traction engine? The case is complicated by the fact, which did not arise in *Gas Light and Coke Company* v. *Vestry of St. Mary Abbott's, Kensington* (*ubi sup.*), that the plaintiffs, in addition to being owners of the pipe, are also the road authority. That, no doubt, would be in favour of the defendant, and, indeed, would be a defence to this action if the defendant had been able to show that the damage was caused by a breach by the plaintiffs of their duty as the road authority. Although no question

arises in this case under the Locomotives Acts, I ought to say that I think the fair result of and inference from the decision in *Attorney-General* v. *Scott* (*ubi sup.*) is that the road authority in the exercise of their duty as road authority must keep the road up to date, and must maintain it in a reasonably fit condition to bear the ordinary traffic of the particular district. That being so, we have now to consider the findings of the County Court judge. It has been urged for the defendant that, as the pipe was broken on this one occasion only, and as traction engines had used this road for many years, the judge ought to have found that the cause of the accident was the inherent inability of this pipe laid beneath the road as it was to resist the strain. We were pressed to take the view that the pipe was broken owing to that. The County Court judge, however, has found that the pipes at the time when they were broken were sufficiently strong and well laid to withstand the pressure of the ordinary traffic of the district, and he has also found that there was no negligence or want of reasonable skill on the part of the defendant as regards either the construction or user of the engine, and that the damage was caused simply by the great weight of this particular engine. He also found that there had been no negligence or neglect by the plaintiffs in their duty as road authority, even assuming, as I have already said, that the case of *Attorney-General* v. *Scott* (*ubi sup.*) has laid it down that it is the duty of the road authority to keep the roads up to date. This seems to me to be a finding that the use of this particular engine was at the defendant's own risk, whatever may be the case with regard to traction engines generally. The judge also finds that there was no duty on the part of the plaintiff corporation as the road authority to take into account or provide against excessive or exceptional pressure arising from the use of these machines. Upon those facts it seems to me to be a case where the fact that the plaintiffs, who are the owners of the pipes, are also the road authority does not assist the defendant. It may be that the test of liability is that pointed out in *Gas Light and Coke Company* v. *Vestry of St. Mary Abbott's, Kensington* (*ubi sup.*), that there was no necessity or obligation to use so heavy an engine. Lindley, L.J., in delivering the considered judgment of the court, there said: "Now, there is no dispute that the defendants can perform their duty without using steam rollers of such a weight as to injure the plaintiffs' pipes, but they say it is their duty and right to repair the roads in the most economical and best way, and to avail themselves of all improvements regardless of the effect on the plaintiffs' pipes. Field, J. has held that this contention cannot be supported, and we are of opinion that his decision is correct." In my opinion, the principle of that judgment applies to the present case. It was, no doubt, convenient for the defendant to haul these trucks with one engine, but it is not suggested on his behalf that it was necessary to use so heavy a traction engine for that purpose. The defendant chose to use this exceptionally heavy traction engine, and he did so at his own risk. If a person in the exercise of a right exercises the right in such a way as is likely to cause damage to another person's property which is lawfully in the place where it is, then he must show that to enable him to enjoy that right it is necessary for him to exercise the right in that particular way. In the present case the defendant has not shown that it was necessary for him to exercise his rights by using so heavy a traction engine. In my opinion, therefore, the appeal must be dismissed.

WILLS, J.—I have come to the same conclusion, because I think the way the County Court judge has found the facts binds us. I think the facts as found stand hopelessly in the way of the defendant's contention. If the defendant had been able to show that the accident was due to any failure of duty on the part of the plaintiffs as the road authority, that would have been an answer to the action. It therefore becomes a question, and, to my mind, a cardinal question in the case, whether the plaintiffs have been guilty of any failure of their duty as such road authority to keep this road in a proper state of repair for the traffic that might ordinarily be expected to pass over it. The case of *Attorney-General* v. *Scott* (*ubi sup.*) seems to show that it is the duty of the road authority to alter from time to time the standard of repair of the road according to the necessities of the traffic. In such cases I have generally directed juries that the duty of the road authority in that respect must vary from time to time, and I have pointed out to them that, if the character of the traffic in a neighbourhood essentially changes and the usual traffic to be carried along the road becomes much greater or heavier, then the road authority must adapt themselves to the altered character of the traffic and put the road into a condition of repair reasonably necessary for the heavier traffic. If the facts in the present case had shown that the traffic by traction engines of this size had become usual in this district, then I should have been disposed to think that the defendant's contention would have been right. But the facts as found by the County Court judge seem to me to dispose of that. He has found that this particular traffic was beyond that which the plaintiffs had the right to expect and to which they were bound to adapt the condition of the road; and that negatives the essential condition which would exonerate the defendant from liability. This case does not seem to me at all to depend upon the case of *Rylands* v. *Fletcher* (*ubi sup.*), but it rests upon other considerations; nor do I think that the case of *Gas Light and Coke Company* v. *Vestry of St. Mary Abbott's, Kensington* (*ubi sup.*) is at all decisive of this case. The facts there brought the case within the principle of *Rylands* v. *Fletcher* (*ubi sup.*). The road at the time was under repair and was in such a condition that heavy pressure would naturally do the damage that was done. While the road was in such a state a heavy steam roller was put upon the road and was passed backwards and forwards along the road. That was the case of using what under the circumstances was a dangerous thing, and the person so using it was bound to take care that the use of such dangerous thing was confined within legitimate limits. In the present case it seems to me, without having any resort to the principle of *Rylands* v. *Fletcher* (*ubi sup.*), that the defendant did that which was likely to cause injury, and as the County Court judge has found that the damage was in fact caused by the great weight of the defendant's

engine, I think the appeal ought to be dismissed.

DARLING, J. read the following judgment:—To my mind the matter of this appeal presents itself thus. The plaintiffs have the right, and indeed the duty, to lay and maintain the highway and the water mains beneath it. All people, including the defendant, had a right—not limited by time—to use the highway in a natural manner, having reasonable regard to the kind of traffic which would usually pass along it. This must involve a duty on the plaintiffs to vary the construction of the road from time to time, so as to adapt it to conditions of traffic which should have at any given time become ordinary, although these were formerly unknown, afterwards rare, then less uncommon, and at last not exceptional but usual. It is a duty the discharge of which might become more or less burdensome, for the road to Portsmouth may in time be as little used as is now the Roman road to Silchester. The County Court judge finds that this engine is not of the sort to be at present considered on that road a part of the ordinary traffic. I think it was not necessary to find, as the County Court judge does, that the engine is in itself a dangerous thing, and I very much doubt whether anything whatever can, strictly speaking, be called "a dangerous thing." That depends on its use and on environment. Water, which caused the injury complained of in *Rylands* v. *Fletcher* (*ubi sup.*), is only dangerous in certain conditions, and so is fire. The expression "in itself dangerous" is used in the headnote to *Rylands* v. *Fletcher* (L. Rep. 3 H. L. 330), but I do not find it in the judgments, nor do I think it an appropriate expression anywhere—except, perhaps, as used by Mr. Pope in regard to "a little learning."

Appeal dismissed.

Solicitors for the plaintiffs, *Palmer* and *Bull*, for *J. W. Loader Cooper*, Town Clerk, Chichester.

Solicitors for the defendant, *Stow*, *Preston*, and *Lyttelton*, for *Raper*, *Freeland*, and *Tyacke*, Chichester.

Tuesday, Nov. 7, 1905.

(Before Lord ALVERSTONE, C.J., WILLS and DARLING, JJ.)

GREEN (app.) *v.* WANKLYN (resp.). (*a*)

Registration of voters—Amendment of list—Omission of second Christian name—Objection—"Mistake"—Jurisdiction of revising barrister to correct—Parliamentary and Municipal Registration Act 1878 (41 & 42 *Vict. c.* 26), *ss.* 24, 28, *sub-s.* 1.

In the list of voters for a borough the name of Herbert Green appeared in division 1 *of the list as occupier of a certain house. Objection was duly made to his name being retained on the list upon the ground that the name of the occupier of the house was Herbert Ambrose Green, and it was proved or admitted before the revising barrister that the correct name of the occupier was Herbert Ambrose Green, the second Christian name having been omitted in the list. The voter had not made any new claim or any declaration in order to correct such omission. The revising barrister was asked to treat the omission of the second Christian name as a "mistake" under sect.* 28, *sub-sect.* 1, *of the Parliamentary and Municipal Registration Act* 1878, *and to amend the list accordingly, but he held that the omission was not a mistake which he was bound to correct, and refused to make the correction.*

Held, that the omission of the second Christian name was a "mistake" within sect. 28, *sub-sect.* 1, *and that the revising barrister had power to correct it, and ought to have done so; and the fact that the voter could have had the mistake corrected by making a declaration under sect.* 24 *did not deprive the revising barrister of the power given by sect.* 28, *sub-sect.* 1, *to make the correction.*

CASE stated by the revising barrister for the borough of Colchester.

At a court held before the revising barrister to revise the list of voters for the borough of Colchester, at Colchester, on the 11th Sept. 1905, objection was duly made to the name of Herbert Green being retained on division 1 of the list of voters for the borough in respect of a dwelling-house, No. 20, St. Peter's-street.

The facts were as follows:—

1. The name of the occupier of the house appeared in the list as Herbert Green, and it was proved or admitted that the correct name of the occupier of the house was Herbert Ambrose Green.

2. In a considerable number of cases the Christian names of the voters were omitted from or misstated in the list, and in many cases those voters had made either a new claim or a declaration in order to correct such omission or misstatement.

3. Herbert Ambrose Green had not made a new claim or a declaration.

4. The revising barrister was asked to treat the omission of the second Christian name as a "mistake" in the list within the meaning of sect. 28, sub-sect. 1, of the Parliamentary and Municipal Registration Act 1878, and to correct it.

5. The revising barrister held that an omission was not a mistake which he was bound to correct after objection had been made, and he declined to make the correction and struck the name of Herbert Green out of the list.

6. The names of the nine persons set out in the schedule to the case were objected to in similar circumstances, and were struck out of the list.

7. Due notice of appeal from the decision of the revising barrister was given in each case, and he directed the appeals to be consolidated.

If the court should be of opinion that the decision of the revising barrister was wrong and that the correction should have been made, the register was to be amended by inserting the name of Herbert Ambrose Green, with the qualification dwelling-house, No. 20, St. Peter's-street, in division 1 of the list, and the names of the nine other persons as they appeared in the schedule. [Then followed the schedule.]

The Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26) provides:

Sect. 24. Any person who is entered on any list of voters for a Parliamentary borough or any burgess list, subject to revision under this Act, for a municipal

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

borough, and whose name or place of abode, or the nature of whose qualification, or the name or situation of whose qualifying property is not correctly stated in such list, or in respect of whom there is any other error or omission in the said list, may, whether he has received a notice of objection or not, if he thinks fit, make and subscribe a declaration in the form in that behalf in the schedule to this Act, or as near thereto as the circumstances will admit, before any justice of the peace or any commissioner or other person authorised to administer oaths in the Supreme Court of Judicature. The declaration shall be duly dated, and shall, on or before the twelfth day of September, be sent to the town clerk, who forthwith shall indorse on the declaration a memorandum signed or initialled by him stating the date when he received it and naming the declarant and the list to which the declaration refers, and shall deliver all such declarations to the revising barrister at his first court. If the declaration is sent as aforesaid in due time (of which the said indorsement shall be *primâ facie* proof), the revising barrister shall receive the declaration as evidence of the facts declared to, and that without proof of the signature of the declarant, or of the justice, commissioner, or person before whom the declaration purports to have been subscribed, unless he has good reason to doubt the genuineness of any signature thereto. The declarations shall be open free of charge to public inspection at the office of the said town clerk, at any time between the hours of ten of the clock in the forenoon and four of the clock in the afternoon of any day except Sunday, before the fifteenth day of September, and he shall deliver copies thereof on application and payment of the price of fourpence per folio of seventy-two words.

The form for correcting misdescription in the list is Form M in the schedule to the Act, and Form M in the third schedule to the Registration Order 1895.

Sect. 28. A revising barrister shall, with respect to the list of voters for a Parliamentary borough, and the burgess lists for a municipal borough which he is appointed to revise, perform the duties, and have the powers following: (1) He shall correct any mistake which is proved to him to have been made in any list; (2) he may correct any mistake which is proved to him to have been made in any claim or notice of objection. . . .

C. E. Jones for the appellant.—The sole question is whether the omission of the second Christian name, is a "mistake" in the lists within the meaning of sect. 28, sub-sect. 1 of the Parliamentary and Municipal Registration Act 1878, which provides that the revising barrister "shall correct any mistake which is proved to him to have been made in any list." If such omission is a "mistake" within that sub-section, then the revising barrister has no discretion in the matter, but he is bound to correct it, as the sub-section provides that he "shall" correct it. There is no authority to show that the revising barrister may not treat this as a mistake, and it is submitted that he was wrong in holding that the omission was not a mistake which he was bound to correct. [He was stopped.]

Lewis Thomas for the respondent.—The decision of the revising barrister was correct, and the question is really concluded by his statement of the case. It is not every mistake which can be corrected under sect. 28, sub-sect. 1 of the Act of 1878. It was not proved to the revising barrister that there was any mistake in the list. There was no evidence given to show that the person whose name was Herbert Green was the same person as Herbert Ambrose Green; the latter may have been the son or the father of Herbert Green; and there was nothing to show that the person whose name was Herbert Ambrose Green was ever before the court or the revising barrister at all. [Lord ALVERSTONE, C.J.—The case is stated upon the hypothesis that the tenant and occupier of the house was Herbert Ambrose Green.] All that is stated in the case is that the name of the occupier of the house was Herbert Ambrose Green, but there was no evidence produced to show that that person was the same person as the person whose name appeared in the list as Herbert Green. There is a proper way of making the correction where there is any misdescription of the name of a person in the list. Sect. 24 of the Parliamentary and Municipal Registration Act 1878 provides that where any person whose name is not correctly stated in the list wishes to make the correction he may, if he thinks fit, make and subscribe a declaration giving his correct name in the Form M in the schedule to the Registration Order 1895. Power is there given by the statute to correct such a mistake as this, and that mode of correcting the mistake must be followed. There is thus by the statute a declaration required for changing the name, and there has been no declaration in this case. If the effect of the alteration be to change the name of one person for another, then the revising barrister has no power to make the alteration in the way sought to be done in this case; and, if the alteration could have been made without a declaration under sect. 24, then that section and Form M would have been unnecessary, and would not have been there at all. [Lord ALVERSTONE, C.J. — Can a person get his name altered without a declaration?] He may do so by going himself and stating the matter before the revising barrister; but that was not done in this case, and there was no evidence whatever to satisfy the revising barrister that this omission was a mistake. There are cases with regard to alterations in the character of the qualification in col. 3, such as *Foskett* v. *Kaufman* (54 L. T. Rep. 64; 16 Q. B. Div. 279), Lord Esher, M.R. there says: "If the voter acts under sect. 24, then the revising barrister can alter the overseer's list according to the declaration; but if the voter, instead of availing himself of the power given by sect. 24, inadvertently waits until the holding of the revision court, and then goes before the revising barrister and offers proof of his qualification, the revising barrister has no power . . . to alter the description of the qualification, as it appears in the list." That, no doubt, applies to alterations in the legal character of the qualification, but it is a very much larger change in the list than merely altering the qualification to insert the name of a person who may be an entirely different person, simply on the mere assertion of some person in court that there has been an omission. *Plant* v. *Potts* (63 L. T. Rep. 730; (1891) 1 Q. B. 256) and *Kitchen* v. *Johnson* (79 L. T. Rep. 422; (1899) 1 Q. B. 95), support the same view. [Lord ALVERSTONE, C.J.—In the case of *Soutter* v. *Roderick*; *Barker's* case (Smith's Reg. Cas. 36), which seems to me to be directly in point, as to whether the appellant ought to have proceeded under sect. 24, it was held by this court that the revising barrister has power to amend an incorrect statement in the list of a voter's abode if made by mistake and *bonâ fide*.]

The place of abode is no part of the qualification:

Luckett v. *Knowles*, 2 C. B. 187.

C. E. Jones was not called upon to reply.

Lord ALVERSTONE, C.J.—If we had come to the conclusion that the meaning of sect. 24, which has been urged before us by counsel for the respondent, was that that was the only means or the only method whereby a claimant could set right a mistake of this kind unless he came before the court himself, then different considerations would have arisen. I quite agree that if we look at the matter simply as a question of considering these two sections without considering the general law applicable to such matters, the fact that sect. 28 provides in general for mistakes being corrected, and that sect. 24 includes specifically the case of a person who applies because his name is wrongly stated—if we were to take that by itself—there would be some ground for saying that the particular matter being included in a particular section—namely, sect. 24—the omission of part of a name was not a mistake within sect. 28. But in my judgment that would be too narrow a view to take of the matter. We have to remember that in this case an objection had been raised—that is to say, the person had been served with a notice and his name had been objected to, and that therefore, it is not a question of something which has been done by the revising barrister of his own motion on some intimation made to him. Counsel for the respondent suggested that someone got up in court and said: "That man's name is Ambrose"; but that is not the way in which the matter arose. There had been formal notice given. Then it was proved or admitted that the correct name of the occupier of the house was Herbert Ambrose Green. That being so, I think that it is, practically speaking, another illustration of the same kind of matter as that which was before the court in *Soutter* v. *Roderick* (*Barker's* case (*ubi sup.*). There was in the present case no dispute as to who was the real occupier, and no dispute as to who was the real tenant. But there was proof, or admission, which is the same as proof—there was evidence before the revising barrister—that the name "Ambrose" had not been put in the list; and that the revising barrister meant to raise that kind of point is, to my mind, clear, because he has treated it as one of nine other cases where similar omissions occurred. Therefore it cannot be suggested that he acted as he did because he was not satisfied that the occupier was the right man, or that there was not sufficient evidence that the right person had come forward and claimed to have his name put right. In these circumstances it seems to me that we ought not to cut down the power of the revising barrister under sect. 28 to correct what is clearly a mistake in the ordinary sense of the word, because there is another section—sect. 24—which enables the person whose name is objected to, if he thinks fit, to get the mistake corrected by another proceeding. Therefore, I think in the present case we are really following out the line laid down in *Barker's* case (*ubi sup.*). It seems to me also most excellent good sense, and I think the revising barrister had power to make this correction, and ought to have made it. The appeal must therefore be allowed, and the register will be amended by inserting the name of Herbert Ambrose Green in the list, and the names of the other nine persons will be inserted in the same way.

WILLS, J.—I think sect. 24 applies to a considerable number of cases, in some of which the correction to be made may be very important, and may, in fact, amount to a new claim; while in others the corrections are trivial or simply of the ordinary class of slips, clerical errors, and so on. If the person whose name is objected to deems it to be of sufficient importance or cares enough about the matter to take steps himself to have the error corrected, whatever it may be, then it seems perfectly reasonable that he should not simply give notice, "This is a mistake," but that he should, if he does not want to attend himself—which is the power which is given to him by that Act of Parliament—send a written notice, a declaration of what his qualification and name is, and what correction he desires to have made. If he sets the law in motion, so to speak, in that way, he must make the declaration required by sect. 24; but that certainly, to my mind, does not deprive the revising barrister of the power given him under sect. 28 to correct any mistake, and, of course, any mistake means anything which is either proved or admitted to be a mere slip and nothing else, which cannot be complicated with the suggestion made by counsel for the respondent that it might be made the cover for a fraudulent claim, and so forth. In my opinion, the learned revising barrister took too narrow a view of his powers, and I agree therefore that this appeal should be allowed.

DARLING, J.—I am of the same opinion. I also think that it is quite plain from the case stated that the real qualified occupier was Herbert Ambrose Green, who had been described in the list as "Herbert Green." The amendment desired was therefore merely to rectify an omission of something from his name. It was not a case where there was any possibility of substituting another person; to my mind it is no more a change of name than the altering of the spelling of the name of the real occupier would have been.

Appeal allowed.

Solicitors for the appellant, *Doyle, Devonshire*, and *Co.*, for *Jones* and *Son*, Colchester.

Solicitors for the respondent, *Milner* and *Bickford*, for *Wills* and *White*, Trowbridge.

Wednesday, Nov. 8, 1905.

(Before Lord ALVERSTONE, C.J., WILLS and DARLING, JJ.)

FOWLER (app.) *v.* CRIPPS (resp.). (*a*)

Merchandise marks—False trade description—Soda crystals—Merchandise Marks Act 1887 (50 *&* 51 *Vict. c.* 28).

On an information under the Merchandise Marks Act 1887 *for selling certain goods—namely, a quantity of Glauber salts mixed with soda crystals—to which a false trade description, to wit, "soda crystals," was applied, it was found that a portion of the soda sold as "soda crystals" on analysis contained soda crystals or*

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

crystallised carbonate of soda mixed with Glauber salts or crystallised sulphate of soda, the analysis of six samples showing a percentage of Glauber salts varying from 18 per cent. to 64 per cent., the difference in the results of the analysis being due to the fact that the mixture was a mechanical one subsequently to the manufacture of the two individual articles. It was also found that carbonate of soda in the crystallised form, and not containing more than 2 per cent. of sulphate of soda, is the commodity commonly known as washing soda for domestic use, and is usually described as soda crystals, which description is not applied to sulphate of soda, nor usually to carbonate of soda containing more than 2 per cent. of sulphate of soda; that the market value of carbonate of soda is about double that of Glauber salts, and that soda crystals meant ordinary washing soda.

Held (Darling, J. dissenting), that the seller was rightly convicted on the information.

CASE stated on an information preferred by the respondent against the appellant for selling a quantity of Glauber salts mixed with soda crystals, to which a false trade description—to wit, "soda crystals"—was applied, contrary to the Merchandise Marks Act 1887.

The following facts were proved in evidence:—

The appellant sold in the ordinary way of his trade to one Butler, a traveller, a hundredweight of soda, which was described on the invoices delivered with the goods as "soda crystals." The price charged for the said goods was 4s.

A portion of the soda purchased as hereinbefore stated was analysed and found to contain soda crystals or crystallised carbonate of soda mixed with Glauber salts or crystallised sulphate of soda. Analyses of six several samples were proved, with the following results:—Soda crystals: (1) 64 per cent.; (2) 78 89 per cent.; (3) 35·10 per cent; (4) 37·29 per cent.; (5) 56·5 per cent.; (6) 39 3 per cent. Glauber salts: (1) 34 per cent.; (9) 18·78 per cent.; (3) 64·83 per cent.; (4) 61·87 per cent.; (5) 43 1 per cent.; (6) 60·7 per cent.

In explanation of the difference in the results of these analyses of the samples it was stated that the carbonate of soda and the sulphate of soda having been separately produced were mechanically mixed together subsequent to their manufacture, and consequently in any sample there might be more of one sort than the other.

There are many salts of sodium which are prepared in a crystallised form. Seventeen salts of sodium are mentioned in the British Pharmacopœia, and one witness said there were as many as 3000 such salts of sodium. Carbonate of soda and sulphate of soda are two of them. These are both usually prepared and sold in a crystallised form.

The process of crystallisation is similar in each case. The result is a chemical combination in a crystallised form of about 33 per cent of carbonate of soda or sulphate of soda, as the case may be, and 66 per cent. of water.

Carbonate of soda is produced by various processes, and one of such processes is known as the ammonia process. The crystallised carbonate of soda prepared by this process always contains a small portion of sulphate of soda. This small quantity is left in the manufacture or is added to the soda ash in the process of crystallisation for the purpose of hardening the crystals. There are other processes by which crystallised carbonate of soda is produced different from this process. These other processes, two of which, known as the Leblanc and Perrikoff processes, were referred to by the witnesses. Both have a proportion of sulphate of soda. In the Leblanc process there is a trace and in the Perrikoff process about 30 per cent., but not in the form of crystal.

Carbonate of soda in the crystallised form, and not containing more than 2 per cent. of sulphate of soda, is the commodity commonly known as washing soda for domestic use, and is usually described as "soda crystals." This description is not applied to sulphate of soda, nor usually to carbonate of soda containing more than 2 per cent. of sulphate of soda. All the witnesses who gave this evidence were (with one exception) analytical or manufacturing chemists.

The market value of crystallised carbonate of soda is about double that of Glauber salts or crystallised sulphate of soda.

Sulphate of soda or Glauber salts have no detergent qualities, but in appearance is exactly like carbonate of soda.

The appellant was not called as a witness, and no evidence was tendered on his behalf.

It was contended on behalf of the appellant that crystallised soda and soda crystals are the same; that, where a description is true with regard to the material of which two or more things are composed, it cannot under any circumstances become a false trade description as to any one of them; that soda is a generic term applicable to any preparation or compound of sodium, and cannot be a false description when applied to any one of them; that the words "soda crystals" when applied to crystallised carbonate of soda or to crystallised sulphate of soda is a true description of the material of which each article is composed, and therefore cannot be a false description when applied to a mixture of both and that there was no evidence of any false trade description within the meaning of the Merchandise Marks Act 1887.

It was contended on behalf of the respondent that the words "soda crystals" were only applicable to crystallised carbonate of soda containing not more than 2 per cent. of sulphate of soda, and that it was therefore a false trade description when applied to a mixture of crystallised carbonate of soda and crystallised sulphate of soda when the proportion of the latter was more than 2 per cent. of the whole.

The justices held that "soda crystals" meant ordinary washing soda, and that on the evidence before them this article consisted of crystallised carbonate of soda containing not more than 2 per cent. of sulphate of soda, and that it was therefore a false trade description when applied to a mixture of crystallised carbonate of soda and crystallised sulphate of soda sold by the appellant as hereinbefore stated. They therefore convicted the appellant of the offence charged in the information.

Horace Avory, K.C., *Bonsey*, and *H. M. Finch* for the appellant.—These proceedings were taken under the Merchandise Marks Act and not under the Sale of Food and Drugs Acts, and the question

is whether there was a false trade description within the meaning of the former statute. They referred to

Merchandise Marks Act 1887 (50 & 51 Vict. c. 28), s. 3.

That section defines a trade description and also a false trade description. Can it be false to say these goods are soda crystals when it is shown they are crystals of soda and nothing else? The description given is true as to the materials of which these goods are composed.

The *Solicitor-General* (Sir E. Carson, K.C.), *Sutton*, and *Safford* for the respondent.—It is here found as a fact that sulphate of soda in the crystallised form is not known as soda crystals. They referred to

Merchandise Marks Act 1887 (50 & 51 Vict. c. 28), ss. 2, 3.

That finding shows that the appellant applied a false trade description to these goods.

Kerly held a watching brief on behalf of persons interested.

DARLING, J.—I am sorry that in this case I have the misfortune to differ from the opinions which the Lord Chief Justice and my brother Wills have come to, and, although naturally I have the greatest deference for their views, yet I think the appellant is entitled, for what it is worth, to have an expression of my opinion upon this matter. It strikes me in this way. The summons charged the appellant in this case that he did unlawfully sell certain goods—to wit, a quantity of Glauber salts mixed with soda crystals, together of the weight of so-and-so, to which a false trade description, to wit, the words "soda crystals," was applied, contrary to the provisions of the Merchandise Marks Act. Now, he was asked for "soda crystals." He sold a quantity of something, and there was no offence committed unless to that he had affixed a false trade description. What is a trade description is stated in the Merchandise Marks Act, s. 3, and there is given a definition of a false trade description. The Act says: "The expression 'a false trade description' means a trade description which is false in a material respect as regards the goods to which it is applied." Now, I come to the conclusion that, if a description of the goods is in fact true, it cannot be a false trade description merely because that is not the description usually applied to that thing in the trade. The finding by the court was as follows: "A portion of the soda purchased by the said William Guyton Butler as hereinbefore stated was analysed and found to contain soda crystals or crystallised carbonate of soda mixed with Glauber salts or crystallised sulphate of soda." Then the case states: "There are many salts of sodium which are prepared in a crystallised form. Seventeen salts of sodium are mentioned in the British Pharmacopœia, and one witness said there were as many as 3000 such salts of sodium—carbonate of soda and sulphate of soda are two of them." Now, what this man sold was carbonate of soda and sulphate of soda in a crystallised form. These are both usually prepared and sold in a crystallised form. The case says: "The process of crystallisation is similar in each case." The statement in the case upon which the Solicitor-General relies says this: "Carbonate of soda in the crystallised form, and containing not more than 2 per cent. of sulphate of soda, is the commodity commonly known as washing soda." I should agree with the Solicitor-General's argument if the magistrates had found that carbonate of soda in a crystallised form, not containing more than 2 per cent. of sulphate of soda, is the commodity commonly known as "soda crystals," but they have not found that. They have said it is commonly known as washing soda for domestic use, and is usually described as soda crystals. It usually is, but it does not follow that nothing else may be described as soda crystals, and if it be not untrue to describe something else as soda crystals, if it be not a false description of something else to call it "soda crystals," I do not think the offence is committed, although it be true and common to call another thing "soda crystals." In short, if two things, and here, so far as I can see, at least seventeen different preparations may equally well be called "soda crystals," and if it be not untrue to say of any of those seventeen, or of any two of them, that they are soda crystals, then I do not think that any one of them can get the exclusive right to a trade description which is true of that one but certainly is not false of another. The matter was put in this way in the contentions of the appellant. The earlier part of that contention, I think, is demonstrably wrong, because he says that he contended that "where a description is true with regard to material of which two or more things are composed, it cannot under any circumstances become a false trade description as to any one of them." I think it is demonstrably a false contention, because if that were so, if you describe a mixture of oil and vinegar as oil and vinegar, then the appellant would contend that you might truly describe oil as oil and vinegar, or vinegar as oil and vinegar, which of course is absurd. Then he goes on to say, what I think is true, "that the words 'soda crystals' when applied to crystallised carbonate of soda or to crystallised sulphate of soda are a true description of the material of which each article is composed, and therefore cannot be a false description when applied to a mixture of both." That is, if you have two things which are both called oil and you mix them and call the mixture oil it is true. If you have two things which are both called vinegar and you mix them and simply call the mixture vinegar that is true. It seems to me to be precisely the same if you have two things, either of which could accurately be called "soda crystals" whether they be sulphate of soda or carbonate of soda in a crystallised form, then it does not become a false trade description to call them both, when mixed, "soda crystals," for the simple reason that it is not a false trade description in fact. I much regret to have to come to this conclusion, because I certainly think that my decision might enable a person to do what may be to the disadvantage of the purchaser. Therefore I am not sorry that the prevalent opinion of this court is the other way.

WILLS, J.—I think that this conviction ought to stand. The Act of Parliament is an Act passed, not to ensure scientific accuracy in trade terms, but to protect trade, and to ensure, as far as legislation can do so, that trade shall be carried on honestly, and that terms shall not be applied

to substances which are the subject of dealing in commerce which in the common acceptance of the trade would lead the purchaser to suppose they were something else than what they were. Now, the view that I take of this case is very simple. I listened with great attention indeed to Mr. Avory, to see whether the view which I entertained could be shown to be at all wrong, or anything could be said which would lead me to suppose it required reconsideration. But I have found no answer to what seems to me to be the exceedingly simple way of putting this case. Following out what I have said—viz, that this is an Act of Parliament intended to control, not the processes of trade, but to control dealings in ordinary trade transactions—it says, at the end of sect. 3, that the use of any word "which according to the custom of the trade are commonly taken to be an indication of any of the above matters," and amongst the above matters is the material of which the goods are composed, "shall be deemed to be a trade description." It seems to me, therefore, when we have a term used which in the trade is commonly understood to mean washing crystals and to mean carbonate of soda containing not more than 2 per cent. of sulphate of soda, you have precisely the description which was intended by the Act of Parliament. It is a trade description. In the trade it is commonly understood to be a representation or guarantee that the substance shall not contain more than 2 per cent. of sulphate of soda, and that if that is the case and it turns out that it contains 30, 40, or 50 per cent., or whatever it might be, it is a false trade description. I have just heard that my brother Darling does not take the same view of what is found in the case that I do, but I cannot for my part conceive how any reasonable distinction can be drawn between the word "commonly" and the word "usually." "Usually" means what people commonly do in the trade, and "commonly" means the same thing. I think it is only by accident that both terms have been used instead of the same term being repeated. I do not think any distinction was intended to be drawn. Perhaps if I had drawn the case instead of the person who did, I should have said it was better to reverse the statement and say that soda crystals means in the trade "washing soda," and implies that not more than 2 per cent. of sulphate of soda is used. But it appears to me it would be perfectly hypercritical to say that, because the sentence is so framed, then it means something else. The case goes on, as it were, to qualify or weaken that statement by saying that all the witnesses who gave this evidence were, with one exception, analytical or manufacturing chemists. There may be some value in the observation if the evidence which they had given was not capable of qualification or contradiction, but it goes on further to state in the case that no evidence to the contrary was called, and the appellant himself did not give evidence. Under those circumstances I think the magistrates were perfectly justified in acting on the analytical or manufacturing chemists' evidence, although it was not supplemented by further or trade evidence, as very likely it might not be easy to get trade evidence of that kind. There is nothing to my mind which ought in any way to qualify the full effect which ought to be given to the statement in the case. Taking the view that I do of what the justices meant to state as the result of the evidence, and the further finding of fact, it seems to me that along with the final words of sect. 3 of the Act of Parliament there is but one answer which can be given to the question which has been asked before us. I should like to be allowed to add one sentence which I intended to embody in my judgment, which I forgot at the moment. I want to point out that many of these trade terms are very old, and that nothing is more likely than that with the advance of science trade terms will become scientifically incorrect, and that still, as it seems to me, they hold their trade meaning, although they may not represent, as they were supposed possibly when invented to do, the true state of the composition of their chemical relations.

Lord ALVERSTONE, C.J.—I agree with the view taken by my brother Wills and should add very little to his judgment, but, as I am differing from my brother Darling and have a great regard for his opinion, I think it right just to state my reasons in my own way. If I could put the construction on sect. 3 which Mr. Avory so ably contended for, I think I should come to a contrary view. If I could take the view that all that is required in order to evade the application of the Act is to show that the description is chemically true, I think it would be impossible to support this conviction. But, following out what my brother Wills has said, I do not think that that was either the scope of the Act or the way in which the section was intended to be construed. I quite agree that the prosecution have to make out their case, and I wish again to say, as I have said in previous cases, that no inference ought to be drawn from the non-calling of the appellant in this case or witnesses on this behalf, if the case for the prosecution leaves no reasonable case to be answered. Therefore, as I have said, if the Act of Parliament is to be construed as meaning the true chemical description of the material, I think there was no case to answer here. But once take it that the Act of Parliament has a wider scope, and that the evidence shows something to be answered, given the wider scope to the Act of Parliament, then I must say that I think sect. 2 does indicate that there is a question of motive and a question of object involved in this offence, because it is open to the appellant to show that he took reasonable precaution or otherwise acted innocently. I wish to associate myself with what my brother Wills has said as to the evidence and the findings of fact, the evidence being only given on one side here. I think it is impossible to say that the section shall be construed as meaning a false or true chemical description of the material, because, the words "trade description" having been referred to in the earlier section, sect. 2 is "sells or has in his possession for any purpose of trade or manufacture any goods or things to which any false description is applied or to which any trade mark or marks resembling a trade mark as to be calculated to deceive is falsely applied," and then it describes a trade description in a way in which I agree it is limited, as far as this is concerned, to the material of which any goods are composed, and it says: "The use of any words which according to the custom of the trade is commonly known

to be an indication of any of the above matters shall be deemed to be a trade description." Therefore I think in construing "false trade description" you must read "trade description" in the sense indicated immediately previously, and it means false in a material respect of that trade description previously referred to. Taking that to be so, I find here three statements which in my opinion are quite sufficient to give *primâ facie* evidence of an offence which required to be answered, and therefore the prosecution have satisfied their onus. The first is: "Carbonate of soda in the crystallised form, and not containing more than 2 per cent. of sulphate of soda, is the commodity commonly known as washing soda for domestic use and is usually described as soda crystals." I am sure that there was no intention of changing the word "commonly" into "usually." Perhaps the gentleman was more anxious about the style than about the effectiveness of the language, and thought it better not to use "commonly" twice over, but that "usually" and "commonly" for this purpose are the same thing I have no doubt. What is very important is that this description is not applied to sulphate of soda; that is a distinct statement and is not usually applied to carbonate of soda with more than 2 per cent. of sulphate of soda. You have, therefore, that crystallised carbonate of soda is what is commonly known as "soda crystals" in my reading of it, and sulphate of soda is not known as soda crystals in the trade. I think that, once being stated, it lies on the appellant to rebut that *primâ facie* case. The third statement is: "We hold that soda crystals mean ordinary washing soda." I put that to Mr. Avory because I thought it might be possibly contended that there was no evidence of that, but I think, reading the case, it is clear there was abundant evidence that soda crystals in the trade is applied to crystallised carbonate of soda and not to crystallised sulphate of soda. Now, what is the other evidence in this case? I cannot possibly take the view that it was meant that, the sulphate of soda and carbonate of soda having been mixed and being crystallised, these proportions appeared. If that was the rea meaning, I think the appellant certainly would have been prepared with the evidence. I understand the passage in the case to mean that the carbonate of soda crystals and the sulphate of soda crystals having been separately produced were mechanically mixed together. Then we find this extraordinary result, that in three samples you have 64, 61, and 60 per cent. of the crystallised sulphate of soda. Therefore it seems to me that the magistrates were entitled to say, in the absence of any of the evidence to the contrary, that a description here is applied to a substance which is not commonly called soda crystals—namely, the description soda crystals. That being so, I certainly think there was evidence on which they were entitled to say that in the trade a description had been given to this article which was sold which indicated the material which according to the trade description it is not. I think this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Neve, Beck*, and *Kirby; Solicitor to the Board of Trade; Leesmith, Munby*, and *Nevile.*

Friday, Nov. 10, 1905.

(Before Lord ALVERSTONE, C.J., WILLS and DARLING, JJ.)

MOORE (app.) *v.* LEWIS (resp.).(*a*).

Revenue—Carriage — Licence—Exemption—Customs and Inland Revenue Act 1888 (51 *& 52 Vict. c.* 8), *s.* 4 (3).

In order that a vehicle may be exempt from carriage duty by virtue of sect. 4 (3) *of the Customs and Inland Revenue Act* 1888, *it must be constructed or adapted solely for the conveyance of goods, as well as used solely for the conveyance of goods, though it need not be* ejusdem generis *with a waggon.*

CASE stated on an information preferred by the appellant against the respondent for keeping a carriage for which a licence was required without having taken out such licence.

It was proved that on the 9th Feb. last the respondent was driving a pony attached to a vehicle which the appellant described as a governess cart. It was of the well-known type of such a vehicle, having cushions. There were no goods in the cart.

The respondent had been convicted before on the same charge in respect of the same carriage, but he and his witnesses swore that since that conviction he had used it solely for the purposes of his business, that of a general broker and wardrobe dealer.

He never used it for pleasure, on Sundays or any other day.

He generally took a buyer with him in it when he was purchasing goods at private houses. He never used it to solicit orders nor for collecting debts, and only drove in it to private houses to call for and bring away goods after receiving orders.

He had had the carriage specially strengthened to go long distances, as his business called him to different parts of Lancashire and Cheshire. His name, with the word "Liverpool," was painted on the shaft of the carriage in letters over 1in. long.

It was contended on behalf of the appellant that it did not come within the exception from the definition of "carriage" as "a waggon, cart, or other such vehicle which is constructed or adapted for use and is used solely for the conveyance of any goods or burden in the course of trade or husbandry" in sect. 4 (3) of 51 and 52 Vict. c. 8.

The justices were of opinion (*a*) that the vehicle was adapted for use for the conveyance of goods in the course of the respondent's trade; (*b*) that the vehicle was used solely in connection with the respondent's trade; (*c*) that the real use of the vehicle under ordinary circumstances was for the conveyance of goods in the course of the respondent's trade; (*d*) that it would be unduly straining the excepting words of the statute if their meaning precluded the vehicle being used at any time and under any circumstances for any other purpose than the conveyance of goods; (*e*) that a strictly literal construction of the words in the exception would forbid the vehicle being used at all when empty without a licence; (*f*) that it was a question of fact for them to decide whether the vehicle in question came within the exception referred to, and they dismissed the information.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

The *Attorney-General* (Sir R. Finlay, K.C.) and *S. A. T. Rowlatt* for the appellant.—In this case we submit that this is not a "waggon, cart, or other such vehicle," and that it is not "constructed or adapted for use and used solely for the conveyance of any goods or burden in the course of trade or husbandry," and, further, it is not exclusively used for that purpose because it is admittedly used to take the respondent about. With regard to the point that this was not "a waggon, cart, or other such vehicle," words practically identical were construed in the case of *Danby* v. *Hunter* (41 L. T. Rep. 622; 5 Q. B. Div. 20). In that case an information was laid against the respondent for using a cart on the highway without having his name painted thereon as required by 5 & 6 Will. 4, c. 50, s. 76. The cart was a light spring cart with two wheels used by the respondent in his business as an agricultural implement maker in which he frequently carried agricultural implements to market and drove his family about from place to place, and for which he paid duty under 32 & 33 Vict. c. 14, s. 18, and it was there held that a cart or carriage contemplated by the statute of William IV. was *ejusdem generis* with a waggon, and that therefore the magistrates were right in dismissing the information. In *Hanworth* v. *Williams* (67 J. P. 315) there was a finding of fact that the vehicle was adapted for the carriage of goods, and we submit that the view taken in that case of the words "constructed or adapted for use and is used solely for the conveyance of any goods" ought to be read "constructed or adapted for use for the conveyance of any goods." "For use" must relate to the conveyance of goods. In *Hanworth* v. *Williams* (*sup.*) there was an intimation by the court that "solely" only qualified the words "is used," but, if the point is open to us, we contend that the words "constructed or adapted for use" relate to "solely to the conveyance of goods," for, if it did not mean that, the statute would have said "and is solely used." [Lord ALVERSTONE, C.J.—I think "solely" belongs to all three participles.] This vehicle was not used solely for the conveyance of goods in the course of trade, for the case finds that it was put to other uses. They referred to

Customs and Inland Revenue Act 1872 (35 & 36 Vict. c. 20), s. 6;
Revenue Act 1869 (32 & 33 Vict. c. 14), s. 19 (6);
Customs and Inland Revenue Act 1888 (51 & 52 Vict. c. 8), s. 4 (3);
Corrupt Practices Act 1883 (46 & 47 Vict. c. 51), s. 14 (4);
Municipal Elections Act 1884 (47 & 48 Vict. c. 70), s. 10 (4).

The exemptions created by these statutes are fatal to the views put forward by the justices.

The respondent did not appear.

Lord ALVERSTONE, C.J.—I am afraid I have to say again what I have said more than once since I have had the honour of occupying this seat, that one cannot be too careful not to express opinions which are not absolutely necessary for the purpose of the case. I think I was by the course of the argument in the case of *Hanworth* v. *Williams* probably misled into saying something which was not necessary, and which I do not think was right. I think the construction of this Act is "constructed solely for the conveyance of goods" and "used solely for the conveyance of goods." I do not accept the view that the vehicle must be something *ejusdem generis* with a waggon, meaning thereby a heavy vehicle; a cart may be a heavy vehicle; a cart may be either very heavy or very light; and I do not think the question of taxation or non-taxation ought to depend upon the weight of the vehicle or the character of the vehicle in that sense if the other conditions are fulfilled, but I think there must be a fulfilment of all the conditions, and probably the Attorney-General is right in saying that the effect of the alteration is to impose a further limit upon the exemption. But taking it to be a vehicle which has to be either constructed or adapted for use solely for the conveyance of goods, and is used solely for the conveyance of goods, I am clearly of opinion that the magistrates have not applied the law properly, and that their findings are only consistent with an erroneous direction of themselves on a point of law. In clause (*b*) they say that "the vehicle was used solely in connection with the respondent's trade." That is clearly far from the point. That would cover the case of a man who went about soliciting orders in his own gig. In clause (*c*) they say that "the real use of the vehicle under ordinary circumstances was for the conveyance of goods." That again seems to me to overlook the condition of the statute either before or after the introduction of the earlier words "constructed or adapted for use and is used solely for." When we look at the statement of the evidence upon which they have expressed those findings, it is obvious it included the case of a person going to a house and not knowing whether he would find any goods in it to take away. Under these circumstances it seems to me they have not applied the proper construction of the statute and not properly directed themselves in order to ascertain the proper question of fact, and that the argument of the Attorney-General must prevail, and this vehicle under the circumstances ought upon the findings of fact to be liable to taxation. I think therefore the case must go back to the magistrates to convict.

WILLS, J.—I am of the same opinion. I think the natural grammatical sense of the phraseology which has been used is that the word "solely" attaches itself to the three members of the preceding phrase to which it can reasonably attach. If it was intended that "solely" should attach only to the part of the phrase which says "is used," I agree with the Attorney-General that the natural way of expressing that is to say "is solely used," because that would prevent the argument which has been raised, and I think successfully raised, that it ought to apply to the whole three. I think for these reasons it is quite clear that any expression of opinion which fell from the court in the case of *Hanworth* v. *Williams* which might be deemed to conflict with this view was an *obiter dictum* and not at all necessary for the decision of that case, and therefore we are not bound by it when we come to a case where it is necessary to consider it.

DARLING, J.—I am of the same opinion. It is manifest that the words used in this Act of Parliament are not used very carefully, and that appears by the construction which was put upon

it, which was not necessary for the decision of the case, in one of the cases which the Attorney-General has cited. It seems to me that here upon the facts found it is apparent that this cart, or whatever it was — call it what you please—was not used solely for the conveyance of goods, and I think it appears that really it was not used mainly for the conveyance of goods. It is perfectly plain that this man, who was a wardrobe dealer, drove long distances about the country. He took a buyer with him. He did not know for certain that he was going to buy any goods, because, if the price asked was too much, or more than the buyer advised him to give, it is obvious he would not have bought the goods at all. Therefore, when it is said he used it to call for and bring away goods after receiving orders, it does not mean orders for goods, but an order to call at a place. He called with the buyer. If the buyer and the seller of the goods could agree about the price, he put the goods into his trap and drove away. If they did not agree about the price, he would leave the goods where they were and drive on to some other place for which he had an order. I think that is a kind of cart or trap, or whatever you choose to call it, which the Legislature intended to tax when it passed this Act of Parliament.

Appeal allowed.

Solicitor: *Solicitor of Inland Revenue.*

Friday, Nov. 10, 1905.

(Before Lord ALVERSTONE, C.J., WILLS and DARLING, JJ.)

WHITHAM (app.) *v.* MORRIS (resp.). (*a*)

Revenue — Carriage — Licence — Exemption — Customs and Inland Revenue Act 1888 (51 & 52 *Vict. c.* 8), *s.* 4 (3).

A governess cart that was used for collecting debts and obtaining orders by a travelling upholsterer, and which was used for the conveyance of goods and solely in connection with the business, is not a vehicle "constructed or adapted for use and is used solely for the conveyance of any goods . . . in the course of trade," and so exempt from requiring a carriage licence.

CASE stated on an information preferred by the appellant against the respondent for keeping a carriage for which a licence was required by the statute without having a proper licence.

It was proved that on the 12th Dec. 1904 the respondent with his lad was driving a pony attached to a vehicle which the appellant described as a governess cart. It was of the well-known type of such vehicle, having cushions on the seats and padded back rests. The respondent stated to the appellant that he was collecting debts and endeavouring to obtain orders in connection with his business, which was that of an upholsterer.

The respondent stated that the vehicle was used by him solely for the purpose of his business as a travelling upholsterer chiefly in small articles; that he called for any orders that there might be for him, and took any chairs or such like articles to or from his place of business in the vehicle; that on the day in question he was collecting debts and endeavouring to obtain orders; that he never used the vehicle for pleasure or took it out on Sundays; and that the vehicle would have been equally convenient for him without the cushions.

In answer to the Bench the respondent stated that his name and address were engraved on a brass plate about 1ft. in length attached to the vehicle.

The respondent's lad on oath confirmed this statement, and also said that he usually drove the vehicle for the respondent; that he constantly had taken small pieces of furniture in the vehicle, and had once taken a sofa; and that it was his business to look after the vehicle and pony, and that he had never known it used for any other purpose than his master's upholstery business.

The appellant contended that the vehicle in question did not come under the exception of "a waggon, cart, or other such vehicle constructed or adapted for use, and used solely for the conveyance of any goods or burden in the course of trade or husbandry," and cited *Hanworth* v. *Williams* (67 J. P. 315) in support of his argument.

The justices were of opinion that the vehicle was adapted for use for the conveyance of goods in the course of the respondent's trade; that the vehicle was used solely in connection with the respondent's trade; that the real use of the vehicle under ordinary circumstances was for the conveyance of goods in the course of the respondent's trade; that the occasional use of the vehicle for collecting debts did not destroy its real use so as to prevent the respondent claiming the benefit of the exception contained in the Act; that it would be unduly straining the excepting words of the statute if their meaning precluded the vehicle being used at any time or under any circumstances for any other purpose than the conveyance of goods; and that a strictly literal construction of the words would forbid the vehicle being used at all when empty without a licence.

They decided that it was a question of fact whether the vehicle was within the exception, and they dismissed the information.

The *Attorney-General* (Sir R. Finlay, K.C.) and *S. A. T. Rowlatt* for the appellant.—The question is whether a carriage known as a governess cart is exempt from carriage duty. By sect. 4 (3) of 51 & 52 Vict. c. 8, in the construction of this section each of the following terms has the meaning thereby assigned to it: "'Carriage' means and includes any carriage except a hackney carriage drawn by a horse . . . but shall not include a waggon, cart, or other such vehicle which is constructed or adapted for use and is used solely for the conveyance of any goods or burden in the course of trade or husbandry. . . ." This conveyance was not used solely for the conveyance of goods. In *Hanworth* v. *Williams* (67 J. P. 315) the court held that "solely" related only to the words "is used," and it did not govern "constructed or adapted for use." A governess cart is not "a waggon, cart, or other such vehicle," for the "other such vehicle" must be *ejusdem generis*.

The respondent did not appear.

Lord ALVERSTONE, C.J.—We clearly think the magistrates' decision wrong. The vehicle

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

certainly does not come under the words "constructed or adapted for use," and it was not "used solely for the conveyance of any goods or burden in the course of trade or husbandry."

WILLS and DARLING, JJ. concurred.

Appeal allowed.

Solicitor: *Solicitor of Inland Revenue.*

Nov. 6 *and* 28, 1905.

(Before Lord ALVERSTONE, C.J., WILLS and DARLING, JJ.)

REX *v.* DAVIES; *Ex parte* HUNTER. (*a*)

Contempt of court — Inferior court — Criminal proceedings before justices — Publication of matter tending to prejudice fair trial — Subsequent committal of accused for trial — Jurisdiction of High Court to attach for contempt.

The King's Bench Division of the High Court, as inheriting all the jurisdiction and powers of the Court of King's Bench, has jurisdiction to punish by attachment as for contempt of court, in respect of the publication of articles in a newspaper tending to prejudice the fair trial of an accused person while the proceedings against the accused are still before the justices, although the charge against the accused is one upon which the accused might be committed for trial either to quarter sessions or to assizes, and although at the date of such publication it is uncertain whether the accused will be committed to quarter sessions or to assizes or will not be committed at all; and the power to protect the independence of inferior courts and to punish by attachment for contempts of such courts exists in such cases equally whether the accused has already been committed for trial to quarter sessions or not.

RULE calling on David Davies, the editor, printer, and publisher of a newspaper called the *South Wales Daily Post*, to show cause why a writ of attachment should not issue against him for his contempt in printing and publishing, or causing to be printed and published, in the newspaper of the 5th, 8th, 9th, and 12th Sept. 1905 certain comments calculated to prejudice one Henrietta Hunter upon her trial at the next assizes for the county of Glamorgan upon a charge of the attempted murder of a certain child, and also upon a further charge of abandoning the same child.

The affidavit made by the solicitor for the applicant, upon which the rule was granted, was as follows:

On the 1st Sept. 1905 an infant child was abandoned at Morriston, near Swansea, in the county of Glamorgan. On the 2nd Sept. one Henrietta Hunter was arrested on a charge of abandoning the child at Morriston on the 1st Sept. At a later date a charge of attempted murder was preferred against her. She was brought time after time before the justices at Swansea, and on the 11th Oct. she was committed for trial to the next Glamorganshire Assizes on a charge of attempted murder of the child, which it was alleged was abandoned by her on the 1st Sept. At Swansea there was printed and published by one David Davies (the respondent) a newspaper called the *South Wales Daily Post*, and he was the editor and publisher. David Davies has unlawfully attempted to obstruct and prevent the due course of law and justice, and has printed and published statements calculated and tending to the same result. The issue of the *South Wales Daily Post* for the 5th Sept. 1905 contained an article entitled "Abandoned by the Hedgeside," and after a report of the police-court proceedings therein a paragraph headed "Antecedents of the Accused" was published, and a statement alleged to have been made by Mrs. Hunter, together with a comment on the alleged statement. In the issue of the newspaper for the 8th Sept. the respondent printed and published an article entitled "Traffic in Babies," such article, amongst other things, alleged that the statements published in the issue of the 5th Sept. were amply borne out by further information which had come to his hands, and, further, that such information showed Mrs. Hunter to be one Dora Johnstone. The article further stated that under that name she had been guilty of wholesale child farming, and that as Dora Johnstone she had been convicted of fraud, and it gave a list of convictions of Dora Johnstone at Bristol. A paragraph which was headed "Dora Johnstone's Llanelly Victims" proceeded to state the methods of Dora Johnstone, who, it was suggested, did an extensive business in baby farming. The article further stated that there was no doubt in the minds of the police that the name Henrietta Hunter was only one of her several aliases, and it proceeded to give details of letters alleged to have been left behind by Henrietta Hunter at Llanelly, and also interviews with other persons who it was alleged had been duped. A further article in the newspaper of the 9th Sept. contained a report of an interview and a statement alleged to have been made by several persons, and the article commenced "The latest development in the Swansea sensation is in Swansea itself, and serves to show how extensive Mrs. Hunter's dealings undoubtedly were There now lies in Danygrang Cemetery a five months old mite in a grave under a name not its own"; and in the issue of the 12th Sept. there was an article entitled "Baby Farming Sensation," and certain comments were published. The *South Wales Daily Post* is a newspaper with a very large circulation, and contains a statement that such circulation was guaranteed to be at least three times as large as that of any other newspaper in that district. Henrietta Hunter was at the time the articles were published charged with only the abandonment of one child, the same child in respect of which she had been committed for trial on a charge of attempted murder. She denied that she was the woman Dora Johnstone, and further denied that she had been before convicted.

The deponent stated that he had been instructed to defend Mrs. Hunter, and that in his opinion the articles complained of would greatly prejudice the fair trial of the woman by reason of the alleged previous convictions having been published of matter that would not be admissible as evidence, and allegations having been made and statements published by persons who would not be subjected to cross-examination, and also by reason of the fact that her alleged antecedents had been referred to in detail, and that there had been a suggestion that the woman had been trafficking in babies and baby farming in an extensive manner, when no evidence of any kind had been produced to that effect; that she had been committed for trial to the next assizes for the county of Glamorgan on the 21st Nov. on a charge of attempted murder of the child and also on a further charge of abandoning the same child, and that the jury for the assizes which would be held at Cardiff were or might be readers of the *South Wales Daily Post*, as the

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

jury would be drawn from various parts of the county.

The respondent made an affidavit in reply, in which (amongst other things) he stated that his newspaper was an evening newspaper, and that the chief paragraphs complained of were taken from a morning paper; that he was absent when one of the publications was issued and was unaware of such publication; and he pointed out that at the time the articles were published the only charge against the woman was that of abandoning the child, which could be tried at quarter sessions, and that it was not until the 27th Sept., and therefore after the publications had ceased, that the charge of attempted murder was preferred, and he further expressed his deep regret that the articles had been published, and stated that he had no intention of prejudicing the fair trial of the case.

J. E. Bankes, K.C. (*Ellis Hill* with him), for the respondent Davies, showed cause.—There was no contempt committed against the High Court. The first charge against this woman was that of abandoning the child, and if she had been committed on that charge her committal would almost inevitably have been to quarter sessions and not to the assizes. In that case the High Court would have no jurisdiction to punish for contempt of court, inasmuch as it would not be a contempt of the High Court at all. The articles complained of began on the 5th Sept. and ended on the 12th Sept. During the whole of that period the only charge was that of abandoning the child, and it was not until the 27th Sept., and therefore long after the publication had ceased, that the woman was further charged with a crime which would be tried at assizes. If the articles had appeared after the 27th Sept., when the charge of attempted murder was preferred, then it could not have been argued that there would not have been a contempt of this court, and in that case there would have been no answer to this rule since the decision of this court in *Rex* v. *Parke* (89 L. T. Rep. 439; (1903) 2 K. B. 432). In that case the court, in a considered judgment, decided that where a person had been charged before the petty sessions with an indictable offence which could be tried only at assizes matter published in a newspaper tending to interfere with the fair trial constituted a contempt of court which the High Court had jurisdiction to punish, notwithstanding that at the time of the publication of the matter complained of the case was still before the petty sessions and the accused had not been committed for trial to the assizes. That case does not at all conclude the present case, where, if the accused had been committed only upon the charge then preferred of abandoning the child, the committal might have been to quarter sessions and not to the assizes. The remedies of criminal information or indictment are the only remedies open in such a case as this; but this court has not the jurisdiction to punish as for contempt of court, and no case can be cited to show that the court has ever exercised such jurisdiction. If it is desirable that the High Court should have power to protect inferior courts and to punish for a contempt of those courts, then that is a matter for the Legislature. Even if the court has jurisdiction it ought in this case to be exercised in a lenient manner, as the respondent has stated in his affidavit that he had no intention of prejudicing the trial of the case, and has expressed his deep regret that the articles were published.

R. E. Vaughan-Williams in support of the rule.—The case of *Rex* v. *Parke* (*ubi sup.*) shows that this court has jurisdiction in such a case. The charge of abandoning the child might have been sent to the assizes for trial, and if the accused had afterwards been commited to the assizes upon that charge, then that case would have been absolutely in point and would have been conclusive to show that this court has jurisdiction. The possibility of being committed to the assizes upon the then pending charge is sufficient to give the court jurisdiction. Although there is no authority which is exactly in point, the general principle ought to apply that this court, as representing the Court of King's Bench, ought to see that no person should do acts of this kind so seriously calculated to interfere with the administration of justice.

Cur. adv. vult.

Nov. 28.—WILLS, J. read the judgment of the court (Lord Alverstone, C.J., Wills and Darling, JJ.), as follows:—This is an application to commit the defendant for contempt of court. The circumstances which have given rise to it are as follows:—A woman was arrested on the 2nd Sept. 1905 on a charge of abandoning a child at Morriston, in the county of Glamorgan. She was brought before the magistrates at Swansea on the 5th Sept. The defendant is the editor, printer, and publisher of the *South Wales Daily Post*, a newspaper published at Swansea. In the issue of his paper published on the evening of the 5th Sept. there appeared a report of the proceedings before the justices, followed by a statement headed "Antecedents of the Accused," and in the issue of the 8th Sept. another article entitled "Traffic in Babies," and in the issues of the 9th and 12th Sept. further articles relating to the accused person. They contained a great number of statements calculated to give an exceedingly unfavourable impression of the prisoner, and notably the article of the 8th Sept. stated that she had been guilty of wholesale child farming and alleged her identity with one Dora Johnstone, who, it was alleged, had more than once been convicted of fraud; but it is not necessary to give any more specific account of their contents, inasmuch as Mr. Bankes, who appeared for the defendant, admitted that nothing could be said in defence or even in palliation of the act of publishing such articles concerning a person under remand upon a charge which might lead to her committal. He confined his argument to denying the jurisdiction of this court to deal with the present application on the ground that as the offence charged could be tried at quarter sessions, the offence was one against the quarter sessions and could not be dealt with summarily by this court. It would, perhaps, be enough to say that, inasmuch as the question whether the committal should take place to the assizes or quarter sessions depended in all probability upon the mere accident of which tribunal might hold its sittings before the other, it was just as much a contempt of the assize court as of quarter sessions, and, if so, our judgment in *Rex* v. *Parke* (89 L. T. Rep. 439; (1903) 2 K. B. 432) applies. We adhere to the view we expressed

in that case, that the publication of such articles is a contempt of the court which ultimately tries the case after committal, although at the time when they are published it cannot be known whether there will be a committal or not. Their tendency is to poison the stream of justice in that court, though at the time of their publication the stream had not reached it, and as such articles are calculated to interfere with the power of the court (whatever it be) that tries the case to do effective justice, it is a contempt of any court which very well may try the case but in fact does not do so, as well as of the court which actually tries it. What actually happened was that ultimately, some time after the publication of the articles now complained of, the prisoner was committed on a charge of attempting to murder the child who was the subject of the original charge, and, of course, upon such a charge she was committed to the assizes. We think that, although the original charge has been altered, it is still intimately connected with the original charge and relates to the same subject-matter, that the articles in question are equally calculated to prejudice the fair trial of the accused whatever form the charge might ultimately take, and that their publication does constitute a contempt of the assize court to which the woman has been committed. It matters not whether the uncertainty at the time the articles were published extended only to the forum to which the case should be sent or to the question whether a committal would take place at all, or to both. In each of such cases the mischief is the same, and the court which might have to try the case would find its authority equally underminded beforehand. We think it right to repeat in this connection a passage in the judgment in *Rex* v. *Parke* (89 L. T. Rep., at pp. 441-2; (1903) 2 K. B., at pp. 436-7), which expresses the deliberate opinion of the court as constituted when this case was argued, as well as of the court as constituted when *Rex* v. *Parke* (*ubi sup.*) was decided: "It has been argued, however, that publication of articles of the kind in question cannot be treated as a contempt of the assize court unless the committal has actually taken place and a bill been found, when only, it is urged, is there a case pending in the assize court, and when, it is also urged, the jurisdiction ought to be exercised by that court itself. A moment's consideration, it seems to us, is sufficient to dispose of such a proposition. The reason why the publication of articles like those with which we have to deal is treated as a contempt of court is because their tendency, and sometimes their object, is to deprive the court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned. It is difficult to conceive an apter description of such conduct than is conveyed by the expression 'contempt of court.' If it be once grasped that such is the nature of the offence, what possible difference can it make whether the particular court which is thus sought to be deprived of its independence and its power of effecting the great end for which it is created, be at that moment in session or even actually constituted or not? It is perfectly certain that by law it will and must be constituted, and that when constituted it and it alone can take cognisance of the particular offence which is the subject of the preliminary inquiry. The wrong can hardly be the less because the purpose or the tendency of the act complained of is that the assize court never shall have undisturbed power to fulfil its functions satisfactorily. The High Court exists always. To provide beforehand that one of its branches, which, although it does not at the moment exist, yet must, both according to immemorial custom and now also by statutes and rules having the same effect, come into existence, shall be hampered and hindered in the effectual discharge of its duties as soon as it is constituted, if called upon to try a particular case which it is at all events proposed to bring into that court, is surely an offence against the High Court itself." It is true that, in the case of *Rex* v. *Parke* (*ubi sup.*), the only uncertainty was whether the accused person would be committed to any court, the offence charged being one which in case of committal must go to the assizes. We cannot see that the additional element of uncertainty, that the case could be tried at quarter sessions, makes any difference in principle or prevents the interference with the due course of justice, in a case which may come to the assizes, from being a contempt of that court, and we are of opinion that upon these grounds alone the present application ought to be granted. But inasmuch as a further question of great and growing importance—namely, the jurisdiction of this court to treat attacks of this kind upon the independence and usefulness of inferior tribunals as offences to be dealt with, *brevi manu*, by this court in its summary jurisdiction—has been raised and argued, we think it desirable to deliver our judgment upon this point also, and to treat the case as if a committal had actually taken place to quarter sessions. The present King's Bench Division of the High Court stands in the place of the three ancient superior Courts of Common Law, and besides representing the powers and exercising the authority of the Courts of Common Pleas and Exchequer, inherits all the jurisdiction and powers of the Court of King's Bench. From the most ancient times, that court exercised functions which belonged to no other court in the kingdom. The high nature of those functions is described in emphatic language by Lord Coke in 4th Inst., c. 7, on "The Court of King's Bench," and in Hawkins' Pleas of the Crown under the same title, Book 2, c. 3, to which we refer only to show the supreme place in the judicature assigned to that court. There is no doubt that the great functions of this court as of all others must be exercised, as pointed out by Lord Coke, "according to due course of law." His general attribution to it of the power to "correct errors and misdemeanours extra-judicial tending to the breach of the peace or oppression of the subjects . . . or any other manner of misgovernment," as well as Hawkins' wider and more elaborate description of the like powers, refers to every kind of misdemeanour, including those which are properly the subject of indictment or criminal information, as well as those which are punishable summarily

by attachment, and therefore throws no light upon the question whether a particular offence falls under the one head or the other or both. They do serve to show the very great trust reposed in the Court of King's Bench in respect of its control and superintendence of all inferior courts, and that it is in a special manner the guardian and protector of public justice throughout the kingdom. Offences of the exact kind in question in this case are necessarily of modern origin. They could not exist to any appreciable extent, if at all, before printing was freely resorted to, and, as long as it was unlawful even to publish reports of proceedings before magistrates on account of their supposed tendency to interfere with a fair trial, persons who knew that this was unlawful were not very likely to go to the further length of announcing and commenting upon supposed facts to the prejudice of a prisoner which had not even come before the magistrates. Down to 1792 the judge at the trial determined as a matter of law whether a particular writing was a libel or not, and, looking to the legal definition of a libel, it is obvious that writers of all kinds stood in far greater danger than they have done since the Act of 32 Geo. 3, c. 60 (the Libel Act 1792); and for a long time after that there is no doubt that persons who published libels of any kind were in more peril than at present. We have pointed out in the judgment in *Rex* v. *Parks* (1903) 2 K. B., at p. 438, that from 1811 to 1888 but one case has been recorded in which the publication of reports of proceedings before justices tending to committal, or of extraneous matter connected with such reports, has come under judicial cognisance. That case occurred in 1886, and for reasons which we will give later on we are of opinion that little reliance can be placed upon it. We mention these facts to show how impossible it is that precedents earlier than some twenty years ago for cases like the present can be found or expected, and, if there is no great amount of direct authority in favour of the view that such an offence is summarily punishable by this court, it is at all events conceded by Mr. Bankes that he has been able to find none to the contrary. We are therefore driven to consider the question in the first instance from the point of view of principle, and in the second in the light of the reported cases during the last twenty years with such small help as can be gathered from older authorities. There is no doubt that almost all the cases of contempt of court to be found in the books are cases in which the act so called and so dealt with has been some act in defiance of one of the superior courts, in which case, of course, no one of those courts interfered with the other. Each of the three Courts of Common Law and also the Court of Chancery possessed ample powers to protect itself and to punish conduct which it deemed to be so derogatory of its own authority as to constitute a contempt of court. It is very natural, therefore, that the language generally used in such cases should refer to the power of the superior court to insure respect for itself or its orders, and should not go beyond that. The almost total absence of any recorded case in which a contempt of an inferior court has come into question is an abundant proof that serious offences of this kind were very rare. They were also always punishable by indictment, and in old days, when means of communication were slow, uncertain, and expensive, there was an inducement to refrain from appealing to the Court of King's Bench, which no longer exists. In these circumstances, the absence or scantiness of precedent is not to be wondered at, and in this connection we may cite a passage from Hawkins' Pleas of the Crown, Book 2, c. 3, s. 4, in which, speaking of the Court of King's Bench, after a general description of the jurisdiction of the court to prevent abuses and oppression, he says: "Neither is it necessary in a prosecution of any such offence in this court to show a precedent of the like crime formerly punished here, agreeing with the present in all its circumstances, for this court, being the *custos morum* of all the subjects of the realm, wherever it meets with an offence contrary to the first principles of common justice and of dangerous consequence to the public if not restrained, will adapt such a punishment to it as is suitable to the heinousness of it," observations which are as applicable to the exercise of summary jurisdiction as to the proceeding by indictment. What, then, is the principle which is the root of and underlies the cases in which persons have been punished for attacks upon courts and interferences with the due execution of their orders? It will be found to be not the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of the offence to them, but of protecting the public, and especially those who either voluntarily or by compulsion are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired. See the judgment prepared by Wilmot, C.J. in *Rex* v. *Almon* in 1765, but not delivered, because the case was allowed to drop: Wilmot's Opinions, 243, at p. 256. The word "authority" is used by him to express "the deference and respect which is paid" to the judges of a court and their acts "from an opinion of their justice and integrity." These words are apt with respect to the particular case with which he was dealing. But what possible difference in principle can there be in respect of direct attacks upon courts or judges and of writings the tendency of which is to deprive the inferior courts beforehand of the possibility of doing even-handed and impartial justice according to the due course of law? To hold that there was a distinction would give colour to the notion, which cannot be too strongly repudiated, that the offended dignity of a particular court or of the persons who compose it is the subject of punishment in such a case. "The object of the discipline enforced by the court in case of contempt of court," says Bowen, L.J., "is not to vindicate the dignity of the court or the person of the judge, but to prevent undue interference with the administration of justice": *Helmore* v. *Smith* (56 L. T. Rep. at p. 75; 35 Ch. Div. 449, at p. 455); and a considerable part of the undelivered judgment of Wilmot, C.J., to which we have referred, is devoted to showing that the real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone. He adds that such conduct is pre-eminently the proper subject of summary jurisdiction. Attacks upon the judges, he says, "excite in the minds of the people a general

dissatisfaction with all judicial determinations . . . and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever—not for the sake of the judges as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial and to be universally thought so are both absolutely necessary for the giving justice that free, open, and uninterrupted current which it has for many ages found all over this kingdom": (Wilmot's Opinions, pp. 255-6). With a few verbal alterations these eloquent words will apply with at least equal force to writings whose direct tendency is to prevent a fair and impartial trial, or at least one that can be so considered, from being had in courts of inferior jurisdiction which have not the power of protecting themselves from such encroachments upon their independence. The public mischief is identical, and in each instance the undoubted possible recourse to indictment or criminal information is too dilatory and too inconvenient to afford any satisfactory remedy. It is true that the summary remedy with its consequent withdrawal of the offence from the cognisance of a jury, is not to be resorted to if the ordinary methods of prosecution can satisfactorily accomplish the desired result—namely, to put an effectual and timely check upon such malpractices. But they do not. "I am," said Wilmot, C.J., "as great a friend to trials of facts by a jury, and would step as far to support them as any judge who ever did or now does sit in Westminster Hall, but if to deter men from offering any indignities to courts of justice" (and we may well add from interfering with the due course of justice) "it is a part of the legal system of justice in this kingdom that the court should call upon the delinquents to answer for such indignities" (to which we add "misconduct") "in a summary manner by attachment, we are as much bound to execute this part of the system as any other." The several parts of the system, he adds, "act in combination together to attain the only end and object of all laws, the safety and security of the people" (p. 258)—words which it appears to us are as appropriate to the question we have in hand as they were in the case with which he was dealing, to the application under different circumstances of the same great principle that courts and the administration of justice exist for the benefit of the people, that for the benefit of the people their independence must be protected from unauthorised interference, and that the law provides effective means by which this end can be secured. If it is to be secured at all in the case of the inferior courts, it can only be secured by the action of this court, for they have not the power to protect themselves; and if it be true that the King's Bench is in any sense the *custos morum* of the kingdom, it must be its function to apply, with the necessary adaptations to the altered circumstances of the present day, the same great principles which it has always upheld. "Law"—to use the words of Lord Coleridge—"grows, and though principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the time." The quotation is from the summing up in *Reg.* v. *Foote and another*, for publishing a blasphemous libel. The case was tried at Nisi Prius, 7th July 1883, and the summing up was published by Lord Coleridge, as appears from the preface, in the form of a separate pamphlet. The passage cited is from p. 11 and p. 12. The summing up is also reported in 48 L. T. Rep. 733, 735. The truth is that the constant use of the term "contempt of court"—owing to the fact that in the vast majority of cases the particular offence in question was an actual and direct setting at defiance of the orders of the Superior Court appealed to, in which the phrase "contempt of court" has strictly and in the narrowest sense its apt description and its indiscriminate application to all of the superior courts—has tended to obscure both the foundation and object of the jurisdiction and to throw into the shade the essential difference between the jurisdiction exercised by the Court of King's Bench and that of the other courts, which possessed none of the relations with the inferior courts which have always appertained to the King's Bench. The preservation of the purity of the stream of justice in the case of the other courts could affect no other court than that which was exercising the jurisdiction. They were not the *custodes morum* (to use Hawkins' phrase) in any sense analogous to that which the phrase bears when applied to the King's Bench, whose particular function it was to exercise superintendence over the inferior courts and confine them to their proper duties. This, however, as it seems to me, was only one exercise of the duty of seeing that they did impartial justice, and if and when the attainment of that end required that the misdeeds of others should be corrected, as well as the misfeasances of the inferior courts themselves, it seems to us that it is no departure from principle, but only its legitimate application to a new state of things, if others, whose conduct tends to prevent the due performance of their duties by those courts, have to be corrected as well as the courts themselves. We proceed to examine the very few authorities bearing upon the subject closely enough to be of any value—so far at least as we have been able to discover them. Of old cases of this character we have found but two—*Burgh* v. *Blunt* (10 Mod. 349) and *Rex* v. *Burchett* (1 Str. 567). *Burgh* v. *Blunt* (*ubi sup.*) was heard in Hilary Term, 3 Geo. 1 (1717). It was a motion for attachment against the judge of the Court of Holdernesse for disobeying a *tolt*, whereby the cause was to have been removed into the County Court, from whence, as Serjeant Chessbyre who moved the rule, "believed the parties"—according to the report—"designed by a *pone* to remove it into the Court of Common Pleas; and though, by a *recordare*, it might have been removed at once into the Court of Common Pleas, yet the parties might take this way if they pleased." He urged that "disobedience to the *tolt* was a contempt to the law of the land over which the Court of King's Bench were guardians; that that court was invested with a general jurisdiction over inferior courts and was to take care not only that they did not transgress their jurisdiction, but likewise that they proceeded regularly in matters confessedly within their jurisdiction." The court evinced some reluctance to grant the

rule, Eyre, J. observing that the proper course was to proceed in the first instance by *mandamus*, and Parker, C.J. pointing out that prohibition or a writ of false judgment would be effective remedies; but upon a statement by Serjeant Page that a rule in the like case had been granted to him in *Rex* v. *Langston* they granted the rule. What became of it does not appear. It will be observed that no attempt was made to show that the disobedience was contumelious. The court was evidently disposed to treat it as an error of the inferior court, which must have been the court of a wapentake, hundred, or lordship. The nature of the writ of tolt appears from Fitz-Herbert's Natura Brevium, 3 F. It was a writ issued by the sheriff of the county to remove the plaint into the County Court. It was a writ which the plaintiff might have as a matter of course, and the defendant only upon cause shown. The *pone* was a writ which is also described in Fitz-Herbert, in a number of passages to which reference will be found in the index. It and the *recordare* were both writs to remove a case from an inferior court into the Court of Common Pleas. Both were obtainable in many instances by the plaintiff without showing cause, by the defendant upon cause shown, and in some instances either plaintiff or defendant must show cause. As both parties were stated to be willing to remove the case into the Common Pleas, and it is not stated that it was one of the exceptional cases in which the plaintiff must show cause, it is not surprising that the court should be inclined to treat it, as it certainly would be treated in the like circumstances by this court, as an unnecessary application, and be disposed to refuse it. If it is to be taken as suggesting that the Court of King's Bench will in no case interfere in such a case, it is contrary to a great body of ancient law. The Court of King's Bench may "award an attachment against any such court"—that is, judge—"usurping a jurisdiction no way belonging to it, and putting the subject to unnecessary vexation by colour of a judicial proceeding wholly unwarranted by law, and therefore prohibited by it": (Hawkins, book 2, c. 22, s. 25). He points out that it is more usual to award prohibition in the first instance, but mentions several analogous cases in which the attachment will go in the first instance. The case in 10 Mod. is so far removed from the case before us in its circumstances and in the principles involved that it cannot be regarded as any authority against the proposition contended for by the applicant in the present case. *Rex* v. *Burchett* (1 Str. 567) occurred in Trinity Term 9 Geo. 1 (1723). The very meagre report is as follows: "The court ordered an attachment *nisi* against the town clerk of Guilford and a defendant convicted on the Game Act for granting and suing out a replevin of goods distrained for the penalty. But on showing cause the next term, when Eyre, J. only was present, he discharged the rule, because it was only a contempt to the inferior jurisdiction of the justices, and in that case B. R. never interposes." It cannot be considered as a decision of any great weight. It is obvious that no question of general importance was involved in what had been done by the local court, which was probably nothing more than a mistaken exercise of jurisdiction, more properly to be remedied by a prohibition than by attachment. But for what it is worth, it is the judgment of a single judge, not necessarily that the jurisdiction did not exist, but that in the case of acts which could be treated only as contempts of magistrates it was not the practice of the Court of King's Bench to interfere. The wider question whether, when beyond the mere interference with the process of the magistrates' court there was involved the grave danger to the public of prejudicing the fair trial of a case to be heard in an inferior court, the jurisdiction existed cannot have been raised, or the report could hardly have been so perfunctory, nor would it have been decided by a single judge. The circumstances of that case cannot be compared with those with which we have to deal; nor was there any appreciable risk of the class of inroads upon the independence of the inferior tribunals which the altered conditions of to-day have brought into prominence, and made it necessary for us to consider very seriously and anxiously the nature of the jurisdiction we are asked to exercise, and the principles upon which it is based. The modern cases which throw any sort of light upon the question are three, and three only, of those enumerated and from a somewhat different point of view discussed in *Rex* v. *Parke* (*ubi sup.*). We have been unable to make any addition to the list. There are a certain number of cases of this kind in respect of publications during the pendency of an election petition. They are for the most part reported as cases in the "King's Bench Division," but it must be remembered that since the year 1880 that division represents the old Court of Common Pleas in which all election petitions, since they were transferred to the judges, had to be brought, and whilst the three superior courts of common law existed as separate entities they were always brought in the Common Pleas, and in dealing with them the King's Bench Division was only exercising the functions of the old Common Pleas and of the old King's Bench. We propose to state very shortly what these cases come to. They range only from 1886 to 1895, and it is necessary to premise that until the argument in *Rex* v. *Parke* (*ubi sup.*) took place and attention was called to the fact that the Central Criminal Court, under 4 & 5 Will. 4, c. 36 (the Central Criminal Court Act 1834), s. 1, sits by virtue of a general commission, and that by sects. 16 and 29 of the Judicature Act 1873 it became a branch of the High Court, there had been a very general misapprehension, which was undoubtedly shared by the court in several of the cases referred to, as to the position and rank of the Central Criminal Court, which had been looked upon as a court of separate, if not also of inferior jurisdiction. It is necessary to bear this in mind because in that light alone can the decisions be duly estimated as bearing upon the present question. In two of the cases, in one of which proceedings were pending before the magistrates with a view to a committal to the Central Criminal Court, and in the other the prisoner had been committed to that court, a rule against persons who had published articles calculated to prejudice the fair trial of the accused was refused. In the first case, heard in the year 1886, before Lord Coleridge, C.J. and Hawkins, J., the court treated it as clear that they had no jurisdiction: (see *Re an Application for an Attachment for Contempt of Court*, 2 Times L. Rep. 351; *Rex* v. *Parke*, 89 L. T. Rep. at p. 442; (1903) 2 K. B. at p. 439).

There is no report of the second case save a short notice in the *Law Journal* newspaper of the 4th Jan. 1896. In neither was there any serious argument, and none of the important considerations upon which our judgment is based were advanced. It is said in the few lines in which the case is reported that the rule was refused on the ground of want of jurisdiction. It seems difficult to reconcile this statement with the fact that in the third of the three cases we have referred to (*Reg.* v. *Armstrong*, reported in the *Times* of the 9th May 1894) Wright, J., one of the judges who refused the rule in the case mentioned in the *Law Journal* newspaper, had said that he should pause long before coming to the conclusion that the court had no jurisdiction in such a case, or with the fact that the court allowed the rule to drop on an undertaking by the defendant to pay the costs, a term which they could hardly have imposed had they thought that there was no jurisdiction. The scanty reports of these cases—each of which relates to publications affecting cases committed or likely to be committed to the Central Criminal Court—do not explicity state that the Central Criminal Court was treated as a court of inferior jurisdiction, but we think it must have been so. All the matters complained of were acts done not in the face of the court, and the effect of the Judicature Act of 1873 was nowhere brought to the notice of the court. It appears to us that the state of the authorities, such as they are, is such as to leave the question, as was pointed out in *Rex* v. *Parke* (*ubi sup.*), entirely open for our decision. Our attention has been called to observations of Sir George Jessel, M.R. in *Re Clements* (46 L. J. 375, at p. 383, Ch.) as to the necessity of caution in dealing with a matter where the liberty of the subject is concerned. Such considerations have been fully present to our minds and certainly needed no authority to enforce them. It is because we think that we are creating no new jurisdiction, but acting strictly in conformity with the cardinal principles upon which the jurisdiction to commit for conduct tending improperly to interfere with the administration of justice, that we have come to the conclusion at which we have arrived. To confine the application of such principles to facts identical with or closely resembling those of preceding cases, and to hold that, because in times long gone by the chief, if not the only, danger to be guarded against was the illegal exercise of arbitrary power by inferior courts and their officers, therefore the power of this court extends no further, and that the King's Bench cannot afford the protection as well as administer correction would, we think, be to mistake the application of a principle for the principle itself. The mischief to be stopped is, in the case of the inferior courts, identical with that which exists when the due administration of justice in the Superior Courts is improperly interfered with. The reason why the Court of King's Bench did not concern itself with contempts of the other Superior Courts was that they possessed ample means and occasions for protecting themselves. Inferior courts have not such powers, although some of them—quarter sessions, for example—try many more cases than are tried at assizes, and have a very extended and important jurisdiction. The danger is perhaps greater to them than it is to the Superior Courts of having their efficiency impaired by publications such as those which have given rise to the present proceedings. Thinking, as we do, that the application now before us asks for nothing more than the legitimate application to new circumstances of the old principles of the common law, we have come to the conclusion that we ought to grant the remedy invoked, and it remains only to consider the penalty that ought to be inflicted. We have again looked through the articles complained of. They contain a number of statements respecting the person charged of a character likely seriously to prejudice her case, to create a feeling against her, and to affect the minds of persons who might take part in her trial. In our opinion such a case demands a severe punishment. We order David Davies to pay a fine of 100*l.* and the costs of these proceedings.

Rule absolute. Order that the respondent do pay a fine of 100*l.*, *and the costs of the proceedings.*

Solicitors for the applicant, *Smith, Rundell,* and *Dods,* for *Harold Lloyd* and *Cross,* Cardiff.

Solicitors for the respondent, *Soames, Edwards,* and *Jones.*

Nov. 7 *and* 8, 1905.

(Before Lord ALVERSTONE, C.J., WILLS and DARLING, JJ.)

BROOKS (app.) *v.* BAKER AND OTHERS (resps.). (*a*)

Registration of voters—Ownership vote for county—Service franchise—Servant inhabiting dwelling-house by virtue of service—Servant on list as inhabitant occupier—Exclusion of occupation of owner—Representation of the People Act 1832 (2 *& 3 Will. 4, c.* 45), *s.* 24—*Representation of the People Act* 1884 (48 *& 49 Vict. c.* 3), *s.* 3.

The provision in sect. 3 *of the Representation of the People Act* 1884 *that a man who inhabits a dwelling-house by virtue of any office, service, or employment "shall be deemed for the purposes of the Act and of the Representation of the People Acts to be an inhabitant occupier of such dwelling-house as a tenant" does not exclude the occupation of the owner of the dwelling-house in such a way as to prevent such owner from being the occupier of the dwelling-house within the meaning of sect.* 24 *of the Representation of the People Act* 1832, *and therefore the section does not operate to give the owner a vote for the county in respect of his freehold interest in the house in a case in which by reason of sect.* 24 *of the Act of* 1832 *he would not have had a vote before the passing of the Act of* 1884.

CASE stated by the revising barrister for the Northern or Tewkesbury Division of the county of Gloucester.

At a court held before the revising barrister the respondents (other than the respondent Edward Gardom, who was clerk to the Gloucestershire County Council) duly claimed to have their names entered in the Parliamentary ownership list for the parish of Cheltenham.

The following was the entry in the claim of the respondent William Baker:—

1st Col. Name of the claimant at full length, the surname being first.—Baker, William.

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law

2nd col. Place of abode.—Weimar, Bath-road, Cheltenham.

3rd col. Nature of qualification.—Freehold house.

4th col. Description of qualifying property.—Weimar Cottage, Cheltenham.

Due notice of intention to oppose all the claims was given by the appellant.

The following were the admitted facts in the case of the respondent, William Baker.

The claimant was owner of Weimar House and grounds of Weimar Cottage, referred to in the fourth column of the claim. Weimar House and grounds were occupied by the claimant, and he was on the occupation list of the register for the Parliamentary borough of Cheltenham in respect of such occupation, with the description "dwelling-house" of his qualification. Weimar Cottage stood within the grounds of Weimar House, but apart from it. It was occupied by the claimant's gardener, Joseph Woore, who, by reason of his service, was entitled to occupy it. Woore was on the occupiers' list, Division 2 (service), of the said register, in respect of such occupation, and it was admitted that he was properly so registered. It was contended that the occupation of Woore was the occupation of the claimant, and that by reason of sect. 24 of the Representation of the People Act 1832, the claimant being so on the Parliamentary register of the borough of Cheltenham was not entitled to qualify as an ownership voter for the Northern or Tewkesbury Division of the county of Gloucester in respect of the cottage.

The revising barrister was of opinion that Woore was an inhabitant occupier as tenant within the meaning of sect. 3 of the Representation of the People Act 1884; therefore the claimant was not the occupier of the cottage, and that he had a good qualification in respect of it as a freeholder, the value not being in question, and the revising barrister allowed his claim.

The other claimants, whose names and qualifications were set out in the schedule, were objected to upon the same grounds. It was admitted that in each of these cases the qualifying property described in the fourth column of the claim was a cottage or tenement in the occupation of the claimants' servant, which he was entitled to occupy by reason of his service; that the servant in each case was properly registered on Division 2 in respect of such occupation; that the claimants were owners of the cottages or tenements as well as of the principal residence in the grounds of which they were situate; and that the claimants were registered in respect of the occupation of their residences in the same manner as the respondent Baker. Upon these admissions and for the same reasons the revising barrister allowed the claims.

Due notice of appeal from his decision was given.

If the court should be of opinion that the decisions of the revising barrister were wrong, the register was to be amended by erasing the names of the respondents (other than Gardom) from the list of Parliamentary ownership voters for the parish of Cheltenham.

[Then followed the schedule before referred to.]

Sect. 24 of the Representation of the People Act 1832 (2 & 3 Will. 4, c. 45) provides:

Notwithstanding anything hereinbefore contained, no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future Parliament in respect of his estate or interest as a freeholder in any house, warehouse, counting-house, shop, or other building occupied by himself, or in any land occupied by himself together with any house, warehouse, counting-house, shop, or other building, such house, warehouse, counting-house, shop, or other building being, either separately or jointly with the land so occupied therewith, of such value as would, according to the provisions hereinafter contained, confer on him the right of voting for any city or borough, whether he shall or shall not have actually acquired the right to vote for such city or borough in respect thereof.

The Representation of the People Act 1884 (48 & 49 Vict. c. 3) provides (under the heading "Extension of the Household and Lodger Franchise"):

Sect. 2. A uniform household franchise and a uniform lodger franchise at elections shall be established in all counties and boroughs throughout the United Kingdom, and every man possessed of a household qualification or a lodger qualification, shall, if the qualifying premises be situate in a county in England or Scotland, be entitled to be registered as a voter. . . .

Sect. 3. Where a man himself inhabits any dwelling house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act and of the Representation of the People Acts, to be an inhabitant occupier of such dwelling-house as a tenant.

R. Mortimer Montgomery for the appellant.—The revising barrister was wrong in holding that the claimant was not the occupier of the cottage. The claimant was the occupier within the meaning of sect. 24 of the Representation of the People Act 1832, and, therefore—there being no question raised as to the value—he was by that section precluded from claiming an ownership vote for the county in respect of his ownership of that cottage. By sect. 3 of the Representation of the People Act 1884, it is provided that where a man inhabits any dwelling-house by virtue of his service or employment, he shall be deemed to be an inhabitant occupier of such dwelling-house as a tenant. Before the Act of 1884 the fact that the owner's servant lived in the cottage would not have excluded the occupation of the owner—the occupation of the servant in such case being the occupation of his master—and the claimant in this case being in occupation of the cottage through his servant, could not, by reason of the provision in sect. 24 of the Act of 1832, have claimed a vote for the county in respect of his freehold interest in the cottage. It is submitted that sect. 3 has made no change in this respect. The revising barrister has held that the section, by making the servant an inhabitant occupier of the dwelling-house, has made him the occupier of it, and has ousted the freeholder from the occupation, and that, therefore, the claimant, being the owner of this cottage which he does not occupy, is not prohibited by sect. 24 of the Act of 1832 from claiming a vote for the county. The effect of that would be not only to enlarge the right of the servant by giving him a vote as an inhabitant occupier which he had not before, but also to enlarge the right of the freeholder by giving him an ownership vote for the county which in the circumstances he could not have had before the Act. The purview of the section is to enlarge the right of the servant as an inhabitant occupier, and to give him a vote,

but it does not enlarge the right of the freeholder or operate to give him a vote in a case where he would have been prevented by sect. 24 of the Act of 1832 from having a vote. Sect. 3 merely says that the gardener in this case shall for the purposes of the Representation of the People Acts, "be deemed to be an inhabitant occupier," that is, for the purpose of getting the service qualification to vote, but for no other purpose. He is only to be "deemed to be" an occupier, and it is not said that he is to be "the" inhabitant occupier, but only "an" inhabitant occupier. He was not occupier for any other purpose, and his occupation did not exclude the occupation of his master. Though there is no case absolutely in point, there are cases which support the appellant's contention. In *Dobson* v. *Jones* (5 M. & G. 112, at p. 120), Tindal, C.J., in delivering the judgment of the court, said: "Upon the same principle as the coachman who is placed in rooms of his master over the stable, the gardener who is put into a house in the garden, or the porter who occupies the lodge at a park gate, cannot be considered to occupy as tenants, but as servants merely whose possession and occupation is strictly and properly that of their masters." That case was in 1844, and therefore before the Act of 1884; and it shows that before the Act of 1884 the occupation of the gardener was simply the occupation of his master, and such occupation would have given the gardener no vote, and the whole object of sect. 3 of the Act of 1884—as we see by the heading to sects. 2 and 3, "Extension of the Household and Lodger Franchise"—was to extend the Parliamentary franchise to the servant in such a case by reason of his occupation. That that was its only effect is clear from the case of *McClean* v. *Pritchard* (58 L. T. Rep. 337; 20 Q. B. Div. 285, at p. 287), in which an appellant who occupied a dwelling-house by virtue of his service claimed under sect. 3 the municipal franchise, as well as the Parliamentary franchise. Lord Coleridge, C.J. said: "The appellant has no claim to be enrolled as a burgess of Brighton. Before the Representation of the People Act 1884 the class to which he belongs possessed neither the Parliamentary nor the municipal franchise, and by that Act Parliament gave them the former, and the former only. The word 'occupier' is relied on; but 'occupation' is a technical term, and means legal, not mere physical occupation, and the appellant is still as little an occupier for the purposes of the municipal franchise as he was before the passing of the Representation of the People Act 1884."

W. H. Clay for the respondents.—Before the Act of 1884 the owner was not entitled to a vote for the county in respect of property which he occupied in a Parliamentary borough. Then came sect. 3 of the Act of 1884, which made a person in the position of the gardener in this case an inhabited occupier of the dwelling-house as a tenant. He is, therefore, by the section itself made occupier "as a tenant," so that his occupation is, for the purposes of these Acts, the occupation of a tenant. He ceases to occupy merely as a servant and occupies as a tenant, and his occupation is no longer the occupation of his master. By that change in the occupation of the servant the owner gains a vote in the county, inasmuch as he then owns property in the borough which he does not himself occupy—the value not being in dispute. The case of *McClean* v. *Pritchard* (*ubi sup.*) is not in point. The question there was as to the municipal franchise, and not as to the Parliamentary franchise. Here the question relates to the Parliamentary franchise, and all that *McClean* v. *Pritchard* (*ubi sup.*) decided was that the appellant in that case was not in occupation for the purpose of getting the municipal franchise. That is the distinction between the two cases. Sect. 3 of the Act of 1884—and the case stands entirely on that section—says that the gardener is for all the purposes of the Representation of the People Acts to be deemed the inhabitant occupier of the cottage, and as there cannot be two inhabitant occupiers, for the master and servant are not joint occupiers, the effect of sect. 3 is to oust the occupation of the master and therefore to take the master out of the operation of sect. 24 of the Act of 1832. There is, therefore, nothing to prevent the claimant in this case from claiming a vote for the county in respect of his freehold interest in the cottage, and the revising barrister was right in so holding.

Montgomery was not called on to reply.

Lord ALVERSTONE, C.J.—I am clearly of opinion that this appeal must be allowed, and that the register must be amended by expunging the names of the respondents from the Parliamentary ownership list. Much may be said for the argument urged for the appellant as to the object of this section of the Act of 1884, as expressed in the heading to these sections. We must look at the object of this Act. Sect. 3, which is the section applicable in this case, comes under the heading "Extension of the Household and Lodger Franchise," and it does not purport to deal with the freehold franchise at all. To my mind, the section was framed simply to enable a servant who inhabited a dwelling-house by virtue of his service or employment to get his vote as if he were an inhabitant occupier of that house as a tenant. The gardener in this case, therefore, is to be deemed to be an inhabitant occupier of Weimar Cottage for the purposes of the Representation of the People Acts, and the Act is plain that he is to be such an inhabitant occupier as gives him the Parliamentary franchise, and he is to get his vote accordingly. That being so, the question we have to decide is whether his occupation of the cottage puts his master out of occupation in such a way as to enable his master to claim a freehold vote for the county in respect of his ownership of the cottage. In my opinion there is nothing in the Act to show that the respondent Baker was so excluded from the occupation by the operation of that section. The section says not that the servant is the inhabitant occupier, but that he is only to be deemed an inhabitant occupier for the purposes of the Representation of the People Acts, and it seems to me to have been inserted with the sole intention of giving a vote to the man who occupies a dwelling-house by virtue of his service. We should, I think, be going much too far if we said that the occupation of the servant excluded the occupation of the master in such a way as to give the master a freehold vote in respect of the cottage. I express no opinion as to the vote of the occupier of such a house

2nd col. Place of abode.—Weimar, Bath-road, Cheltenham.

3rd col. Nature of qualification.—Freehold house.

4th col. Description of qualifying property.—Weimar Cottage, Cheltenham.

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The following were the admitted facts in the case of the respondent, William Baker.

The claimant was owner of Weimar House and grounds of Weimar Cottage, referred to in the fourth column of the claim. Weimar House and grounds were occupied by the claimant, and he was on the occupation list of the register for the Parliamentary borough of Cheltenham in respect of such occupation, with the description "dwelling-house" of his qualification. Weimar Cottage stood within the grounds of Weimar House, but apart from it. It was occupied by the claimant's gardener, Joseph Woore, who, by reason of his service, was entitled to occupy it. Woore was on the occupiers' list, Division 2 (service), of the said register, in respect of such occupation, and it was admitted that he was properly so registered. It was contended that the occupation of Woore was the occupation of the claimant, and that by reason of sect. 24 of the Representation of the People Act 1832, the claimant being so on the Parliamentary register of the borough of Cheltenham was not entitled to qualify as an ownership voter for the Northern or Tewkesbury Division of the county of Gloucester in respect of the cottage.

The revising barrister was of opinion that Woore was an inhabitant occupier as tenant within the meaning of sect. 3 of the Representation of the People Act 1884; therefore the claimant was not the occupier of the cottage, and that he had a good qualification in respect of it as a freeholder, the value not being in question, and the revising barrister allowed his claim.

The other claimants, whose names and qualifications were set out in the schedule, were objected to upon the same grounds. It was admitted that in each of these cases the qualifying property described in the fourth column of the claim was a cottage or tenement in the occupation of the claimants' servant, which he was entitled to occupy by reason of his service; that the servant in each case was properly registered on Division 2 in respect of such occupation; that the claimants were owners of the cottages or tenements as well as of the principal residence in the grounds of which they were situate; and that the claimants were registered in respect of the occupation of their residences in the same manner as the respondent Baker. Upon these admissions and for the same reasons the revising barrister allowed the claims.

Due notice of appeal from his decision was given.

If the court should be of opinion that the decisions of the revising barrister were wrong, the register was to be amended by erasing the names of the respondents (other than Gardom) from the list of Parliamentary ownership voters for the parish of Cheltenham.

[Then followed the schedule before referred to.]

Sect. 24 of the Representation of the People Act 1832 (2 & 3 Will. 4, c. 45) provides:

Notwithstanding anything hereinbefore contained, no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future Parliament in respect of his estate or interest as a freeholder in any house, warehouse, counting-house, shop, or other building occupied by himself, or in any land occupied by himself together with any house, warehouse, counting-house, shop, or other building, such house, warehouse, counting-house, shop, or other building being, either separately or jointly with the land so occupied therewith, of such value as would, according to the provisions hereinafter contained, confer on him the right of voting for any city or borough, whether he shall or shall not have actually acquired the right to vote for such city or borough in respect thereof.

The Representation of the People Act 1884 (48 & 49 Vict. c. 3) provides (under the heading "Extension of the Household and Lodger Franchise"):

Sect. 2. A uniform household franchise and a uniform lodger franchise at elections shall be established in all counties and boroughs throughout the United Kingdom, and every man possessed of a household qualification or a lodger qualification, shall, if the qualifying premises be situate in a county in England or Scotland, be entitled to be registered as a voter. . . .

Sect. 3. Where a man himself inhabits any dwelling house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act and of the Representation of the People Acts, to be an inhabitant occupier of such dwelling-house as a tenant.

R. Mortimer Montgomery for the appellant.—The revising barrister was wrong in holding that the claimant was not the occupier of the cottage. The claimant was the occupier within the meaning of sect. 24 of the Representation of the People Act 1832, and, therefore—there being no question raised as to the value—he was by that section precluded from claiming an ownership vote for the county in respect of his ownership of that cottage. By sect. 3 of the Representation of the People Act 1884, it is provided that where a man inhabits any dwelling-house by virtue of his service or employment, he shall be deemed to be an inhabitant occupier of such dwelling-house as a tenant. Before the Act of 1884 the fact that the owner's servant lived in the cottage would not have excluded the occupation of the owner—the occupation of the servant in such case being the occupation of his master—and the claimant in this case being in occupation of the cottage through his servant, could not, by reason of the provision in sect. 24 of the Act of 1832, have claimed a vote for the county in respect of his freehold interest in the cottage. It is submitted that sect. 3 has made no change in this respect. The revising barrister has held that the section, by making the servant an inhabitant occupier of the dwelling-house, has made him the occupier of it, and has ousted the freeholder from the occupation, and that, therefore, the claimant, being the owner of this cottage which he does not occupy, is not prohibited by sect. 24 of the Act of 1832 from claiming a vote for the county. The effect of that would be not only to enlarge the right of the servant by giving him a vote as an inhabitant occupier which he had not before, but also to enlarge the right of the freeholder by giving him an ownership vote for the county which in the circumstances he could not have had before the Act. The purview of the section is to enlarge the right of the servant as an inhabitant occupier, and to give him a vote,

but it does not enlarge the right of the freeholder or operate to give him a vote in a case where he would have been prevented by sect. 24 of the Act of 1832 from having a vote. Sect. 3 merely says that the gardener in this case shall for the purposes of the Representation of the People Acts, "be deemed to be an inhabitant occupier," that is, for the purpose of getting the service qualification to vote, but for no other purpose. He is only to be "deemed to be" an occupier, and it is not said that he is to be "the" inhabitant occupier, but only "an" inhabitant occupier. He was not occupier for any other purpose, and his occupation did not exclude the occupation of his master. Though there is no case absolutely in point, there are cases which support the appellant's contention. In *Dobson* v. *Jones* (5 M. & G. 112, at p. 120), Tindal, C.J., in delivering the judgment of the court, said: "Upon the same principle as the coachman who is placed in rooms of his master over the stable, the gardener who is put into a house in the garden, or the porter who occupies the lodge at a park gate, cannot be considered to occupy as tenants, but as servants merely whose possession and occupation is strictly and properly that of their masters." That case was in 1844, and therefore before the Act of 1884; and it shows that before the Act of 1884 the occupation of the gardener was simply the occupation of his master, and such occupation would have given the gardener no vote, and the whole object of sect. 3 of the Act of 1884—as we see by the heading to sects. 2 and 3, "Extension of the Household and Lodger Franchise"—was to extend the Parliamentary franchise to the servant in such a case by reason of his occupation. That that was its only effect is clear from the case of *McClean* v. *Pritchard* (58 L. T. Rep. 337; 20 Q. B. Div. 285, at p. 287), in which an appellant who occupied a dwelling-house by virtue of his service claimed under sect. 3 the municipal franchise, as well as the Parliamentary franchise. Lord Coleridge, C.J. said: "The appellant has no claim to be enrolled as a burgess of Brighton. Before the Representation of the People Act 1884 the class to which he belongs possessed neither the Parliamentary nor the municipal franchise, and by that Act Parliament gave them the former, and the former only. The word 'occupier' is relied on; but 'occupation' is a technical term, and means legal, not mere physical occupation, and the appellant is still as little an occupier for the purposes of the municipal franchise as he was before the passing of the Representation of the People Act 1884."

W. H. Clay for the respondents.—Before the Act of 1884 the owner was not entitled to a vote for the county in respect of property which he occupied in a Parliamentary borough. Then came sect. 3 of the Act of 1884, which made a person in the position of the gardener in this case an inhabited occupier of the dwelling-house as a tenant. He is, therefore, by the section itself made occupier "as a tenant," so that his occupation is, for the purposes of these Acts, the occupation of a tenant. He ceases to occupy merely as a servant and occupies as a tenant, and his occupation is no longer the occupation of his master. By that change in the occupation of the servant the owner gains a vote in the county, inasmuch as he then owns property in the borough which he does not himself occupy—the value not being in dispute. The case of *McClean* v. *Pritchard* (*ubi sup.*) is not in point. The question there was as to the municipal franchise, and not as to the Parliamentary franchise. Here the question relates to the Parliamentary franchise, and all that *McClean* v. *Pritchard* (*ubi sup.*) decided was that the appellant in that case was not in occupation for the purpose of getting the municipal franchise. That is the distinction between the two cases. Sect. 3 of the Act of 1884—and the case stands entirely on that section—says that the gardener is for all the purposes of the Representation of the People Acts to be deemed the inhabitant occupier of the cottage, and as there cannot be two inhabitant occupiers, for the master and servant are not joint occupiers, the effect of sect. 3 is to oust the occupation of the master and therefore to take the master out of the operation of sect. 24 of the Act of 1832. There is, therefore, nothing to prevent the claimant in this case from claiming a vote for the county in respect of his freehold interest in the cottage, and the revising barrister was right in so holding.

Montgomery was not called on to reply.

Lord ALVERSTONE, C.J.—I am clearly of opinion that this appeal must be allowed, and that the register must be amended by expunging the names of the respondents from the Parliamentary ownership list. Much may be said for the argument urged for the appellant as to the object of this section of the Act of 1884, as expressed in the heading to these sections. We must look at the object of this Act. Sect. 3, which is the section applicable in this case, comes under the heading "Extension of the Household and Lodger Franchise," and it does not purport to deal with the freehold franchise at all. To my mind, the section was framed simply to enable a servant who inhabited a dwelling-house by virtue of his service or employment to get his vote as if he were an inhabitant occupier of that house as a tenant. The gardener in this case, therefore, is to be deemed to be an inhabitant occupier of Weimar Cottage for the purposes of the Representation of the People Acts, and the Act is plain that he is to be such an inhabitant occupier as gives him the Parliamentary franchise, and he is to get his vote accordingly. That being so, the question we have to decide is whether his occupation of the cottage puts his master out of occupation in such a way as to enable his master to claim a freehold vote for the county in respect of his ownership of the cottage. In my opinion there is nothing in the Act to show that the respondent Baker was so excluded from the occupation by the operation of that section. The section says not that the servant is the inhabitant occupier, but that he is only to be deemed an inhabitant occupier for the purposes of the Representation of the People Acts, and it seems to me to have been inserted with the sole intention of giving a vote to the man who occupies a dwelling-house by virtue of his service. We should, I think, be going much too far if we said that the occupation of the servant excluded the occupation of the master in such a way as to give the master a freehold vote in respect of the cottage. I express no opinion as to the vote of the occupier of such a house

where the house is also occupied by a person who under this section has an occupation vote by virtue of his service or employment; but I think that in this case the particular decision was wrong, and that this appeal must be allowed.

WILLS, J.—I agree.

DARLING, J.—I also agree. The court is occasionally obliged to put an interpretation upon a word in a statute which it does not ordinarily bear when the statute says that something "shall be deemed" to be a certain thing. I do not think that that difficulty arises in this case. Sect. 3 says that where a man inhabits any dwelling-house by virtue of any office, service, or employment he is to be "deemed" for the purposes of that Act and the Representation of the People Acts to be an inhabitant occupier of such dwelling-house. The section does not say that he becomes the only occupier of the house; the words are, not that he shall be the inhabitant occupier, but that he shall be deemed to be an inhabitant occupier for the purposes of that particular Act, and I think the Act means exactly what it says, and gives a man so occupying the house a vote as an inhabitant occupier without excluding the occupation of the master or owner. If the Legislature had intended in this section to exclude the occupation of the owner and to give him a freehold vote in respect of his ownership of the dwelling-house, I think they would have used stronger and clearer words for that purpose.

Appeal allowed.

Solicitors for the appellant, *Russell Cooke* and *Co.*

Solicitors for the respondents, *Ayrton, Biscoe,* and *Barclay,* for *Langley-Smith* and *Son,* Gloucester.

Tuesday, Dec. 19, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

LAIRD (app.) *v.* DOBELL AND ANOTHER (resps.) (*a*)

Feeding stuff—Sale—Causing or permitting invoice to be given—Invoice false in material particular—Not giving invoice stating name—Fertilisers and Feeding Stuffs Act 1893 (56 *&* 57 *Vict. c.* 56).

Guilty knowledge that an invoice is false in a material particular is not necessary under sect. 3 (1) (*b*) *of the Fertilisers and Feeding Stuffs Act* 1893. *It is sufficient if the description is in fact untrue.*

An invoice described an article as "Galveston Decd. Cotton Cake Meal."

Held, that no offence had been committed under sects. 2 *and* 3 (1) (*a*) *for not adding to this description a statement whether it had been prepared from one substance or seed, or from more than one substance or seed.*

CASE stated on an information preferred by the appellant against the respondent for selling as food for cattle five tons of Finest Galveston Decorticated Cotton Seed Cake Meal, being an article manufactured in the United Kingdom or imported from abroad, and unlawfully did cause or permit an invoice or description of the same to be given to the purchaser false in a material particular to the prejudice of the purchaser in that it described the article as containing 58 per cent. of oil and albumenoids, whereas in fact it only contained 51 per cent.

The appellant on the 2nd Feb. 1905 took an average sample of meal from six bags selected out of a quantity at the farm of the purchaser, which sample was sent to the district agricultural analyst.

In reply to a communication from the purchaser, the respondents on the 11th Jan. 1905 wrote:

In reply to your postcard of the 10th inst., we have pleasure in handing you samples of the following:—Finest Galveston Dec. C. S. Cake Meal at 6*l.* 7*s.* 6*d.* per ton. Guaranteed 58 per cent. oil and albumenoids . . . in bags, net cash terms free on rails Liverpool, and we hope to receive your orders.

On the 12th Jan. 1905 the purchaser sent an order to the respondents for five tons of the Finest Galveston Decorticated Cotton Seed Cake Meal, guaranteed 58 per cent. oil and albumenoids, by canal to Minshull Wharf at 6*l.* 7*s.* 6*d.* per ton free on rails, and he received from the respondents an invoice, dated the 13th Jan. 1905, as follows:

114 bags Galveston Decd. Cotton Cake Meal, wg. cwt. 101 q. 1 at 6*l.* 7*s.* 6*d.* per ton—32*l.* 4*s.* 1*d.* S.W. Canal to Minshull Wharf.

The meal was received on or about the 27th Jan. 1905 apparently in a dry state, and on the 2nd Feb. 1905 fair and average samples were taken and sealed in the purchaser's presence by the appellant.

A receipt for the price was produced, dated the 1st Feb. 1905, for the cotton seed cake meal.

The district analyst proved that on the 3rd Feb. 1905 he received from the appellant a sample of cotton seed cake meal, and that on analysis it only contained 51 per cent. of oil and albumenoids.

It was contended for the respondents that they were not guilty of the offence until it had been proved that they had knowingly supplied meal not of the quality which they guaranteed, and that there was no proof of such knowledge; and the case of *Korten* v. *West Sussex County Council* (88 L. T. Rep. 466) was referred to.

It was proved on behalf of the respondents that this meal was part of a consignment of 200 tons, and that when it arrived samples were drawn and taken under the direction of the respondents and forwarded to their analyst, who certified that the samples so analysed contained 60·27 per cent. of oil and albumenoids, and that they sold at 58 per cent. believing it to be true, and that they relied upon that analysis and sold the meal upon it.

The justices were of opinion that the alleged offence had not been proved, as they considered no evidence had been given that the respondents knowingly supplied the meal not of the quality demanded, or were aware that the meal was not of the quality guaranteed, and they dismissed the information.

There was another information charging that the respondents did fail without reasonable excuse to give on or before or as soon as possible after the delivery of the said article an invoice stating the name of the article, and whether it had been

(*a*) Reported by W. DE B. HERBERT, Esq. Barrister-at-Law.

prepared from one substance or seed, or from more than one substance or seed.

The facts were identical with those on the former information.

The justices were of opinion that this alleged offence had not been proved, as they considered that no evidence had been given that the respondents had failed without reasonable excuse to give an invoice, and they dismissed this information.

Bankes, K.C. and *Trevor Lloyd* for the appellant.—The first information is under sect. 3 (1) (*b*) of the Fertilisers and Feeding Stuffs Act 1893, alleging the respondents had offended against that section, which says, "causes or permits any invoice or description of the article sold by him to be false in any material particular to the prejudice of the purchaser," and the second offence charged is that they failed "without reasonable excuse to give on or before or as soon as possible after the delivery of the article the invoice required by this Act." The point under the first information is whether it is necessary to prove knowledge on the part of the person charged—that is to say, whether *mens rea* was an ingredient in the offence. On the second point the invoice was not in accordance with the Act, for it ought to have contained a statement as to whether the article was composed of more than one substance or not, for under sect. 2 "Every person who sells for use as food for cattle any article . . . shall give to the purchaser an invoice stating the name of the article and whether it has been prepared from one substance or seed, or from more than one substance or seed." With regard to the first point, we submit that it is decided by *Korten* v. *West Sussex County Council* (88 L. T. Rep. 466). That case is directly in point. On the second point the words of sect. 2 are explicit, and not only must you tell the purchaser that he is getting what he ordered, whether he ordered it by name or description, but you have to say whether it is prepared from one substance or seed, because in so stating you have to state whether the thing is pure or not.

Taylor, K.C. and *F. E. Smith*, for the respondents, were not called upon to argue the second point. With regard to the first point argued by the other side, although the case of *Korten* v. *West Sussex County Council* (*sup.*) did involve some question on the Act, it really was a decision whether or not in that particular case on the facts there was evidence in respect of which it could be said that the man there charged had permitted an invoice with a false statement in it to be sent.

Lord ALVERSTONE, C.J.—In this case one information was against the vendors for not sending as soon as possible after the delivery of the article an invoice stating the name of the article, and whether it had been prepared from one substance or seed, or from more than one substance. The magistrates found that "the alleged offence had not been proved to have been committed by the respondents, as we considered that no evidence had been given that the respondents had failed without reasonable excuse to give an invoice as alleged by the information." They have taken the words of sub-sect. 1 (*a*). That does seem to me to involve two possible conclusions: (1) That there was no offence committed at all; and (2) if any offence, it was not without reasonable excuse. Mr. Bankes' argument appeared to us to import this, that you must add to a description whether it has been made from one seed, or whether it has been made from more than one seed. It seems to me that is going a great deal too far. This appears to my less informed mind to be a case in which there is a description which involves that it is made from one seed. The description of the article according to the invoice was "Decorticated Cotton Cake Meal." Unless Mr. Bankes is right in saying you must add to that "it has only got cotton seed in it," it seems to be saying the same thing over again, or "it is made of different kinds of cotton seed," which is again saying that it is cotton seed. I cannot see that there was any offence committed in the first instance. My impression is that is what the magistrates meant. We are further entitled to draw that conclusion on the facts. I see no evidence on which we ought to say the magistrates were wrong in coming to the conclusion that there was no neglect to send in an invoice stating those particulars without reasonable excuse for not giving it. I think, therefore, that appeal should be dismissed. The other case was stated by Mr. Taylor, and I think, as stated by the magistrates, does to a certain extent appear a hard case, because it is alleged that the respondents, when they sent out the invoice or description which stated the 58 per cent, had taken steps through a competent analyst to find out what it was. Mr. Taylor says it was reported it was 60 per cent., and they cut it down to 58; but I do think that this statute, which is for the protection of farmers, does mean that the person who sends out the description is liable, as far as the farmer is concerned, for sending out a false description, and the fact that he can get back under sub-sect. 3 of sect. 3 the amount he has paid, does support the view that the Act means to refer to a document or description which is untrue in fact. The further argument is also brought home to my mind that, if guilty knowledge is necessary, there is no distinction between "causes" and "permits." If you know it and you let your manager send it out, you cause it to be sent out. My impression is those words were inserted for the purpose of protecting the purchaser where the description is in fact an untrue description. In this court we are bound by the judgment in *Korten* v. *West Sussex County Council*. I only add this. It has been pressed upon us that we could come to a different conclusion had the facts of this case been before us when the point was first in discussion. In this case there is no question of the respondents' character. If I am right in my view of the statute, a man may choose to rely upon an invoice sent or description sent to him without inquiry, or he may make an inquiry into it himself in order to satisfy himself. I thought at first it might be said there was no description on the invoice at all; but when you look at the request, the offer, and the subsequent invoice, the three documents must be taken together, and I am satisfied that there was a description which did say that this stuff contained 58 per cent. I think it must be taken, from the way in which this case is stated, that the magistrates have found that the stuff was not in accordance with that; therefore the invoice was untrue. I think, therefore, that the appeal must be dismissed on the invoice point, and allowed on the causing or permitting.

LAWRANCE, J.—I agree on both points.

RIDLEY, J.—I agree. I only wish to add one word. I do not know that I should agree had it not been for the previous decision.

Judgment accordingly.

Solicitors: *Busk, Mellor*, and *Norris*, for *J. H. Cooke*, Winsford; *North, Kirk*, and *Co.*, Liverpool.

Tuesday, Dec. 19, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

TYLER (app.) *v.* FERRIS (resp.). (*a*)

Weights and measures—Prosecution by inspector—Consent of local authority—Weights and Measures Act 1878 (41 *&* 42 *Vict. c.* 49), *s.* 25—*Weights and Measures Act* 1904 (4 *Edw.* 7, *c.* 28), *s.* 14.

By sect. 14 *of the Weights and Measures Act* 1904 "*an inspector of weights and measures may, with the consent of the local authority, prosecute before a court of summary jurisdiction or justices any information, complaint, or proceeding arising under the Weights and Measures Acts or in the discharge of his duties as such inspector.*"

Held, that a special consent was not necessary for each particular case.

CASE stated on an information preferred by the appellant against the respondent under sect. 25 of the Weights and Measures Act 1878 for unlawfully having in his possession for use for trade one 2lb. weight which was unjust.

Upon the hearing of the information the following facts were proved or admitted:—

The appellant is an inspector of weights and measures for the western district of the county of Middlesex, and the information prosecuted by the appellant was an information arising under the Weights and Measures Acts.

The respondent on the date alleged in the information had in his possession for use for trade a 2lb. weight which was unjust.

The appellant had the consent of the local authority to prosecute generally before a court of summary jurisdiction or justices any information, complaint, or proceeding arising under the Weights and Measures Acts, but the local authority did not specifically direct the present prosecution. Such consent was contained in a resolution of the Middlesex County Council passed on the 23rd Feb. 1905, and stated: "That the county council do hereby consent to Mr. Walter Tyler, the inspector of weights and measures for the western district of the county of Middlesex, prosecuting before a court of summary jurisdiction or justices any information, complaint, or proceeding arising under the Weights and Measures Acts or in the discharge of his duties as such inspector."

It was contended on behalf of the respondent that under sect. 14 of the Weights and Measures Act 1904 a special consent must be obtained by an inspector for every separate information, complaint, or proceeding prosecuted by him under the Weights and Measures Acts, and that the general consent produced by the appellant was not sufficient.

It was contended on behalf of the appellant that the consent produced was a sufficient consent within the meaning of the section, and that there was no obligation under that section to obtain a special consent for every separate information, complaint, or proceeding prosecuted by him under the Weights and Measures Acts.

The justices found on the facts that the respondent had committed an offence under sect. 25 of the Weights and Measures Act 1878, but they were of opinion that the consent produced by the appellant was not in law a sufficient consent within the meaning of sect. 14 of the Weights and Measures Act 1904, but that under that section an inspector before he could prosecute any information, complaint, or proceeding under the Weights and Measures Acts must obtain a special consent for each separate prosecution, and they therefore dismissed the information.

Eustace Hills for the appellant.—The justices were wrong, for a special consent in each particular case is not necessary. All that there has to be is a consent by the local authority that the inspector may carry on prosecutions for infringements of the statute.

Clarke Hall for the respondent.—The meaning of the section is that a special consent has to be obtained for each prosecution, and it was intended to give full control to the local authority over its officers. There might be cases where, although there had been a breach of the Act, proceedings should not be taken, and the local authority ought to consider each particular case, and consider whether or not a prosecution should follow. The word "consent" is new, the former words being "authorise" or "empower." There can be no "consent" unless the facts are known. He referred to

Isle of Wight Ferry Company v. *Ryde Commissioners*, 25 J. P. 454;
Reg. v. *Turner*, 58 J. P. 320.

Lord ALVERSTONE, C.J.—Mr. Clarke Hall has suggested some motive on the part of the Legislature in changing the word "authorised" to "consent," but there is nothing in the Acts to suggest it. This is a Weights and Measures Act, where power is given to a local authority to consent to other persons prosecuting proceedings under the Weights and Measures Acts. I do not think that the word "consent" refers to a particular consent in each particular case, but it only indicates that the inspector is the person who may be authorised to take and conduct proceedings before the justices. The appeal must be allowed.

LAWRANCE and RIDLEY, JJ. concurred.

Judgment accordingly.

Solicitors: *Richard Nicholson; W. T. Ricketts.*

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

Dec. 19 *and* 20, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

LOWERY (app.) *v.* HALLARD (resp.). (*a*)

Food and drugs—Brandy—Division of sample—Portion handed to seller not sufficient for analysis—Certificate—Sale of Food and Drugs Act 1875 (38 *& 39 Vict. c.* 63), *s.* 14.

Each of the three parts into which an article bought for analysis is required to be divided by sect. 14 *of the Sale of Food and Drugs Act* 1875, *although they need not be equal or mathematically the same quantity or indentical in every respect, must all be sufficient to afford substantially the same facilities for analysis.*

The certificate of the analyst correctly stated the parts or the percentages of foreign ingredients in the same, but the analyst, in giving the reasons for his opinion why the sample was adulterated, by an error in copying stated it contained only 25 *parts of A. E. per* 100,000 *parts of P. S. instead of* 32·7 *parts. The analyst was called to correct this error, which could be corrected by the figures given in the certificate itself.*

Held, that the certificate was good.

CASE stated on an information preferred by the respondent against the appellant for that she did by the hands of her servant unlawfully sell to the respondent, the purchaser, and to his prejudice a certain article of food, to wit, brandy, which was adulterated with spirit not derived from the grape, and which brandy was not of the nature, substance, and quality of the article of food demanded by the purchaser.

The summons in pursuance of the information was duly served upon the appellant on the 2nd Dec. 1904, and a copy of the certificate of Mr. J. Carter Bell, the public analyst for the county, was served with the summons.

The following is a copy of the certificate:

I, the undersigned public analyst for the county of Chester, do hereby certify that I received on the 12th day of November 1904 from inspector W. J. Hallard a sample of brandy, marked No. 833, for analysis, which then weighed 5oz., and I have analysed the same and declare the result of my analysis to be as follows:—

I am of opinion that the said sample contained the parts as under or the percentages of foreign ingredients as under:—

Proof spirit	76·340
Acetic acid...	·015
Acetic ether	·025
Total solids	·543
Water	23·077
	100·000

This sample is adulterated with 29 per cent. of proof spirit derived from some source other than the grape. This opinion is based upon the fact that the sample contained only 25 parts of acetic ether per 100,000 parts of proof spirit. Whereas pure brandy contains at least 46 parts of acetic ether per 100,000 parts of proof spirit. No change had taken place in the constitution of the sample that would interfere with the analysis.

As witness my hand this 18th day of November 1904.

(Signed) J. CARTER BELL, Analyst.

Mr. J. Carter Bell, the analyst, was called as a witness before the justices. He stated that his analysis was correct, but that in drawing up his certificate he had in error copied the figures "25" from the table in the certificate instead of giving the correct statement that the sample contained 32·7 parts of acetic ether per 100,000 parts of proof spirit, and he pointed out that from figures given in the certificate itself the mistake could be rectified. The figures "25" represented the proportion of acetic ether as compared with all the other constituent parts of the sample analysed. If the acetic ether were compared with the proof spirit only, the proportion was necessarily larger, and the correct figures were 32·7, that figure bearing the same ratio to 100·000 as 25 to 76·340. It was admitted on behalf of the appellant that verbal notice of this error had been given to the appellant's solicitors at 5.20 p.m. on the 16th Dec., with an intimation that the prosecution intended to call Mr. J. Carter Bell to give evidence to correct the error in his certificate.

Counsel for the appellant objected to the certificate and contended that it was bad on the face of it and could not be amended in court on the hearing and was not in conformity with the provisions of the Sale of Food and Drugs Acts, and that the public analyst could not be called as a witness to correct his certificate.

The justices were of opinion that the certificate was valid and in compliance with the Acts on the ground that the certificate was in the proper form and was complete and sufficient without the sentence as to the grounds of the analyst's opinion, and that the sentence being superfluous the error found in it did not affect the validity of the material part of the certificate, and, further, that the error being apparent on the face of the certicate and being able to be corrected by information given in the certificate itself was immaterial. They found as a fact that the error did not in any way prejudice or mislead the appellant. In the alternative they were of opinion that the respondent, even if the error were material, was entitled to call the public analyst as a witness before them to correct the certificate, and that having done so the certificate was good, valid, and sufficient within the meaning of the said Acts. They therefore overruled the objection of the appellant and declined to dismiss the summons on the grounds above mentioned.

During the hearing of the case evidence was given that the quantity of brandy purchased by the respondent from the appellant had been divided into three parts as required by sect. 14 of the Sale of Food and Drugs Act 1875, and that the purchaser had delivered one of the parts to the appellant or her agent. There was no sufficient evidence of the exact weight of the brandy purchased nor of the weight of the part retained by the respondent and subsequently sent to the Government laboratory for analysis. There was evidence and the justices found as a fact that the part sent to the public analyst weighed 5oz, that the part subsequently sent to the Government laboratory weighed 3oz. or thereabouts, and that the part given to the appellant weighed about 2oz. and less than 2½oz. The part of the sample retained by the respondent and subsequently ordered by the justices to be sent to the Government laboratory for analysis was analysed by the chemical officers at the Government laboratory and their certificate is set out below.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law

For the appellant, Mr. Herbert Davies, analytical chemist, of 28, Chapel-street, Liverpool, was called as a witness, and stated that the third part had been sent to him for analysis, but that he refused to analyse it as it contained less than 3oz. On behalf of the respondent, Mr. J. Carter Bell stated in his evidence that he could not make a complete analysis with less than 5oz. of brandy, and that he would not issue a certificate for the prosecution on anything under 5oz., but that when he knew an analyst's figures he could form an opinion whether they were correct if he had not less than 2oz., but that the least amount on which he could get a satisfactory analysis was about 4oz.

For the appellant it was contended that the sample bought from her ought to have been divided into three equal parts, and that as it had been divided into three unequal parts as set out in the preceding paragraph, and as the part delivered to her contained less than 2½oz., whereas the part delivered to the public analyst contained 5oz., there was no compliance with sect. 14 of the Sale of Food and Drugs Act 1875.

The justices were of opinion that upon the facts set out there was a sufficient compliance in law with the requirements of the section, and they therefore overruled the objection of the appellant and declined to dismiss the summons on the grounds above mentioned.

Upon the hearing of the case the following facts were proved:—

On the 11th Nov. 1904 the respondent ordered from the barman of the appellant at her licensed premises a "small brandy" and, after being served, the respondent asked for and purchased half a pint from the same bottle, and he paid 2*s.* for it. The respondent then divided the sample into three parts as hereinbefore stated, and complied with the other requirements of the Food and Drugs Acts, and submitted one of the three parts to Mr. J. Carter Bell, the public analyst for the county, who subsequently gave the certificate set out above.

Mr. Herbert Davies, the analyst called by the appellant, did not analyse the appellant's part of the sample purchased by the respondent. He did, however, analyse a sample taken from the same jar—viz., the jar from which the liquid sold to the respondent had originally been taken for the purpose of comparison—and, after hearing the result of his analysis of that sample, the justices in their discretion caused the part of the brandy retained by the respondent to be sent to the Government laboratory for analysis, pursuant to sect. 22 of the Sale of Food and Drugs Act 1875, and they adjourned the further hearing of the case.

The justices subsequently received the certificate, of which the following is a copy:

Government Laboratory, Clement's-inn-passage, Strand, London, W.C.

The sample of brandy marked No. 833 referred to in your letter of the 23rd Dec. last was received here on the 28th Dec. The sample was securely sealed.

We hereby certify that we have analysed the brandy, and conclude from the results of our analysis that the sample consists of a mixture of pot still grape spirit and neutral or patent still spirit.

We estimate the proportion of neutral spirit to be not less than one-fifth of the total quantity of spirit in the sample.

As witness our hands this twenty-sixth day of January nineteen hundred and five.

(Signed) C. SIMMONDS.
(Signed) GEO. STUBBS.

The Clerk to the Justices, 55, Hamilton-square, Birkenhead.

It was contended for the appellant that the certificate issued by the Government laboratory takes the place of and must be in the same form as is required by law in the case of a public analyst's certificate, and that as the appellant was charged with selling brandy which had been adulterated with spirit not derived from the grape, and that as the public analyst had admitted in cross-examination that it was impossible to tell the source or origin of any neutral or silent spirits, and that as after hearing the evidence of the analyst for the defence the justices had sent the sample for analysis to the Government laboratory, the said certificate received from the Government laboratory was not one on which they could convict, since it did not set out such facts as would enable them to come to the conclusion whether the brandy had or had not been adulterated as alleged in the information, and that the appellant was entitled to be discharged.

The justices decided that the certificate of the Government analysts did not take the place of the public analyst's certificate, and that it need not be in the same form as that required by law for the certificate of a public analyst.

It was proved or admitted that pure brandy is made from the juice of the grape by distillation in a pot still (so as to preserve the ethers). Neutral or patent still spirit may be made from a large number of substances other than grapes, and when made it is impossible to tell by analysis the origin of the spirit. It can also be made from wines that are sour or bad, or in danger of going sour, or from grape skins, and if brandy be distilled over and over again in a pot still its ethers will be eliminated and it will become neutral spirit and be undistinguishable from patent still spirit, but by so distilling the brandy over and over again its medicinal and commercial value is very largely diminished.

After hearing the evidence called by the appellant and respondent respectively (including several expert tasters called by the appellant) the justices found as a fact that the sample of brandy purchased by the respondent was adulterated with neutral or patent still spirit, and was not of the nature, substance, and quality demanded by the respondent, but, as it was proved to their satisfaction that neutral or patent still spirit was sometimes made from bad or sour wines and from grape skins, they were unable to say whether the neutral or patent still spirit found in the sample was or was not derived from the grape.

The justices convicted the appellant.

The questions of law arising for the opinion of this court were: First, whether the service on the appellant with the summons of a copy of the certificate of the public analyst, which certificate contained the error hereinbefore mentioned, was a compliance with sect. 19, sub-sect. 2, of the Food and Drugs Act 1899; secondly, whether the said certificate was a valid and sufficient certificate within the meaning of the Sale of Food and Drugs Acts 1875 to 1899; thirdly, whether, in the event of the court being of opinion that the

said certificate was not so valid and sufficient, the justices were right in admitting the evidence of the public analyst to correct the said error, and in allowing the said certificate to be amended in court; fourthly, whether the conviction was wrong on the ground that the sample of brandy purchased from the appellant or her agent was divided into three unequal parts as hereinbefore stated—to wit, one part containing 5oz. for the public analyst, one part containing about 3oz. being retained for comparison, and one part containing less than 2½oz. being delivered to the appellant; fifthly, whether, in view of the facts hereinbefore set out, the certificate of analysis from the Government laboratory being silent as to the origin of the neutral or patent still spirit found in the sample was sufficient in form, and whether, having received the certificate as aforesaid, they were unable in law to convict the appellant of the offence alleged in the information or any offence; sixthly, whether, in view of the fact that the information alleged that the appellant had sold brandy which was adulterated with spirit not derived from the grape, and that they found that the brandy was adulterated with neutral or patent still spirit and was not of the nature, substance, and quality demanded by the respondent, but that they could not decide what was the origin of the neutral or patent still spirit, and having regard to the evidence referred to in this case, could not say positively that it was not derived from the grape, they were wrong in law in convicting the appellant, and whether the conviction, not following the form of the information, can be held good in law.

Pickford, K.C. (*Cuthbert Smith* with him) for the appellant.—The certificate in this case was bad, for it must be such that it shows the appellant what is alleged against him, and the analyst cannot be called to correct the certificate. He referred to

Fortune v. *Hanson*, 74 L. T. Rep. 145; 18 Cox C. C. 258; (1896) 1 Q. B. 202;
Bridge v. *Howard*, 75 L. T. Rep. 300; 18 Cox C. C. 42; (1897) 1 Q. B. 80.

Under the Sale of Food and Drugs Acts the certificate alone is *primâ facie* evidence, and therefore it is essential that it should be correct. He also referred to

Newby v. *Sims*, 70 L. T. Rep. 105; (1894) 1 Q. B. 478;
Batt v. *Mattinson*, 82 L. T. Rep. 800;
Hudson v. *Bridge*, 88 L. T. Rep. 550.

Further, the sample under sect. 14 of the Sale of Food and Drugs Act 1875 has to be divided into three equal parts, and each of those parts must be sufficient to afford the same facilities for analysis. Here the part that was left with the respondent was not sufficient to allow it to be analysed, and this condition precedent has not been fulfilled in this case, and the conviction is bad and ought to be quashed. He referred to

Barnes v. *Chipp*, 38 L. T. Rep. 570; 3 Ex. Div. 178;
Mason v. *Cowdary*, 82 L. T. Rep. 802; (1900) 2 Q. B. 419;
Smith v. *Savage*, 92 L. T. Rep. 775; (1905) 2 K. B. 88.

Bankes, K.C. (*Leslie Scott* with him) for the respondent.—The certificate is good, for the error is apparent on the face of the certificate, and can be corrected by information given on the certificate itself. The analyst was not called to contradict his certificate, but merely to correct a palpable mistake which did not mislead the appellant. It is not a condition precedent under sect. 14 of the Sale of Food and Drugs Act 1875 that the sample should be divided into three equal parts, nor is it a condition precedent that each part should be sufficient for analysis. Sect. 14 does not say what sizes the parts shall be, and all that has to be done is that the sample shall be divided into three parts.

Lord ALVERSTONE, C.J.—This is a very important case, and I wish to say that I recognise its importance, and Mr. Bankes has said, in the course of the argument, the consequence would be, if we took the view which we have indicated, that the Act would be seriously impaired. I come to an entirely different conclusion. I do not want it to be thought that I do not recognise the importance of this case, but I think the Act would be very much impaired if Mr. Bankes' view prevailed. In this case a half-pint of brandy was purchased, and 5oz. were sent to Mr. J. Carter Bell, on which it was intended that the prosecution (if any) should be founded. Three ounces were put aside, and the sample was ultimately sent to the Government analyst under circumstances which I will mention in a moment or two, and 2½oz. or thereabouts, not more than 2½oz. and less than 3oz., were given to the seller. Now the objection is taken to Mr. Carter Bell's analysis on the ground that the figures are inconsistent. We indicated that we did not desire to hear Mr. Bankes on that part of the case. It seemed to us that the analysis clearly showed there was adulteration—clearly showed a minimum amount of adulteration. The only objection that could be taken would be that the figures were not consistent. I take the view, which is that which the justices have expressed, that the correction would be made on the face of the figures themselves, and that therefore the error was one that would not vitiate the certificate, having regard to the substantial matter therein described. I think, therefore, there is no ground for alleging that the certificate was bad on the face of it. The next point is one of very great and general importance—aye or no is it an objection to these proceedings that the samples in fact, or, rather, the portions into which the sample is divided, are to be sufficient to enable what Mr. Bankes has correctly called from this point of view, a checking analysis to be made? Now, the provision of sect. 14 and some other sections are of importance. I read the section as it now stands: "The person purchasing shall after the purchase has been completed forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst." Now, that has been held to be a condition precedent in the strictest sense of the term. You have got actually to make a statement that this is going to be analysed by the public analyst, which seems to go very far. The section then goes on: "And shall divide the article into three parts, which are then and there separated, each part to be marked, or sealed, or fastened up in such manner as its nature shall permit, and shall, if required to do so, deliver one of the parts to the

seller or his agent. He shall afterwards retain one of the said parts"—what for?—"for future comparison, and submit the third part, if he deems it right to have the article analysed, to the analyst." Now, it is contended that it is not a condition precedent that the other two parts so kept shall be of equal value for the purpose of analysis with the part that is going to be submitted to the public analyst. Now, the perusal of that section is, to my mind, conclusive against such a view. They are to be sealed up; they are to be marked, and one is to be kept by him for future comparison, and the other is to be given to the seller if he desires, and I should have thought that on the merest and most superficial consideration the purchase of this sample would be sufficient to show that at least the three parts must afford substantially the same facilities for analysis. Of course, I do not mean that they must all of necessity be mathematically the same. They must be subject to any incidents that arise from the fact that the body, fluid, or substance is divided into three parts. I believe it is borne out that the percentages vary even in parts that are divided with considerable care. That cannot, in my opinion, justify the suggestion that the other two parts not submitted to the public analyst need not be sufficient for the purpose of public analysis, and I repeat that I cannot understand on what grounds it can be urged, as Mr. Bankes has urged before us, that the part that goes, I will not say to the prosecuting analyst, but to the analyst whose analysis is going to be used for the prosecution, shall afford better facilities for examination than those which go to the other two people. Now, when you turn to sect. 20 this view is in my opinion confirmed. "When the analyst having analysed any article shall have given his certificate of the result, from which it may appear that an offence against some one of the provisions of this Act has been committed, the person causing the analysis to be made may take proceedings." Now, that is, of course, an analysis of the one portion that has gone to him. Then under sect. 22: "The justices before whom any complaint may be made, or the court before whom any appeal may be heard, under this Act may, upon the request of either party, in their discretion cause any article of food or drug to be sent to the Commissioners of Inland Revenue." Now, that was not thought strong enough, because, by sect. 21—I think it is of the Act of 1899—at the request of either party the other sample may be sent to the public analyst. In the one it was in their discretion. They had a discretion as to the sending of the sample under sect. 22, but that discretion was taken away, and they have now to send it at the absolute discretion of either party in the next section. Then we have also to consider the third portion, which, if required, shall be delivered sealed up to the seller or his agent. It would be little less than a farce if the part which is delivered to the seller or his agent is not sufficient for his analysis. The whole scheme, to my mind, points to this being a formal part of the proceedings. Now, is there any reason why, having regard to this legislation, that this matter should be strictly carried out. It seems to me that there is a good reason, and that is that, under sect. 21, on production of an analysis, the justices may act upon that if they like, without further evidence being called, if it is sufficient. Therefore it does seem to me that it is of the very greatest importance that there should be a proper opportunity of checking or correcting any analysis that is made. I therefore come to the conclusion, not that the sample or three parts of the sample must be equal, and not that the three portions must be of mathematically the same quantity or identical in every respect, but that at least they shall be sufficient for the subsequent purposes contemplated by the Act—viz., investigation by Government analysts and investigation by someone whom the seller may himself wish to call. Now, it equally is not disputed in this case that this sample did not fulfil the purpose. The justices have found that Mr. Herbert Davies, who was asked to examine the seller's portion, refused on the ground that it contained 3oz. Mr. Bell says he could not get a satisfactory analysis under 4oz. Therefore there is no evidence before us or before the justices at all as to the sufficiency of either of these other samples for the purpose of analysis. It is true that the report with a certain estimate is made by Mr. Simmonds and Mr. Stubbs, the Government analysts, but it is certainly not very satisfactory that they do not give the same information as was thought to be necessary to be given by Mr. Bell when he made the first analysis, although it possibly might not be required, and it is not required, that that analysis should have the same formality. Therefore upon the same point that in order to found a prosecution persons buying must divide the articles sold so that each of these three samples, the three portions, may be sufficient for analysis, I have not the slightest doubt. I think there would be very grave objections to the Act if we thought it sufficient that one portion, and that which the prosecution is going to send, should alone be sufficient for the purpose of analysis. Now, these being our views of the Act, the only question which remains is, Ought we to send this case back? Now, we have more than once in this court reaffirmed the old principle that justices are supposed to state cases honestly, and I think in the great majority of cases they do state them honestly, and state the whole facts. In my opinion, if there had been any evidence the other way, the justices on this carefully drawn case would have stated it; and I do not think we ought to send back the case in order that fresh facts may be taken when there is no suggestion of any evidence which contradicts the part of the case which the justices have stated for our consideration. This being a full statement of the case, I think we ought to act upon the facts, and say that the justices have come to the conclusion that it was not necessary that the other two portions of the samples should fulfil the same condition as the first portion, and, that being so, that this conviction ought not to stand. I can only say that, if there be cases of the class which Mr. Bankes has said in which it is impossible to get three parts of a sample, that has never been suggested before, and it is not in accordance with my experience of the cases. If it be so, it is a matter for the Legislature. But I think we ought not in this case to deprive the defendant of the protection he ought to have under these circumstances, unless there is a clear indication of some special circumstances. I think, therefore, that the contention that there

was not a sufficient sample is right, and that this conviction should be quashed.

LAWRANCE, J.—I entirely agree.

RIDLEY, J.—I agree.

Solicitors: *Thompson*, *Hughes*, and *Mathison*, Birkenhead; *Cecil Holden* and *Cotton*, Birkenhead.

Dec. 20 *and* 21, 1905.

(Before Lord ALVERSTONE, C.J. and LAWRANCE, J.)

BOYLE (app.) *v.* SMITH (resp.). (a)

Licensing—Sale by drayman off van without authority—Liability of employer—Licensing Act 1872 (35 *& 36 Vict. c.* 94), *s.* 3.

The respondent was one of the managing directors and secretary of a brewery company, and had been appointed receiver and manager for the debenture-holders, and was licensed to sell beer at the brewery premises. He also had control of the draymen.

One of the draymen, contrary to express orders, sold beer off his van to persons who had not ordered it at the brewery.

Held, that the respondent was not liable under sect. 3 *of the Licensing Act* 1872 *for the acts of the drayman.*

CASE stated on five summonses preferred by the appellant against the respondent for selling beer on five different dates at Lydden-grove, Wandsworth, where he was not authorised by his licence to sell—namely, at Lydden-grove—contrary to sect. 3 of the Licensing Act 1872.

On the hearing of the summonses against the respondent it was proved that a licence had been granted to him to sell beer by retail for consumption off the premises named in such licence—to wit, the Southwark Park Brewery, Trundley-road, Deptford; that under it he was entitled to sell beer by retail only at the said licensed premises; and that on the five days in question one Deeth was in Lydden-grove in charge of a van containing crates of bottled beer bearing the label of the Trundley-road premises, the van bearing the name of the respondent as secretary of the London United Breweries Limited, a company which had acquired the business of the Southwark Park Brewery.

Deeth on each of the days sold and delivered out of the stock of his employers, the limited company, retail quantities of beer to two persons who had, before meeting Deeth at Lydden-grove, sent no orders to the licensed premises, and whose names did not appear in the books of the company and who were not customers and were strangers to Deeth, and who there and then in the street paid Deeth for the beer, and on subsequent visits of Deeth to Lydden-grove with his van returned to him the empty bottles and crates.

It was further proved that the respondent was secretary and one of the managing directors of the company, and had been appointed receiver and manager on the application of the debenture-holders by the court, and had control over the draymen in the employment of the company, and that he had given orders to them (including Deeth) to be careful never to deliver beer unless an order for it had been received by the company at their office; and that he was every day at the company's office, and had taken every care to prevent any beer from being sent out which had not been so ordered, and a notice embodying such instructions had been posted at the office.

Each drayman was required to keep a book, for his own use upon his round, with the name of the customers on such round, and a book was kept in the office showing exactly the beer sent out and the particular customers to whom it was to be delivered in accordance with the orders received, and a special clerk checked the load on the dray before it went out.

The draymen, in addition to their salaries, got a commission of 6*d.* in the pound on all beer sold from the brewery.

The beer was sold almost entirely for cash on delivery by the drayman, who was authorised to receive payment, but gave no receipt, and who was required at the end of each day to bring back to the brewery all beer unsold and undelivered, and a proper amount of money for the beer sold and delivered during the day, so that the amount of beer and money brought back by the drayman should tally with the amount and value of the beer booked out.

None of the bottles or crates bore the name of the customer for whom the beer, with a view to delivery, was loaded on the van, and there was no appropriation by identifying marks or otherwise of any of the bottles or crates of beer to any particular customer.

Occasionally customers of the limited company when called upon by the drayman for the purpose of delivering beer to them were found to have changed their addresses, so that the drayman sometimes had on his van beer he had been unable to deliver, and in these circumstances it was his duty to take back such beer to the company's premises and strike the customer's name from his round-book.

For the appellant it was contended that the respondent was liable for the acts of the drayman, and had through him sold beer by retail at a place not covered by the licence, and that the respondent had committed an offence against sect. 3, because, as there had been no appropriation of any quantity of beer at the licensed premises to any particular customer, and it had been a matter of chance which crate was delivered to any particular customer, the sale had not taken place at the licensed premises.

For the respondent it was contended that he was not responsible for Deeth's acts in selling beer as alleged, as such conduct was outside the scope of his authority and contrary to the express orders given to him, and, with regard to the further contention of the appellant, that it was not relevant and did not arise in the consideration of the respondent's liability for the acts of his servant, and, even if relevant, that the fact as found did not establish an offence.

The magistrate was of opinion that the summonses against the respondent should be dismissed on the ground that he was not responsible on the facts for Deeth's acts.

Danckwerts, K.C. (*Bodkin* and *Bruce Williamson* with him) for the appellant.—The magistrate was

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

wrong here, for the respondent is liable even although the servant has acted contrary to his express instructions. He referred to

Cartman v. *Commissioner of Police*, 74 L. T. Rep. 726; (1896) 1 Q. B. 655;
Williamson v. *Norris*, 79 L. T. Rep. 415; 19 Cox C. C. 203; (1899) 1 Q. B. 7;
Dyer v. *Munday*, 72 L. T. Rep. 448; (1895) 1 Q. B. 742.

Even apart from these sales, which were unauthorised and forbidden, there was a breach of sect. 3 of the Licensing Act 1875, for there was no express appropriation on the licensed premises. He referred to

Cocker v. *McMullen*, 81 L. T. Rep. 784;
Pletts v. *Campbell*, 73 L. T. Rep. 344; (1895) 2 Q. B. 229.

Biron for the respondent.—These sales in the street were contrary to the express orders given by the respondent and he is not responsible, and the magistrate finds that he took every care to prevent any beer being sent out which had not been ordered beforehand. He referred to

Newman v. *Jones*, 55 L. T. Rep. 327; 17 Q. B. Div. 132.

There was no evidence of any other sales except those in the street, and those sales were not within the scope of the authority of the drayman. He referred to

Roberts v. *Woodward*, 63 L. T. Rep. 200; 25 Q. B. Div. 412;
Williamson v. *Norris* (*sup.*).

Danckwerts, K.C. in reply.—*Newman* v. *Jones* (*sup.*) was referred to in *Bond* v. *Evans* (59 L. T. Rep. 411; 21 Q. B. Div. 249) and distinguished. He also referred to

Coppen v. *Moore*, 78 L. T. Rep. 520; (1898) 2 Q. B. 306.

Lord ALVERSTONE, C.J.—This was a case stated by a magistrate on a summons against the defendant for selling, contrary to the provisions of sect. 3 of the Licensing Act 1872, on five separate days, beer, in a place called Lyddengrove, Wandsworth. As stated, the case undoubtedly is open to the observation that it was meant to bring a charge against the defendant in respect of the ordinary carrying on of his business—that is to say, by a drayman taking out beer and delivering it to customers—upon the ground that the property did not pass, or the goods were not set apart, until the drayman actually delivered them out of the dray. If that had been the real case in respect of which the prosecution was brought and the case reserved to us by the magistrate, I think there would be very great difficulty in distinguishing this case from the cases of *Pletts* v. *Campbell* and *Cocker* v. *McMullen*. Further than that (and that was where we are in difficulty), undoubtedly the arguments which are stated both for the respondents and appellants by the learned magistrate as urged before him might be said (and without explanation, I think would be said) to raise the simple point as to the defendant carrying on his business in a way which was an infraction of the statute by sending the drayman out as and when he did. But in consequence of what Mr. Biron told us, and having regard to the terms of the summons itself, we have looked carefully at the depositions, and we are satisfied that the only charge made against the defendant was in respect of the sale of liquor in the street on these five occasions, and not in respect to the delivery to customers who had previously ordered or previously sent orders for beer, and to whom Smith, the respondent, intended to sell beer, and we are also perfectly satisfied that the two statements of the arguments were made with reference to that case, and not with reference to another case, though we can well understand how it was considered on reading the case that it simply was a restatement of the facts in *Pletts* v. *Campbell*. What we have therefore to consider is, whether or not the appeal should be allowed in respect to the sale to people in the street. That raises certainly a difficult question—a question which in my judgment is not entirely covered by any authorities that have been cited. It is quite true there are a number of sections (I am not able to say exactly how many), some of which are grouped under the rubric at the beginning of them—offences against public order—under which it has been decided that a sale against the authority and beyond the authority of the licensed person still is a sale, or is conduct in respect of which he can be held liable to penalties under the Act. That was undoubtedly decided in *Bond* v. *Evans*, and distinguished in *Somerset* v. *Hart* and in *Cartman's* case in 1896, and we have had to consider similar points on more than one occasion with regard to the Licensing Act during the last two or three years. On the other hand, there are cases where we have had to consider whether or not it was necessary that there should be more evidence than a sale unauthorised by the licensee of premises. An illustration of that is *Emary* v. *Nolloth* (89 L. T. Rep. 100; (1903) 2 K. B. 264)—I only give it as an illustration—and therefore no one can say, in my judgment, that under every section of these Licensing Acts it is dependent on whether the sale was within the scope of the authority or not. Then it was pressed upon us that the case of *Williamson* v. *Norris* decided that the servant could not be prosecuted for a sale of this kind. In my opinion, *Williamson* v. *Norris* does not go anything like as far as that, and nothing of the kind was intended to be decided. What was decided as an inference of fact drawn by Lord Russell of Killowen and Wills, J. in *Williamson* v. *Norris* was that there was no sale in fact by the man at all; that he was merely a servant who was selling his master's liquors, and was not himself purporting to sell anything. It is quite clear (if I may use the expression) that Lord Russell never meant to deal with the case where a man was purporting to sell for himself, or was guilty of some improper conduct with reference to his master in doing so. All that was decided in *Williamson* v. *Norris* was that in that particular case the sale was not a sale by the waiter, but was a sale by the kitchen committee of the House of Commons. I have no hesitation in saying that, in my opinion (and I think Lord Russell says the same thing), under sect. 3 of this Act of 1872, if a servant does choose himself to make a contract and sell, that he, not being a licensed person, is liable to penalties under the section, and it is not immaterial to notice in this case that the drayman did certainly commit what was really in effect an offence under the 3rd section. But the further point still remains—Is Smith liable under sect. 3 for his conduct? In my

opinion the magistrate has taken the correct view of this particular section and of the law applicable to this particular case, and he is not liable. As to the facts, first I desire to say that, with reference to any question of unappropriated beer being put into the waggon, the facts were clearly not sufficiently stated. I am quite sure they were never intended to be stated. Although there is one sentence in the depositions where Mr. Smith, when examined, did say that one particular clerk, Low, did not know what was the amount of beer put in, or did not check the amount of beer put in, he went on to say in almost the next sentence (every word of which was read to us) that another man did—a man named Simpson. Now, on the facts stated is Smith liable? It appears that Smith had expressly prohibited anyone from selling to persons in the street, and therefore the question arises whether it can be said that he is liable because the person whom he had allowed to go out to deliver the beer to customers who had ordered it, and possibly—I say "possibly." as I do not want in any way to state the case any higher than Mr. Danckwerts himself puts it—to sell beer to one of those customers, if he acts directly against the order of his master and sells beer in a way the master told him not to do, so that he had in fact no authority to do it, the question arises whether the master is liable under the section? In my opinion he is not, on the facts stated in this case. It is not a case of delegated authority, it is not one of that class of cases to which *Bond* v. *Evans*, *Cartman's* case, and *Somerset* v. *Hart* are instances, one one way and two the other, of delegated authority; it is a case where the business must be carried on in this kind of way, for it cannot be contended that a person in the position of manager to a company can go out and deliver all the beer himself. It seems to me when the facts show that the man had no authority to do that which he did, and was expressly forbidden so to do, that it is not, within sect. 3, a sale by the principal when the man goes and improperly makes a sale in the street. For these reasons I think the case is not governed by the authority of *Pletts* v. *Campbell* as far as the sale in the street is concerned and all the authorities cited by Mr. Danckwerts. Therefore the appeal must be dismissed.

LAWRANCE, J.—I am entirely of the same opinion. I have had some difficulty in finding out from the case what exactly is intended to be raised by the learned magistrate; but, on looking carefully at it, it seems to me perfectly clear that the only question that was fought before the magistrate was the question of the man selling to people in the street the beer for which he was summoned, and for which he himself was fined. The whole point taken before the magistrate, as far as I can understand the case as stated by him, was that in respect to the selling to these people in the street the respondent was liable. That is the whole question which was decided. No doubt a point was taken, because the case states: "On the part of the appellant it was contended before me that the respondent was liable for the acts of the drayman, and, being so responsible, had, through such drayman, sold beer by retail at a place not covered by his retail licence, and, further, that the respondent had committed an offence against sect. 3 of the Licensing Act 1872"; but the main struggle undoubtedly, as far as one can make out from the case, seems to refer to something else—it refers to sales of beer in the street by the drayman. There is no doubt whatever about that. The whole evidence (and I have looked at the case carefully) is directed to the point as to what the duty of the drayman was, the manner in which the books were kept showing exactly the beer sent out, and the particular customers to whom the beer was to be delivered. In accordance with the orders of the master, a special clerk checks these before the dray goes out, and somewhere in the case it is found that the names of the two people never appeared in the books at all. As I understand it, it is said that that shows he had authority to sell it. It is said that, notwithstanding his duty was to deliver the beer to the customers who had ordered beer, he sold beer to other people, and that therefore the respondent is liable. That seems to me to be the whole question in this case. Now, what were the drayman's duties? His duties, according to the evidence, were to deliver beer sent out according to an account kept by the clerk, and if those people were not in, or if for any reason he could not deliver the beer, it is found as a fact in the case that it was his duty to bring the beer back to the brewery. It seems to me those were really what his duties were—viz., to deliver beer which was ordered, and under no circumstances to sell beer on behalf of his master in the street. It is quite true that strict injunctions had been given to him not to sell beer; but of course, if he was acting within the scope of the employment, that would be no answer; he would then be liable on the principle of *Limpus* v. *London General Omnibus Company*. There strict injunctions were given to a man not to do this, that, or the other—not to race. He did race and had an accident, and it was held that the company were liable, because he was carrying out what he was sent out to do—viz., to drive an omnibus—and therefore they were liable. The case on the other side, with regard to the liability for the acts of a servant, is a case where a police constable who was employed by a railway company had orders not to take persons into custody unless it was to put an end to an affray going on in the station. There had been an assault in the station; it was over, but he took one man into custody afterwards. It was held that the company were not liable because his duties were exceeded. Those two cases—one on one side and one on the other—deal with the question, which is very often a difficult question, as to the responsibility of persons through acts of their servants. In this case, in my judgment, this man was agent only for the purpose of delivering beer and not for the purpose of selling beer, and under no circumstances could the respondent be made liable for what was done in this case. That being, in my judgment, the principal ground upon which the case was fought before the learned magistrate—certainly the whole point to which the whole evidence was directed at the time, no other evidence being given except as to five cases, I think, which were stated by the magistrate, of sales in the street—I agree with the conclusion arrived at by my Lord.

Appeal dismissed.

Solicitors: *Maitlands, Peckham,* and *Co.*; *Skewes-Cox, Nash,* and *Co.*

CROWN CASES RESERVED.

Tuesday, Oct. 24, 1905.

(Before Lord ALVERSTONE, C.J., WILLS, KENNEDY, WALTON, and CHANNELL, JJ.)

REX *v.* VASEY AND LALLY. (*a*)

Statute — Interpretation—Intention of statute—Suppression of words — Amending statute—Salmon river—Poisoning—Malicious Damage Act 1861—*Salmon Fishery Act* 1873—24 *&* 25 *Vict. c.* 97, *s.* 32—36 *&* 37 *Vict. c.* 71, *s.* 13.

Effect is to be given to the manifest intention of a statute, and if, in order to make that intention effective, it is necessary to suppress words in the statute, the words must be suppressed.

It was intended by sect. 13 *of the Salmon Fishery Act* 1873 *to extend the provisions of the Malicious Damage Act* 1861, *which make penal the poisoning of fish ponds and waters in which there is a right of private fishery, to salmon rivers. But, by reason of its faulty drafting, sect.* 13 *of the Salmon Fishery Act* 1873 *cannot be applied in its integrity to sect.* 32 *of the Malicious Damage Act* 1861.

Held, that sect. 13 *must be read so as to give effect to its obvious intention, and that that intention is to make poisoning a salmon river a criminal offence.*

CASE stated for the opinion of the Court for Crown Cases Reserved by Grantham, J.

1. John Thomas Vasey and Joseph Lally were convicted before me at the Midsummer Assizes 1905 for the county of Durham upon an indictment under 24 & 25 Vict. c. 97, s. 32, and 36 & 37 Vict. c. 71, s. 13, charging them with having "on the 18th day of June 1905, at the parish of Wolsingham in the county of Durham unlawfully and maliciously put a quantity of lime into Bradley Burn, a tributary of a certain salmon river called the river Wear there situate, with intent thereby to destroy the fish then being in the said tributary of the said salmon river."

2. Judgment was postponed, and the prisoners were discharged upon their own recognisances of bail to appear and receive judgment when called upon.

3. All the facts necessary to support the indictment were proved. But a question was raised as to the effect of the sections under which the indictment was laid.

4. Those sections are in the terms following :—

24 & 25 Vict. c. 97 :

Sect. 32. Whosoever shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam, floodgate, or sluice of any fishpond, or of any water which shall be private property or in which there shall be any private right of fishing, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water with intent thereby to destroy any of the fish that may then be or that may thereafter be put therein, or otherwise destroy the dam or floodgate of any millpond, reservoir, or pool, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for any term not exceeding seven years, or to be imprisoned with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

36 & 37 Vict. c. 71 :

The provisions of the 32nd section of the Malicious Injuries to Property Act(*a*), so far as they relate to poisoning any water with intent to kill or destroy fish shall be extended and apply to salmon rivers as if the words "or in any salmon river" were inserted in the said section in lieu of the words "private rights of fishery" after the words "noxious material in any such pond or water."

5. The question for the decision of the court is whether, having regard to the apparent inconsistency of its language, the latter section is effective to extend the provisions of the former section to salmon rivers, for, although there is no doubt as to the object of the section, it seems impossible to make the section of the amended Act read grammatically when altered as directed by the amending section.

Mitchell-Innes for the Crown.—The only way to give effect to the amending Act is to read it as if the section ended at the words "salmon rivers." It is a principle of construction that, if it is necessary to suppress words in a statute in order that the enactment may be intelligible, the words may be suppressed :

Maxwell on the Construction of Statutes, 4th edit., p. 344.

Words which are immaterial may be discarded :

Salmon v. *Duncombe*, 55 L. T. Rep. 446 ; 11 App. Cas. 627.

It is obviously intended by the Salmon Fishery Act 1873 to make penal the poisoning of salmon rivers just as the Malicious Damage Act 1861 makes penal poisoning ponds and waters in which there are private rights of fishery. Sect. 13, if construed strictly, would make sect. 32 of the Malicious Damage Act 1861 unintelligible. But inasmuch as the result of the suppression of the words after "salmon rivers" would be to make sect. 32 of the Malicious Damage Act 1861 read as if salmon rivers had been originally included in the statute, so, to give effect to the intended amendment, sect. 13 of the Salmon Fishery Act 1873 must be read as ending at the words "salmon rivers." He referred also to

Stone v. *Yeovil*, 34 L. T. Rep. 871 ; 1 C. P. Div. 691 ; *Curtis* v. *Stovin*, 60 L. T. Rep. 772 ; 22 Q. B Div. 513.

No counsel appeared for the prisoners.

Lord ALVERSTONE, C.J.—In this case, which has been very ably argued before us, we have no doubt that effect should be given to the principle of construction, the authority for which has been cited to us. If the effect of following strictly the directions of the amending statute would be to create a difficulty in construing sect. 32 of the Malicious Damage Act 1861, the words which create the difficulty may be disregarded. The authorities cover a long period, and the latest decision is embodied in the judgment of Lord Hobhouse in *Salmon* v. *Duncombe* (11 A. C., at p. 635). We have to see what it is that the amending statute requires to be modified. The object of the statute is abundantly clear ; it was intended by

(*a*) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

(*a*) The short title of this Act is now the Malicious Damage Act 1861 Short Titles Act 1896 (59 & 60 Vict. c. 14).

it to apply the provisions of the Malicious Damage Act 1861 to salmon rivers. To work out this intention, the draftsman adopted the method of prescribing words which were to be used in lieu of certain other words in the section, forgetting that the words "private rights of fishery," which occur in the earlier part of the section, are not descriptive of the property to be protected, but are only descriptive of the ponds and waters to which the statute is to extend. The offence is putting noxious material into such ponds or water. If the words of the amending section are applied strictly, it is quite clear that the manifest intention of the statute would be defeated, but if the instruction to insert the words "salmon rivers" in the place indicated is disregarded, the result aimed at by the amendment is attained.

WILLS, J.—The difficulty is purely formal. It is impossible to doubt what the intention of the statute is; it is to extend the Malicious Damage Act 1861 to salmon rivers. It is necessary to expand the previous antecedent provisions. The words "private rights of fishery" do not occur at all after "noxious material in any such pond or water," and I think that the draftsman must have had in his mind the class of property which is protected by the section. No meaning can be given to the section if it is amended as directed by the amending section, but, as the purview of the amendment can be gathered without reasonable doubt, it does not matter what words are omitted in order to make an intelligible enactment.

KENNEDY, J.—I agree.

WALTON, J.—I am of the same opinion.

CHANNELL, J.—*Quod hærit in littera hærit in cortice.* I am of the same opinion.

Conviction affirmed.

Solicitors: *Belfrage* and *Co.*, for *Halcro* and *Raine*, Sunderland.

Thursday, Nov. 9, 1905.

(Before Lord ALVERSTONE, C.J., WILLS, DARLING, WALTON, and JELF, JJ.)

REX *v.* PALIN. (*a*)

Criminal law—Falsification of accounts—False entry—Document not property of employer—Servant's book—Falsification of Accounts Act 1875 (38 *&* 39 *Vict. c.* 24), *s.* 1.

A person does not commit an offence under the Falsification of Accounts Act 1875 *by making a false statement in a document which is his own property. The act made penal under that statute is the falsification by a clerk, officer, or servant of an account in a book or document belonging to or in the possession of his employer.*

THE facts of this case, stated for the opinion of the court by the chairman of the Lancashire Quarter Sessions, were as follows:—

The prisoner was a gamekeeper whose duty it was to account to the head keeper for rabbits disposed of by him. He gave, on the 13th July 1905, to the head keeper a paper, purporting to be an account, on which he had entered twenty-two rabbits as having been delivered to a certain tenant of his master, whereas he had not delivered the rabbits as he pretended. He was indicted under the Falsification of Accounts Act 1875 (38 & 39 Vict. c. 24), s. 1 (2), for that he unlawfully, wilfully, and with intent to defraud did make and concur in making a certain false entry in a certain account, to wit, an account of certain rabbits, &c.

Counsel for the prisoner objected that, as there was no evidence that the account alleged to have been falsified was the property of the master, the prisoner could not be convicted under the statute.

The chairman overruled the objection, and, the prisoner having been convicted, stated the case.

The question for the court was whether the prisoner was rightly convicted on the indictment.

The prisoner was not represented.

Falsification of Accounts Act 1875 (38 & 39 Vict. c. 24), s. 1:

If any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud make or concur in making any false entry in or omit or alter or concur in omitting or altering any material particular from or in any such book or any document or account, then in every such case the person so offending shall be guilty of a misdemeanour.

George Elliott for the Crown.—It is not necessary to allege or to prove that the document falsified is the property of the master. The offence is making a false account, and a false account may be made by a clerk or servant in his own book, or on his own paper, and if it is a false statement, made for the purpose of deceiving his employers, he is liable under the statute. "Such book" mentioned in the latter part of the section means a book which belongs to the master, but the section then deals with "any document." He referred to 24 & 25 Vict. c. 96, ss. 81, 82.

Lord ALVERSTONE, C.J.—We are all agreed that this conviction cannot stand. Without expressing any opinion as to the effect of sect. 83 of 24 & 25 Vict. c. 96, which it is suggested is analogous, I would point out that that statute only deals with the mutilation of the books of corporations. In considering this case, we must bear in mind the preamble to the statute 38 & 39 Vict. c. 24, which clearly shows that the statute is intended to prevent the falsification by servants of their masters' books. Under the first part of the section the book or account must belong to the employer; but it is argued that, though the book which is mentioned in the second part must belong to the master, "any document" may apply to a document belonging to the servant. I do not think that that is the effect of the enactment.

WILLS, J.—I am of the same opinion. The earlier part of the section deals with exactly the same area of documents as the latter part, except that the word "documents" is used only in the latter part. It cannot be that, while for the purposes of the first part of the section it should be necessary to prove that the "book" is the property of the master, for the purposes of the

(*a*) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

second part the mere trivial paper may be the property of the servant.

DARLING, J.—I agree.

WALTON, J.—I concur.

JELF, J.—I concur.

Conviction quashed.

Solicitors: *W. E.* and *E. H. Tremellen*, for *Baldwin, Weeks*, and *Baldwin*, Clitheroe.

HOUSE OF LORDS.

Nov. 27 *and Dec.* 15, 1905.

(Before Lords MACNAGHTEN, ROBERTSON, and LINDLEY.)

MANCHESTER CARRIAGE AND TRAMWAYS COMPANY *v.* SWINTON AND PENDLEBURY URBAN DISTRICT COUNCIL. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Tramway—Purchase by local authority—Depot outside district of local authority—"Suitable to and used . . . for the purposes of" the undertaking—Liability to purchase—Tramways Act 1870 (33 *&* 34 *Vict. c.* 78), *s.* 43.

By sect. 43 *of the Tramways Act* 1870 *it is provided that "Where the promoters of a tramway in a district are not the local authority, the local authority . . . may . . . by notice in writing require such promoters to sell, and thereupon such promoters shall sell to them their undertaking, or so much of the same as is within such district . . . and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district."*

A local authority gave notice to a tramway company that they were required under the above section to sell to them so much of their works and undertaking as was within the district of the local authority.

The company were also the owners of a large depot situated outside the boundary of the district, which was found by an arbitrator to be "used with and suitable to" the undertaking within the district.

Held (reversing the judgment of the court below), that the local authority could be compelled to purchase the depot.

The words "within such district" qualify the word "undertaking," and not the words "lands, buildings, works, materials, and plant of the promoters."

APPEAL from a judgment of the Court of Appeal (Collins, M.R., Stirling and Mathew, L.JJ.), reported 21 Times L. Rep. 91, who had reversed a decision of Channell, J., reported 90 L. T. Rep. 795, upon a special case stated by an arbitrator.

The facts appear fully in the report of the case before Channell, J. and in the judgment of Lord Macnaghten.

Moulton, K.C., *Astbury*, K.C., *Eldridge*, and *Sandars* appeared for the appellants.

Balfour Browne, K.C., *Pickford*, K.C., and *G. Rhodes* for the respondents.

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Dec. 15.—Their Lordships gave judgment as follows:—

Lord MACNAGHTEN.—My Lords: Notwithstanding the decision of the Court of Appeal and a certain hesitation on the part of the learned judge of first instance, which led the Court of Appeal to think that they were about to "give effect to his real opinion" by overruling the judgment which he had pronounced, it does not appear to me that this case is one of any great difficulty. The question is raised on an award stated in the form of a special case. The arbitrator, who was appointed by the Board of Trade, was the late Sir Frederick Bramwell, a gentleman admittedly of extreme ability and of great experience in arbitrations of this sort. The parties to the controversy were, on the one hand, the Swinton and Pendlebury Urban District Council and, on the other, the Manchester Carriage and Tramways Company Limited, who were (within the meaning of the Tramways Act 1870) promoters of a tramway in the district of the Swinton Council. The tramway under statutory powers and obligations was worked by the tramway company in connection with tramways constructed by the Salford Corporation, and by them leased to the company. In this way the tramway in question formed part of a continuous or through line to Manchester. Adjoining the Salford main line about a mile or three-quarters of a mile from the limits of the district of the Swinton Council the tramway company had two depots, known as the Ford-lane depot and Church-street depot. On the 22nd Jan. 1901 the Swinton Council duly gave notice to the tramway company that they were required to sell to the council, under the conditions and in the manner provided by sect. 43 of the Tramways Act, so much of their undertaking as was within the district of the Swinton Council. On receiving the prescribed notice, the promoters are bound to sell to the local authority "their undertaking or so much of the same as is within" the "district," and the purchasing authority is bound to pay "the then value"—that is, I think, the value at the date of notice (exclusive of any allowance for past or future profits of the undertaking or any compensation for compulsory sale or other consideration whatever) of the tramway and all lands, buildings, works, material, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district. The value is to be determined, in case of difference, by arbitration. What the arbitrator has to find is the value to the promoters, not the value to the purchasing authority. Nor are the promoters under any obligation, as the Court of Appeal seems to have thought, to make a good title to the adjuncts and accessories for which the purchasing authority has to pay. If their title be infirm, if their tenure be insecure, or their possession precarious, the arbitrator, no doubt, would take that into consideration in determining value, but the purchasers must pay the value of their adjuncts and accessories to the promoters whatever it was at the date of the notice, even although they may be of little or no value to the purchasing authority. The notice of Jan. 1901 was given at the instance of the Salford Corpo-

ration. Their lease to the tramway company was then about to expire. On its expiration they proposed to work a combined system of tramways through Swinton and Salford as one undertaking, and to work it by electricity instead of using horse-power. As the persons really interested in the purchase under an arrangement sanctioned by Parliament, they represented the Swinton Council in all the negotiations and proceedings consequent upon their notice to the tramway company. After a protracted hearing of much evidence, the arbitrator made his award on the 28th May 1903. The award sets out with minute and perhaps unnecessary detail the relative Acts of Parliament and orders, and the result of the evidence as to the two depots. And then there is a passage which seems to me to be not immaterial, having regard to the view taken by the Court of Appeal—"and pay for the actual tramways within their districts." But they contended that under sect. 43 they were not compellable to purchase either the Ford-lane or the Church-street depot, on the ground that, even if such depots or either of them were suitable to and used by the tramway company for the purposes of their tramways, they were both of them situated geographically without the district of the council, and that the said section only made it obligatory upon the local authority to purchase that which was within their district. Counsel for the tramway company contended that, if such depots were in fact suitable to and used with their undertaking within the council's district, the council were under the said section compellable to purchase them, although the depots themselves were outside the district. "I was asked," the arbitrator adds, "by counsel for the council to state my award in the form of a special case for the opinion of the court on this point." Now, stopping there, it seems to me that nothing can be plainer than this—that one question, and one question only, was intended to be raised by the special case. It is quite true that the arbitrator does not follow throughout this introductory statement the exact language of the section. In the earlier part he follows it literally. In the latter part he substitutes the expression "used with" for the words "used for the purpose of." In my opinion, that is a mere slip—a very natural slip—a slip which the arbitrator, if his attention had been called to it, would have been entitled to correct. Nor can I see that in this particular case there can be any difference in meaning between the two expressions. If a thing is suitable to and used with a tramway I am unable to imagine how the person or company so using it can avoid using it for the purposes of the tramway. By what perverse ingenuity could it be used otherwise? Then we come to the award. The arbitrator awards and finds "as a fact that the Ford-lane depot, although in a limited sense used with the undertaking of the tramway company within the district of the council, is not suitable to such undertaking." Then he adds: "I further award and find as a fact that the Church-street depot was used with and is suitable to the said undertaking." Then, following accurately the words of the section he finds the value of the tramways and "of all lands, buildings, works, materials, and plant of the Manchester Carriage and Tramways Company suitable to and used by them for the purposes of the undertaking." He finds separately (*a*) the value of the tramway lines; (*b*) the value of the land and buildings constituting the Church-street depot and the tramway lines therein and the tramway line in Church-street leading into the depot; and (*c*) the value of the fixtures and fittings in and upon the Church-street depot as per the valuation thereinbefore referred to. The total was 49,006*l*. But the arbitrator adds that, should the court be of opinion that the council were not compellable to purchase or pay for the Church-street depot, then the last two items, which amounted together to 24,317*l*., were to be deducted, and the value was to be reduced to 24,689*l*. The learned judge of first instance answered the question in favour of the tramway company. The answer of the Court of Appeal was in favour of the Swinton Council. The learned Lords Justices of the Court of Appeal inferred from the variation in language to which I have referred that there was some ambiguity in the award, and that the arbitrator had it in his mind to submit to the court some question of law which he certainly did not formulate, and which the learned counsel for the Swinton Council candidly admitted that he did not ask him specifically to state. What that question could possibly have been I am unable to imagine. The question of user was a mere question of fact. The question of suitability was a mere question of fact. Both those questions had been answered by the arbitrator, and answered, your Lordships will observe, as questions of fact in favour of the Swinton Council. The only question which the arbitrator reserved—the question depending on geographical position—was not argued seriously at your Lordships' Bar. It was determined in favour of the appellants by the learned judge of first instance. The Court of Appeal apparently did not think it worth discussing. And, speaking for myself, I do not think that it is open to argument. The learned Lords Justices in the Court of Appeal seem to have been much impressed with the consideration that the arbitrator was a gentleman of much experience and ability. They thought it most unlikely that he should have made a slip or a blunder, as they termed it, and therefore they came to the conclusion that he must have meant something by the change in his language. Well, persons of the greatest experience and ability do make slips sometimes, and I must say that I should have thought it much more likely that a man of experience and ability should make a slip than that anybody of common sense in a serious document, and after much consideration, should present to the court a conundrum in the form of a cryptogram. It is not, perhaps, uninstructive to find that both the learned and experienced counsel in their address to the arbitrator made just the same slip, if it be a slip, and that the learned counsel for the Swinton Council was, if I may venture to say so, the first offender. I therefore move your Lordships that the order appealed from be reversed, and that the order of Channell, J. be restored with costs both here and below.

LORD ROBERTSON.—My Lords: It is certain that in this special case the arbitrator directly, expressly, and formally states one point for the opinion of the court. It is certain that no other

point is directly, expressly, or formally stated by him, or indeed stated at all. The most that can be said, or has been said, is that it is to be inferred from his having mentioned certain things which would be relevant to the consideration of another question, that he really intended to submit that other question. To this there seem to me to be several answers, and the first is that the arbitrator has shown by the structure of his special case that his way of stating a point for decision was to state it directly or expressly, and I must say that I think this conclusive. But, secondly, even if it were permissible to infer that the arbitrator really intended to submit a further point from his having mentioned things relevant for its discussion, it must be remembered (and has been forgotten) that this is not merely a special case, but an award, and many things are relevant to the award, and of a kind usually inserted in an award, which may not bear on the point submitted for decision. This special case is presented not under sect. 19. of the Arbitration Act, which provides for special cases pure and simple, but under sect. 7 (*b*), which provides for awards being stated in the form of a special case. Now, it cannot be affirmed of all that is set out in this special case that it is relevant, either to the question admittedly stated, or to the question which it is now sought to evolve out of it; and the reason is that the document serves the double purpose of award and special case. Even if all the passages in the award which are founded on by the respondents could be pressed into their service, they are ultimately confronted with the difficulty that the arbitrator has decided that the depot was suitable to the use of the undertaking. Now, it is against this conclusion that the respondents invoke the consideration of distance and inaccessibility, and this conclusion is determined against them in the exact terms of the statute. I am unable to think that there is any veiled importance or significance in the use of the word "with" in the award. There is no limit or suggestion in the award of any intention in this abbreviation, and in the proceedings the word "with" was treated by both parties as convertible with the more ample expression of the statute. I have only to add that in my opinion the words "within such district" qualify the word "undertaking," and not the words "lands, buildings, works, materials, and plant of the promoters." The reading which I adopt is the natural reading, and the reason of the thing is adverse to the opposite view, for it cannot be suggested that stables, which might be close to the district, although outside it, should be excluded from the clause, while the opposite construction breaks down entirely over the words "materials and plant." I am for reversing the judgment appealed against.

Lord LINDLEY.—My Lords: I am also unable to agree with the Court of Appeal in this case. The arbitrator here was not stating a case for his guidance before making his award; he made an award and set out the facts which he considered material in order to make it intelligible and satisfactory. But he made it, as he had power to do, subject to a question of law, which he was asked to state, and did state in very clear terms, in order that it might be decided by the court. He was not requested to state, and did not in fact state, more than one question for such decision; and that question was whether the Church-street depot, which was outside the Swinton district, had to be paid for. The question submitted by the arbitrator to the court for decision has been properly decided, and this is now scarcely disputed. But your Lordships are asked to say that the Swinton District Council desired to raise another point of law, and that the arbitrator has stated the facts in such a way as to show that he intended to raise another question—namely, whether the Church-street depot could in point of law be said to have been "suitable for and used by the company for the purpose of the company's undertaking." Counsel frankly admitted that the arbitrator was never asked to refer any such question to the court, and I cannot myself see that he has in fact done so. The question of suitability is one of fact, and the arbitrator has found that question in favour of the selling company. It requires no little ingenuity to discover that such a question can be regarded as a question of law; but, assuming that it can be so regarded, it is, in my opinion, manifest that no such question was intended by the arbitrator to be referred to the court, and that he has not in fact stated any such question for its decision. I am convinced that the words "used with" in the award are only an abbreviation for "used for the purposes of," and that the arbitrator used the two expressions not intentionally by way of contrast, but inadvertently as synonymous. The appeal ought to be allowed with costs in the usual way.

Order appealed from reversed. Order of Channell, J. restored. Respondents to pay the costs both here and below.

Solicitors for the appellants, *Ayrton, Biscoe* and *Barclay*, for *Brett, Hamilton*, and *Tarbotton*, Manchester.

Solicitors for the respondents, *Trass* and *Taylor*, for *L. C. Evans*, Salford.

Monday, Dec. 18, 1905.

(Before the Earl of HALSBURY, Lords MACNAGHTEN and ROBERTSON.)

KIRBY *v.* ASSESSMENT COMMITTEE OF HUNSLET UNION AND OTHERS. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Poor rate—Assessment—Buildings with machinery not part of the freehold—Tenant's machinery.

Buildings occupied as engineering works contained machines which formed no part of the freehold, but were placed there for the purpose of making, and did in fact make, the buildings fit for the purpose for which they were used. The machines were not affixed to the freehold, and were admitted to be "tenant's machinery."

On an appeal to quarter sessions by the tenant against a poor rate the court held that the correct basis of assessment was to ascertain what was the rent which a hypothetical tenant would give for the works as a combination of land, buildings, and machinery, on a demise, which included the machinery, so that he would get, as part of the consideration for the rent the

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

right to use the machines upon the premises during his tenancy, and that on that footing the machines would be properly taken into account as enhancing the rental and the rateable value of the buildings.

Held (affirming the judgment of the court below) that this was the correct basis of assessment.

APPEAL from a judgment of the Court of Appeal (Collins, M.R., Romer and Mathew, L.JJ.), reported 93 L. T. Rep. 383, who affirmed a judgment of the King's Bench Division (Lord Alverstone, C.J., Kennedy and Ridley, J.J.), reported 93 L. T. Rep. 32, upon a special case stated by the Recorder of Leeds upon an appeal to quarter sessions against a poor rate.

The facts appear briefly in the headnote above, and the special case is set out in full in the reports in the courts below.

Balfour Browne, K.C. and *W. C. Ryde* appeared for the appellant, and contended that a payment for the hire of machinery was not "rent." The machines in this case are not attached to and do not form part of the building. Personalty was exempted from rating by the Parochial Assessments Act 1836 (6 & 7 Will. 4, c. 96) and 3 & 4 Vict. c. 89. The court below thought that the case was governed by the decision in *Tyne Boiler Works Company* v. *Overseers of Longbenton* (55 L. T. Rep. 825; 18 Q. B. Div. 81), but that case applies a fallacious test. The learned recorder also relied on *Reg.* v. *Haslam* (17 Q. B. 220), but that case was virtually overruled by *Chidley* v. *West Ham* (32 L. T. Rep. 486). See also

Reg. v. *Lee*, 13 L. T. Rep. 704; L. Rep. 1 Q. B. 241;

Gifford v. *Chard Union*, 63 L. T. Rep. 249, affirmed on appeal, 6 Times L. Rep. 431;

Crockett v. *Northampton Union*, 72 L. J. 320 K. B.

Rating must be based on the rent, not in the use to which the rateable hereditament is put. *R.* v. *Hogg* (1 T. R. 721; 1 R. R. 374), *R.* v. *Birmingham Gas Company* (6 A. & E. 634; 45 R. R. 572), and *Reg.* v. *Guest* (7 A. & E. 951; 45 R. R. 842), which have been referred to, were all decided before the Act of 1840. The first case after that Act was *Reg.* v. *Southampton Docks* (14 Q. B. 587).

Cripps, K.C., *J. Scott Fox*, K.C. and *W. J. Jeeves*, who appeared for the respondents, were not called on to address their Lordships.

At the conclusion of the argument for the appellant their Lordships gave judgment as follows:—

The Earl of HALSBURY.—My Lords: I am of opinion that the judgment appealed against is perfectly right. Considerable difficulty has, doubtless, been caused through the confusing of two different things. The question of what is, and what is not, attached to the freehold is fraught with important consequences in our law; and undoubtedly if the statute had been always understood to refer simply to the rateable value of the four walls of the building and its roof, I could understand a great deal of the argument which has been suggested to us. It would have been, I should have thought, extremely difficult to arrive at the proper assessment of such things, because the business of human life is not conducted by putting an hypothesis of what a thing would fetch if it were occupied otherwise than as it is; and the problem which the overseers have to solve in arriving at the assessment is difficult enough without putting the additional difficulty upon them, that they are to try to find out what a building would fetch in the shape of rent if it was different from what it is, or if it were used differently from what it is, or if it were furnished differently from what it is. It is enough, to my mind, to say that for a period of certainly more than half a century, erroneously according to the learned counsel who last addressed us, but undoubtedly, judges of the greatest eminence have recognised the fact that although a particular set of machinery may, by reason of the peculiarity of the manufacture or what not, be not affixed to the freehold so as to become part of the land or hereditament, yet if the thing is being so occupied, if the buildings are being so employed, and the machinery in those buildings is being so used as to make the factory appropriate to the particular industry carried on therein, the machinery itself is not to be disregarded in assessing the value of that thing, occupied as it is and used as it is, with the accommodation and furniture which is necessary for it to carry on the manufacture that is there being conducted. If that is so, it seems to me that we have nothing to do with the idea which prevailed in the mind of the learned counsel—to speculate upon what particular sort of contracts of tenancy would be likely to be made between the landlord and the tenant, still less with what contracts are actually made between the landlord and the tenant. The overseer has a comparatively simple problem to solve, although it is difficult enough sometimes; he sees the place being conducted as a brewery or an ironfoundry or what not; he looks at the buildings, he looks at the furniture which is necessary for carrying on the business as a brewery or foundry; he does not in his own mind analyse, and to my mind he ought not to analyse, what would be likely to be the initial arrangements between the intending brewer and the owner of the freehold to see who should provide this or that engine or what not; but he looks at the buildings as they are, and as they are being occupied, and as they are being used, and he says to himself, "Well, looking at the whole of the place, such and such is the rent which would probably be paid by a tenant from year to year for such an establishment as this." And in that he does not, and ought not, to strip the whole of the place of everything but the four walls which contain the whole system of manufacture therein contained, and simply value either the ground upon which the building is placed or the four walls and roof which are the containing elements of all the manufacture that goes on in it. It seems to me that the difficulty which would be imposed upon the overseer would be insurmountable if he were called upon to say, "Well now, before I can value the hereditament used as it is, I must make an inquiry and see how much the landlord has agreed to do and how much the the tenant is going to do." In the present case it is applied to the question of machinery, but I do not know that you could limit that system of assessment even to the question of machinery. You might have to go into a great variety of other things, and find out what accommodation was provided otherwise, by the landlord for this,

that, and the other. If that were so, I think that the Parochial Assessment Act would become a dead letter, and you would have a fanciful arrangement of assessment according to the particular fancy of each overseer as to what the landlord ought or ought not to do, or what the tenant ought or ought not to insist upon, which, to my mind, would certainly be the reverse of doing that which the Parochial Assessment Act was supposed to have done—namely, to simplify the duties of the overseers. I decline myself to enter into what I may call the original equities which might have guided this matter. It is enough for me that a long series of decisions for certainly half a century have established the bald proposition which is all that I am insisting upon—namely, that although the machinery may not be part of the freehold, it yet is to be taken into account, and in saying that, I do not want to muffle it in a phrase, but what I mean by that is that to increase the amount of the rate which is exacted from the tenant you may enter into that question and form a judgment upon it although, as a matter of fact, the machinery may not be attached to the freehold. That is all that I mean to decide in this case; and I believe that it is enough for the decision of this case. I think that the new point which has been raised now—the question having been debated very considerably in a great number of parishes in this country—and has never been raised before—namely, that you must first ascertain how much the tenant is going to get from his landlord, before you can arrive at the assessment, may be dismissed as undoubtedly being necessarily involved in the decisions which have been come to before now, and necessarily disregarded. To my mind therefore, the whole question is reduced to a very simple one: Can you or can you not enhance to any extent the amount of the assessment which you make upon buildings in which there is machinery adapted for the purpose of the manufacture where the manufacture is carried on in them, although the machines do not, as a matter of actual fact, form part of the freehold of the buildings. I am of opinion that, after the long line of decisions which have been arrived at, you can do so. Under these circumstances, it appears to me that this appeal ought to be dismissed with costs.

Lord MACNAGHTEN.—My Lords: I entirely agree. I should only like to remind your Lordships of what was said by Lord Campbell, C.J. in the case of *Reg.* v. *Southampton Dock Company* (*ubi sup.*). After the passage, which has already been read to your Lordships, cited from another case, which was in fact a repetition of what was said in *Rex* v. *Birmingham and Staffordshire Gas Light Company* (*ubi sup.*) and *Reg.* v. *Guest* (*ubi sup.*), which have also been referred to, and are cited by his Lordship, he goes on to say: "In this last case" (*Reg.* v. *Guest*) "all the arguments pressed upon us to show that such fixtures are stock-in-trade, and not to be taken into account in a rate on the realty were urged, but urged in vain. It is of the greatest importance that a rule upon such a subject, which has been laid down and acted upon, should be adhered to; and we see no reason why this rule should be now disturbed." That was a judgment delivered more than fifty years ago.

Lord ROBERTSON.—My Lords: I entirely agree.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Vincent* and *Vincent*, for *Day* and *Yewdall*, Leeds.

Solicitors for the respondents, *Pitman* and *Sons*, for *Elmsley*, *Son*, and *Smith*, Leeds.

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, Nov. 16, 1905.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

KENT AND ANOTHER *v.* FITTALL. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Registration of voters—Borough franchise—Inhabitant occupier—Rooms in house let to different tenants—Landlord resident in the house—No control in fact exercised or claimed by landlord over tenants of rooms—Occupier or lodger—Representation of the People Act 1867 (30 *&* 31 *Vict. c.* 102), *ss.* 3, 4, 61—*Parliamentary and Municipal Registration Act* 1878 (41 *&* 42 *Vict. c.* 26), *s.* 5.

Where the rooms in a house are let out to separate tenants in such a way as to make a tenant primâ facie *entitled to a vote as an inhabitant occupier, such tenant is not prevented from being so entitled to a vote by the mere fact that the landlord resides in the house.*

The question whether the landlord so residing in the house has such control over the rooms demised by him as to make the occupation of the tenant to be that of a lodger is a question of fact.

Decision of the Divisional Court (*Lord Alverstone, C.J., Wills and Darling, JJ.*) *reversed.*

APPEAL from a decision of the Divisional Court upon a case stated by the revising barrister for the borough of Devonport upon his decision that Frank Herbert was an inhabitant occupier of a dwelling-house, and not a lodger, and that his name and the names of 2595 other persons similarly situated should be retained upon the occupiers' list (Division 1) for the parish of Devonport.

The case stated was as follows:—

1. At a court holden before me, Charles Alexander Spencer Garland, barrister-at-law, duly appointed to revise the lists of voters for the Parliamentary borough of Devonport, Henry Hartnell duly objected to the name of Frank Herbert being retained in the occupiers' list (Division 1) for the parish of Devonport on the ground—"That you have not occupied as owner or tenant the premises named in the said list for twelve months immediately preceding the 15th July in this year."

2. The facts of the case as found by me were as follows: Frank Herbert occupies as his residence, and has done so for the necessary qualifying period, under

(*a*) Reported by E. MANLEY SMITH and W. W. ORR, Esqrs., Barristers-at-Law.

a verbal hiring agreement, from week to week at a rent of 3s. 8d. per week, one unfurnished tenement room on the third floor of a house, No. 8, Morice-square, such room constituting a separate dwelling and being used by him for all purposes of living, and being separately occupied by him as a dwelling or dwelling-house; and he has let to him therewith such use of the passages and staircases as is necessary and convenient to the access to and enjoyment of the said dwelling.

3. Frank Herbert's landlord is one Charles John Weevil, to whom the said premises, No. 8, Morice-square, are demised on a yearly tenancy by the owner, one Mrs. Waterhouse.

4. The said Charles John Weevil resides in a separate and independent tenement or set of rooms upon the said premises.

5. There are four other occupiers under agreements of hiring with the said Charles John Weevil residing upon the premises under exactly similar conditions as the said Frank Herbert, save that their tenements are upon different floors and the number of rooms varies. There is also let to Frank Herbert and the other occupiers the use in common of the courtyard, w.c., and washhouse situate therein.

6. Charles John Weevil occupies a set of rooms similarly with the other occupiers of the said house, and so far as their relationship *inter se* as residents is concerned, Charles John Weevil occupies no different position than he would if he were not the landlord.

7. Frank Herbert has the exclusive use, occupation, and enjoyment of his said room or dwelling, and the landlord neither does nor has by agreement or otherwise any right to enter or in any way interfere with, or exercise any control or dominion over the said room, or the joint user of the portion of the said premises so used in common as aforesaid, nor has he any personal relationship with Frank Herbert, nor does he nor has he any right to exercise any control or dominion over him in his occupation and user aforesaid.

8. The said landlord's use of and right of control over the parts of the said premises so used in common as aforesaid is identical with that of his tenants, and he does not reserve to himself or exercise any right of general control or dominion or mastership over the said premises. The cleansing of the passages and staircases is shared in common by those using the same, and no service is rendered by the landlord to his tenants.

9. Frank Herbert has a key which enables him at all times to open the front door and obtain access to the house and his dwelling aforesaid, and the landlord reserves to himself no right to otherwise fasten such door.

10. The landlord is obliged by his contract with the owner to keep the premises in repair.

11. The house is rated as a whole in the name of the said Charles John Weevil, who has duly paid the rates therefor, and whose name appears as the rated occupier in the rate book. The said Frank Herbert is not rated, and has never demanded nor required to be rated in respect of his dwelling aforesaid. His name appears upon the rate book for Oct. 1904, in a column which is numbered 24, as appears upon the copy sheet from the rate book annexed hereto. It does not appear in the rate book for April 1905. Copies of these rates are annexed hereto.

12. The names of 2595 others on the occupiers' list, whose names and places of abode (as appearing in column 2 of the list) are set out in scheds. 1 and 2 attached hereto, were objected to under similar circumstances, save that the number of rooms constituting the separate dwelling in each case may vary from one to two, three, or four, as the case may be, and floors upon which they are situate be different, and save that as regards the persons objected to in the township of East Stonehouse (where the objections relate only to the Parliamentary franchise), their names appear upon the rate book as occupiers, together with the landlord's name, who alone is the person actually rated and paying rates in respect of the particular house, and save that in some cases the resident landlord is himself the owner of the premises, and save that the terms of the demises to the resident lessee landlord may vary in length, and save that where two or more rooms are occupied by one person, they sometimes do not directly inter-communicate nor are they always on the same floor. But the above-mentioned distinctive circumstances are admitted by both sides to be, and are treated by me as being, immaterial so far as concerns the principle covering the various cases. A copy of the rate for the East Stonehouse parish is annexed hereto.

13. It was contended for the appellants that Frank Herbert was not an inhabitant occupier of a dwelling-house as tenant or owner, but a lodger by reason of an alleged control or right of control on the part of the resident landlord, and by reason of the said tenement not being separately rateable. I held such contention to be wrong, and found that neither in fact nor in law was there on the part of the landlord any general control or right thereto over the said house or its occupants, and that the relative position of the said occupants to the landlord was the same as if he did not reside upon the premises, and that in fact and in law the said tenement dwellings were separately rateable, and I decided that Frank Herbert was an inhabitant occupier of a dwelling-house and entitled to be upon Division 1, and allowed his name and those of the 2595 other persons to stand upon such occupiers' list (Division 1).

14. Due notice of appeal from my decision was given in each case, and I ordered the appeals in all the cases to be consolidated.

15. If the court be of opinion that my decision was wrong, then the register is to be amended by expunging the said names from the lists.

The Representation of the People Act 1867 (30 & 31 Vict. c. 102) provides:

Sect. 3. Every man shall, in and after the year one thousand eight hundred and sixty-eight, be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in Parliament for a borough, who is qualified as follows (that is to say): (2) Is on the last day of July in any year, and has during the whole of the preceding twelve calendar months been, an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough; and (3) has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises.

Sect. 4. Every man shall, in and after the year one thousand eight hundred and sixty-eight, be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in Parliament for a borough, who is qualified as follows (that is to say): (2) as a lodger has occupied in the same borough separately and as sole tenant for the twelve months preceding the last day of July in any year the same lodgings, such lodgings being part of one and the same dwelling-house, and of a clear yearly value, if let unfurnished, of ten pounds or upwards; and (3) has resided in such lodgings during the twelve months immediately preceding the last day of July, and has claimed to be registered as a voter at the next ensuing registration of voters.

Sect 61. The following terms shall in this Act have the meanings hereinafter assigned to them, unless there is something in the context repugnant to such construction (that is to say): "dwelling-house" shall include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor.

The Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26) provides:

Sect. 5. In and for the purposes of the Representation of the People Act 1867, the term "dwelling-house" shall include any part of a house where that part is separately occupied as a dwelling, and the term "lodgings" shall include any apartments or place of residence, whether furnished or unfurnished, in a dwelling-house. For the purposes of any of the Acts referred to in this section, where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part. The interpretation contained in this section of "dwelling-house" shall be in substitution for the interpretation thereof contained in section sixty-one of the Representation of the People Act 1867, but not so as to affect any of the other provisions of the said Act relating to rating.

The Registration Act 1885 (48 & 49 Vict. c. 15) provides:

Sect. 18. The forms and instructions contained in the second and third schedules to this Act shall be used and observed in all cases to which they apply, and shall be substituted in all such cases for the forms, instructions, and directions contained in the schedules to the Parliamentary Registration Act 1843, the County Voters Registration Act 1865, the Representation of the People Act 1867, the Parliamentary and Municipal Registration Act 1878, and the Representation of the People Act 1884, but a disregard of any form or instruction shall not of itself invalidate any list, notice, or other thing.

In the third schedule to this Act and in the third schedule to the Registration Order 1895 there is given a form—Form A (Rogers on Elections, 16th edit., p. 690)—of requisition by overseers to owners of property in a Parliamentary borough, requiring the owners of property in the borough to give the situation and description of every dwelling-house forming part of their property in the borough, and to give the names of every man who is an inhabitant occupier of any such dwelling-house; and in the instructions for filling up this form, the last instruction, No. 16, provides:

If the landlord of a house let out in separate tenements lives in the house, he must not return the names of the occupiers of tenements in that house.

There is the same provision in the instructions given in the corresponding form for Ireland—Form No. 34 in the first schedule to the Parliamentary Registration (Ireland) Act 1885 (48 & 49 Vict. c. 17)—with the variation that the words "need not return the names" are substituted for the words "must not return the names."

Nov. 7.—*Dickens*, K.C. (*W. H. Clay* with him) for the appellants.—The question is whether the inmate of this room was inhabiting a separate dwelling. The inhabitant householder and lodger qualifications first arose under the Representation of the People Act 1867. Sect. 3 entitled a man to be registered as a voter who for the requisite period had been "an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough," and sect. 4 gave the lodger franchise in boroughs to a man who had occupied the same lodgings separately and as sole tenant. By sect. 61 "dwelling-house" was defined, but that definition has been replaced by the definition in sect. 5 of the Parliamentary and Municipal Registration Act 1878. Sect. 3 of the Representation of the People Act 1884, which gives the service franchise, also recognises the importance on this question of the residence of the landlord. Sect. 18 of the Registration Act 1885 provides for the enactment of forms, and Form A in the schedule to the Act and in the schedule to the Registration Order 1895 provides, in par. 16, that "If the landlord of a house let out in separate tenements lives in the house, he must not return the names of the occupiers of tenements in that house." That shows that, although the owner is required to fill up the names of all inhabitant occupiers, if he resides in those premises himself, he must not do so, and "house" there does not mean the subordinate part which the separate tenant occupies, but the structure in which the separate tenements are all let out. The case finds that there was let to this inmate with the room such use of the passages and staircases as was necessary for the access to and enjoyment of the dwelling. There was therefore no demise of the passages, and the tenant had no occupation of them. He had a mere right of passage, of ingress and egress to his room, and he could not interfere with trespassers. The possession of these passages and the legal control remained in the landlord as he had not parted with them. He was not merely residing in a room in the house, but was residing in the house, which is the important distinction, and by the fact that he had not demised the passages, &c., he retained in law a general control and dominion over the house. The cases establish these propositions: If the landlord lets out the whole premises in apartments and does not reside himself and does not exercise any control himself, then the inmates are inhabitant householders, and not lodgers. If he does not reside in the house, but exercises some control, then it is a question of degree as to whether the amount of control is sufficient to show that he retains for himself the mastership of the house. But if—as in the present case—he resides in the house and retains a possessory title over the rest of the house, giving to the inmates a mere right of ingress and egress, then the inmates are lodgers only, and it is immaterial whether in fact he reserves as between himself and the tenant any control, because the law gives him such control. The facts here show that the landlord did retain control as master. In *Toms* v. *Luckett* (10 L. T. Rep. O. S. 264; 5 C. B. 23, at p. 38) Maule, J. said: "The question depends upon whether or not the owner of the house resides upon the premises, retaining his quality of master, and reserving to himself the general control and dominion over the whole. If he does, the inmate is a mere lodger." The question was fully considered by the Court of Appeal in 1881 in the three cases of *Bradley* v. *Baylis*, *Morfee* v. *Novis*, and *Kirby* v. *Biffen* (46 L. T. Rep. 253; 8 Q. B. Div. 195), in which the same question arose, as to whether the inmates were lodgers or inhabitant occupiers. In the first two the landlord resided in the house, and in the first he exercised a general control, while in the second there was no such allegation, and in these cases the inmate was held to be a lodger only. In the third case the landlord neither resided nor had any control over the house, and the claimant was held to be an occupying tenant. *Ancketill* v. *Baylis* (48 L. T. Rep. 342; 10 Q. B. Div. 577) and the decision of the Irish Court of Appeal in *Hogan* v. *Sterrett* (20 L. Rep. Ir. 344) support the same

conclusion that where the landlord resides and has legal control the inmates are lodgers. The only case which can be suggested against this view is *M'Laughlin* v. *Chambers* (1896) 2 I. R. 497), in which the Court of Appeal in Ireland held that to prevent the inmates being occupiers the landlord must not only reside, but must reside in such a way as to retain his quality of master. That case is really not against the appellants, as it was a case of tenements let out in flats, and, moreover, on the facts in this case the landlord did retain his quality of master. *Morfee* v. *Novis* (*ubi sup.*) is conclusive, as in that case there was no finding at all that there was any control except the control which the landlord had by reason of his keeping possession of the rest of the house.

Foote, K.C. (*G. W. Ricketts* with him) for the respondent.—The revising barrister's decision upon the facts as he has found them is correct. The contention for the appellants is, and must be, that it was not open to the revising barrister to find as he has done. His findings are largely based upon the decision in *M'Laughlin* v. *Chambers* (*ubi sup.*), and, in stating the facts as he has found them, he has followed that case as nearly as might be, and the circumstances as to the general control must be taken as he has found them. That case has expressly decided that the revising barrister was not bound to find from the mere fact of the landlord's residence alone that the relations of the parties were those of lodger and landlord. It shows that it was open to him to find either way, either that the inmates were lodgers or that they were inhabitant occupiers: (per Palles, C. B., at p. 511). All that the respondent has now to establish is that the revising barrister was not bound from the mere fact of the residence alone to find that the inmates were lodgers. It was open to him to find that they were lodgers or occupiers, and he has found that they were occupiers. The appellants' argument is that where the landlord resides in the house and has not demised the passages, &c., that fact by law reserves to him such an amount of control as to make the inmates lodgers. That argument would have just the same weight if the landlord did not reside in the house at all. If he resided elsewhere and demised these rooms in the same way, not letting the passages, &c., then his legal position and the test put as to his being the proper person to sue for trespass would be exactly the same. Therefore that cannot be the test. The residence of the landlord in the house is not the infallible test, and the decision in *Bradley* v. *Baylis* (*ubi sup.*) shows that. The test is, Has he got in fact—not does he exercise—any control? *M'Laughlin* v. *Chambers* (*ubi sup.*) proves that you may still have a landlord residing and yet such an absence of control that the inmates of the rooms may be occupiers. The revising barrister has found that neither in fact nor in law was there on the part of the landlord any general control or right thereto over the house or its occupants, and that the position was the same as if he did not reside in the house; and also that the landlord's use of and right of control over the parts used in common was the same as that of his tenants, and that he did not retain for himself or exercise any right of general control or mastership over the premises. If those findings mean anything, they mean that the landlord had no more right to interfere in the house than any of the other tenants. *Morfee* v. *Novis* (*ubi sup.*) is distinguishable on this ground, that there the tenant only had the exclusive use and not the occupation of the room. In *Toms* v. *Luckett* (*ubi sup.*), on which the appellants rely, there were these qualifying words: If he reside "retaining his quality of master and reserving to himself general superintendence and control." If the appellants are right, those words would be superfluous, and it would be sufficient to have said "if he reside," because "reside" would in law imply all the rest. That case shows that residence of the landlord is not sufficient, and that in order to make the inmates lodgers the landlord must not only reside, but must retain his quality of master and exercise general control, which it is expressly found as a fact that the landlord did not do. *M'Laughlin* v. *Chambers* (*ubi sup.*) applies precisely in this case, as the revising barrister has drawn the same conclusion as a matter of fact. Though these houses are ordinary houses, if the appellants succeed, it will be almost impossible to distinguish the case of ordinary flats, as in law it is difficult to see any distinction.

Dickens, K.C. in reply.

The COURT (Lord Alverstone, C.J., Wills and Darling, JJ.) allowed the appeal. Leave to appeal was given. Register to be amended by striking out all the names.

From this decision the respondent appealed.

Foote, K.C. (*G. W. Ricketts* with him) for the appellant.—The real question raised in this case is whether persons occupying rooms as dwelling-houses in a building are of necessity prevented from being put on the list of Parliamentary voters as inhabitant occupiers in every case in which the landlord resides on the same premises with them. It is said that where the landlord resides on the premises such occupiers can only be entitled to vote as lodgers. The franchise of an inhabitant occupier of a dwelling-house was created under sect. 3, sub-sect. 2, of the Representation of the People Act 1867. The lodger franchise exists under sect. 4 of the same Act. The meaning of "dwelling-house" in this connection is defined by sect. 5 of the Parliamentary and Municipal Registration Act 1878. Rooms inhabited in a building may be inhabited by an "inhabitant occupier" or by a "lodger" according to circumstances. The question depends on the control exercised over the building by the landlord. I submit that the findings of fact in the case stated by the revising barrister that there is not on the part of the landlord any general control or right thereto over the house or its occupants are conclusive in my favour, and show that the appellant is an inhabitant occupier. On the other side it is contended that the fact of the landlord residing in the house is in itself conclusive evidence that he exercises control over the house and its occupiers. It is clear that the question of the landlord's right of control is the first point to be considered:

Bradley v. *Baylis*, *Morfee* v. *Novis*, *Kirby* v. *Bifsen*, 46 L. T. Rep. 253; 8 Q. B. Div. 195.

It is clear also that this right of control has reference not merely to the staircase and such parts of the house as are common to all the

occupiers, but to the whole building, including the rooms occupied by the various tenants. In Ireland, upon facts very like those which we have to consider in the present case, the Court of Appeal held that the fact of the landlord residing in the building is not conclusive evidence of his right of control over the demised premises:

M'Laughlin v. *Chambers*, (1896) 2 I. R. 497.

That decision was based upon *Bradley* v. *Baylis* (*ubi sup.*). It may well be that the residence of the landlord upon the premises is *primâ facie* evidence that he has a right of control over the building. But that control does not follow, as a matter of law, from his residence. The question is one of fact, and here the revising barrister has found as a fact that the landlord does not exercise control over the whole building. To hold that residence by the landlord is in itself conclusive evidence of a right of control would lead to very serious results. Take the case of a landlord owning several buildings, all let out in flats or rooms in the same way. It would be manifestly unfair if the tenants in one of those houses in which the landlord chose to reside should be thereby disfranchised, while tenants occupying rooms in the other buildings in exactly the same way were allowed to have votes as inhabitant occupiers. And then, again, the landlord might in such a case reside for a week in turn in his various buildings, and thereby would be enabled to disqualify the tenants of any of the houses in which he chose to spend a few days. On the findings of fact by the revising barrister I submit that this claim should be allowed. He cited also

Toms v. *Luckett*, 5 C. B. 23;
Ancketill v. *Baylis*, 48 L. T. Rep. 342; 10 Q. B. Div. 577.

Dickens, K.C. and *W. H. Clay* for the respondents.—The question of the residence of the landlord in the building in question is the crucial one. It is not quite correct to say that his power of control is the true criterion. We rely upon the decision in *Bradley* v. *Baylis* (*ubi sup.*). That decision was misunderstood by the court which decided *M'Laughlin* v. *Chambers* (*ubi sup.*). Moreover, the decision in *M'Laughlin* v. *Chambers* is in conflict with a previous decision of the same court in *Hogan* v. *Sterrett* (20 L. R. I. 344). *M'Laughlin* v. *Chambers* was a case which had reference to a building composed entirely of flats let to different tenants. There is a difference between such a building and a building like that in the present case, in which the landlord resides and merely lets out rooms which he does not wish to occupy. In a building like the present one, where rooms are let out to tenants at 4*s.* a week, there is of course no definite agreement as to the landlord's power of control. These occupiers do not contract with the landlord for any such occupation as clearly shows that they are to be inhabitant occupiers. It is of course understood that the tenant has a right to go up and down the stairs so as to reach and leave the room he occupies. It will lead to enormous inconvenience if inquiry has to be made in the case of every room as to the arrangements made between the landlord and tenant as to the control of the building. The only working rule is to say that for the purposes of registration law, and for that purpose only, the law presumes that if the landlord resides on the premises he has a right of control over the building so that the tenants of the various rooms can only claim the franchise as lodgers. Here the revising barrister has made some erroneous statements of fact and then he states his conclusion, which is one of law, not of fact, that the landlord has no right of control.

Foote, K.C. in reply.—*M'Laughlin* v. *Chambers* (*ubi sup.*) has been followed in Scotland in *Bishop* v. *Duffy* (22 Rettie, 192). That case shows that the landlord's residence in the house is not conclusive; that he must retain a general control over it, if the tenants are to be considered as lodgers. Residence is nothing more than *primâ facie* evidence of control.

COLLINS, M.R.—This is an appeal from the decision of the Divisional Court on a case stated by a revising barrister, and the question is whether the particular claimant is or is not entitled to the household qualification. It is said that a number of other cases depend upon the decision of this case, but it is also said that those cases vary in several respects in their facts; and therefore it seems to me that the statement as to those cases depending upon this is rather the result of mutual agreement between the persons who conduct the discussions before the revising barrister, than a result arrived at by the learned revising barrister upon the hearing of the cases. The present case must, therefore, I think, be dealt with on the footing that we have to decide the particular case in respect of which the special facts are stated. In the discussion with regard to the meaning of the word "lodger," as distinguished from "occupier," we are likely to lose sight of that which is the foundation of the whole matter—namely, the conditions upon which the Legislature has given the household suffrage to certain persons. Sect. 5 of the Parliamentary and Municipal Registration Act 1878 provides that "in and for the purposes of the Representation of the People Act 1867"—by which the household qualification is created—"the term 'dwelling-house' shall include any part of a house where that part is separately occupied as a dwelling; and the term 'lodgings' shall include any apartments or place of residence, whether furnished or unfurnished, in a dwelling-house." By the same section it is provided that "for the purposes of any of the Acts referred to in this section, where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part." Therefore we have to see, when we are dealing with a person who does not occupy the whole of a dwelling-house in the ordinary popular sense, whether he comes within the special provisions, which, the other conditions being fulfilled, enable a person to claim the household qualification under the Act of 1867 in respect of the occupation of part of a dwelling-house. Now, to comply with the conditions laid down in the Act of 1867, the occupation must be at least that of a tenant. In determining whether a person does or does not occupy as a tenant, there is, first, as it seems to me, a question of fact as to what are the terms, as between him and his landlord, upon which he holds, and then, those terms being

ascertained, it is an inference of law whether he is a tenant or a lodger. It is with reference to this question that we have to consider the relation of the landlord, who is the common factor in both cases, to his tenant or lodger. Where a person claims the household qualification in respect of the occupation of part of a dwelling-house, he has to show that he occupies it separately as a dwelling. If another person is really in control of the part of the dwelling-house, then the claimant does not occupy it as a separate dwelling within the meaning of the Act of 1878. The occupation is not that of the claimant, but of his landlord. On the other hand, if by the arrangements between him and his landlord he has an independent occupation which the landlord cannot control, then the occupation is his own and not that of a landlord, and he is occupier as a tenant of such premises as entitle him to the franchise as an inhabitant occupier, provided he fulfils the other necessary conditions. I come now to the findings of fact in this case. The learned revising barrister has found, it seems to me, that the claimant in this case does occupy a separate dwelling in the most absolutely independent manner, free from the control of any person whatever. So far as those findings are questions of fact, we are absolutely bound by them, and unless upon the facts that the revising barrister has found, a necessary presumption of law arises contrary to the conclusion which he has arrived at, it seems to me that we are bound by his findings of fact. The revising barrister states the facts that the claimant pays a rent of 3*s.* 8*d.* per week for one unfurnished tenement room on the third floor of the house, "such room constituting a separate dwelling and being used by him for all purposes of living, and being separately occupied by him as a dwelling or dwelling-house; and he has let to him therewith such use of the passages and staircases as is necessary and convenient to the access to and enjoyment of the said dwelling." So far the subject-matter of occupation, on those findings, which are unquestionably purely findings of fact, is clearly brought within the definition contained in the section. Then the revising barrister finds that the landlord, who is the tenant of the whole house, "resides in a separate and independent tenement or set of rooms upon the said premises." That is to say, the landlord resides upon the premises, but that which he occupies is described, just as that is which the claimant occupies, as a separate and independent tenement or set of rooms upon the premises. There are four other occupiers under agreements, residing under the same terms as the claimant. Then comes a finding that the landlord occupies a set of rooms similarly with the other occupiers of the said house, and, so far as their relationship *inter se* as residents is concerned, the landlord Weevil occupies no position other than he would if he were not the landlord. There, again, it seems to me that that is all fact. Then in pars. 7 to 10 there are findings which I will read. [His Lordship read the paragraphs, and continued:] It was admitted by the court below that they were bound by the statements in the case so far as these are statements of fact, and if the judgment of the court below contradicts the statements of fact it went beyond the jurisdiction of the court. It was only by arriving at the conclusion that the statements in the case were not statements of fact merely, but were inferences of law, that the court below were able to differ from the view taken by the revising barrister. There is really no conflict of opinion in point of law between the view taken by the court below and my view. But it seems to me that the revising barrister, who was the sole judge of the facts, has found certain facts, and that the decision of this case does not rest upon inferences of law from those facts, but upon the facts as found. If we had had before us all the evidence upon which he arrived at his conclusion as to the control of the landlord the matter might have been different. We might then have been able to say that the conclusion could only have been arrived at by a misdirection in point of law. But on the case before us there is nothing whatever to show that he must have misdirected himself in point of law. We must start with the fact that the landlord retains no control over that part of the house for the occupation of which the claimant claims the franchise. I speak of control of the part of the house in respect of which the franchise is claimed, because the amount of control, if any, which the landlord exercises over that which is not part of the qualifying subject-matter appears to me to be quite immaterial. It has been pressed upon us in argument that a person who resides in part of a house cannot claim the franchise as an inhabitant occupier if the landlord resides in the same house, because the residence of the landlord in the house is incompatible with the claim. It seems to me, however, on principle that it cannot be affirmed as a matter of law that the co-existence of the landlord as an occupier of another and distinct subject-matter is any more a bar in law to the claim than if the landlord lived next door or in the next street. The law has created a thing capable of being the subject-matter of a separate tenancy, and the only thing that can prevent its being the subject-matter of a separate tenancy is that it has not been occupied in such a sense that the occupation can be properly described as that of an occupier and not of a lodger; in other words, that the occupation has not been entirely independent and uncontrolled. The occupation may be subject to stipulations, giving the landlord, for instance, a right of entry for the purposes of repair; but such a stipulation is compatible with a perfectly independent occupation, such as would give the franchise to the tenant; and that is the occupation that the revising barrister has found to exist in this case. Those being, in my view, the broad principles upon which the case depends, we have been pressed with authorities, notably the case of *Bradley* v. *Baylis* (*ubi sup.*), and an argument has been founded upon observations in that case, which invites us to hold that the fair inference from that case is that, as a matter of law, the household qualification cannot be claimed where the landlord resides in the same dwelling-house. Now, I think a critical examination of what was said in that case by the learned judges negatives that contention. Each one of them in every reference to the landlord's residence couples with it some statement indicating control on the part of the landlord; and it seems to me that the question treated by all the judges as vital is that of control. Nobody disputes that in the case of a claim to the household qualification in respect of the occupation of part of a dwelling-house, if the landlord is living in the house, that circum-

stance creates a presumption that the occupation of another part of the house is that of lodger rather than that of tenant. But while that is the presumption it is not the necessary inference of law, and there is certainly no authority that it is. On the contrary, it seems to me that the case of *Bradley* v. *Baylis* is against that proposition. I will refer to the judgment of Cotton, L.J., whose judgment does not differ in any way from the judgments that preceded it, but may, I think, be regarded as summing up and interpreting the substance of the earlier dicta on the matter. He says, with reference to the question as to what is a lodger: "In my opinion, it is not necessary that the person with whom he lodges—that is, his immediate landlord—should live in the house to make him a lodger. Nor is it necessary that the immediate landlord should have the exclusive control over the key of the outer door; but, in my opinion, some control over the house must be exercised by the person in whose house the man lives to make him a lodger." Control is the substance of the matter, as it seems to me, even on the language used in the case of *Bradley* v. *Baylis* (*ubi sup.*) itself. That case has been carefully and elaborately considered by the Court of Appeal in Ireland in the case of *M'Laughlin* v. *Chambers* (*ubi sup.*), and the judgment of Palles, C.B. deals specifically with this point. After analysing the dicta in *Bradley* v. *Baylis*, the learned Chief Baron sums the matter up by putting it that control, and not residence, is the really significant thing in considering the question of the landlord's position in relation to these premises which are claimed as the basis of the household qualification. In dealing with an earlier case of *Charlton* v. *McManus* (29 Ir. L. T. Rep.), in which the same point was raised, he says this on p. 509: "In that case the landlord came into possession of part of a structure by reason of the tenant of a separate room therein quitting possession and giving the same over to the landlord who came to live there, and we held that the mere residence of the landlord in the same structure did not of itself disqualify the tenant of another room occupied as a separate dwelling-house, who had been, previous to the arrival of the landlord on the premises, admittedly entitled to be registered as an inhabitant householder. In that case I endeavoured to show that *Bradley* v. *Baylis* (*ubi sup.*) did not establish that the presence of the landlord in a house let out in tenements does of itself determine the question whether a person is a lodger or an inhabitant householder. I want now to go a little further, and to point out what is the determining factor. The real question involved is this: Is there but one dwelling-house, or is the structure one in which there are two or more separate dwelling-houses?" Then the learned Chief Baron read the passage from the judgment of Cotton, L.J. in *Bradley* v. *Baylis* (*ubi sup.*) which I have already read, and went on: "In my opinion the rule laid down in *Bradley* v. *Baylis* (*ubi sup.*) is this: Where a claimant dwells in rooms forming part of a structure, in any other part of which structure the landlord dwells, and over which structure the landlord exercises a control as master—a paramount governing control, which is to be attributed to his position as a master, and which is something different from that of a man who merely occupies rooms in the same structure—then every one of the tenants in the structure or house is a lodger." It is said that this decision is in conflict with an earlier decision of the same court in *Hogan* v. *Sterrett* (20 L. Rep. Ir. 344), but, dealing with that very case and *Bradley* v. *Baylis*, the learned Chief Baron says this: "Neither of these cases decides that the mere fact of the residence of the landlord in the structure in which his tenants reside is enough *per se* as a matter of law to disqualify the tenants." There is accordingly no difference in the view taken in *M'Laughlin* v. *Chambers* (*ubi sup.*) and the earlier case in the same court. In that earlier case, which was relied upon by Mr. Dickens as an authority that the presence of the landlord in the house negatives the acquisition by a tenant of the household qualification, there is this passage in the judgment of Porter, M.R. to which I think it worth while to refer: "I do not mean to decide that in every case where the landlord resides under the same roof the persons occupying the other portions of the structure may not be entitled otherwise than as lodgers. I think they may be entitled; but the evidence of separate occupation must be very clear—such as in the case of 'flats'; for there the landlord would live in a separate 'house' within the meaning of the Act, and there would be several 'dwelling-houses' all under the same roof. When that case arises it will have to be considered on its own merits." That is really the case which has arisen here, because if the particular tenement is once brought within the definition of a dwelling-house, it seems to me that that is in the same position as a flat. I can see no difference in point of law between a tenement which is part of a dwelling-house and is made by statute. The difference is physical only, a separate dwelling-house, and a flat which is also part of a dwelling-house. In *Ancketill* v. *Baylis* (*ubi sup.*), which was also relied on in argument, Sir James Hannen says this: "It is difficult to define the difference between a tenant and a lodger; but probably it may be said with accuracy that where the landlord himself resides in the house the other inmates are lodgers, because they submit themselves to his control; but where the landlord does not reside in the house, or where he occupies a separate set of rooms in the basement"—which, I think, is analogous with the case here—"or where the house is divided into separate and independent dwellings or into separate flats"—"dwelling" there, I take it, means something distinguishable from a flat, a separate dwelling within the Act—"or into separate flats with a porter, or, as happens abroad, with a *concierge* living upon the premises; in each of those cases, even although a servant of the landlord may be present, the separate occupation exists which is necessary to constitute a tenancy." It seems to me that that is a dictum exactly in point on this matter, and that is a dictum in the Court of Appeal in this country. So that it seems to me there is really no foundation for the suggestion that there is any difference of opinion between the English Court of Appeal and the Irish Court of Appeal. On the whole, it seems to me that the authorities are clearly in favour of the proposition that the fact that the landlord lives on the premises, under the conditions described in the case before us, does not prevent a resident in another part of the

house, in other respects fulfilling the conditions of the franchise, from claiming it. In my judgment the appeal must be allowed.

ROMER, L.J.—The subject of this appeal is a striking example of the difficulty which often arises in determining whether a man who resides in a rateable tenement is an occupying tenant, or is occupying or using the tenement as a lodger only. It appears to me to be impossible to lay down hard-and-fast rules or propositions of law, or to give a definition as to what constitutes the difference between an occupying tenant and a lodger, which would solve the difficulty. In *Bradley* v. *Baylis* (*ubi sup.*) Sir George Jessel, M.R. said: "I have been quite unable, so far as I am concerned, to frame an exhaustive definition. Some judges have tried to do so, and, in my opinion, they have failed; and I think it wiser and safer to say that the question whether a man is a lodger, or whether he is an occupying tenant, must depend on the circumstances of each case." I respectfully agree with that statement, and I will proceed to apply it to this case, and to consider shortly what are the circumstances of the case before us. Of course, the facts depend upon the findings of the revising barrister, and I may say at once that, in my opinion, his findings, to which I shall briefly refer, are findings of fact which it is not right or competent for us to disregard. I cannot agree that they can be treated merely as matters of opinion on points of law which we are at liberty to disregard or to overrule; and it is because we consider that the findings of the revising barrister are findings of fact that a difference has arisen between the Divisional Court and this court. Turning to the case, I find that in par. 2 the revising barrister states that the person whose position is in question is occupying a room constituting a separate dwelling used by him for all purposes of living, and separately occupied by him as a dwelling-house, and that he has let to him also the use of certain passages and staircases. Let me at once get rid of the question of the passages and staircases, for it appears to me that, having regard to the provision in sect. 5 of the Parliamentary and Municipal Registration Act 1878 that "where an occupier is entitled to the sole and exclusive use of any part of a house that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part," the joint use of the passages and staircases may be disregarded. It is stated in par. 7 that this inmate has "the exclusive occupation, use, and enjoyment of his room or dwelling, and the landlord neither does nor has by agreement or otherwise any right to enter or in any way interfere with or exercise any control or dominion over the said room"; and further, in par. 8, it is stated that the landlord "does not reserve to himself or exercise any right of general control or dominion or mastership over the premises," and, in par. 9, that the tenant has a key which enables him at all times to open the front door, and to obtain access to the house and to his dwelling, and that the landlord reserves no right to fasten the door. On those findings one thing is clear; that within the definition of the Acts which we have to consider, the room occupied by this inmate is a dwelling-house, and I think there can be no doubt that within the meaning of sect. 3 (2) of the representation of the People Act 1867 he is an inhabitant occupier; and I should, so far, on the facts stated, have certainly been of opinion that he was also a tenant within the meaning of that expression as used in that section, and therefore he would be *primâ facie* entitled to the household franchise. The facts which are found in the case, that the landlord pays the rates and taxes and does the repairs of the house as a whole, would clearly not in themselves alter the position of matters. Indeed, it cannot be disputed that if the landlord did not reside in part of the house the inmate would clearly not be a lodger, but would be an occupying tenant. In the case of *Bradley* v. *Baylis* (*ubi sup.*), to which I have already referred, Sir George Jessel, M.R. says, at p. 220 of the Law Reports: "On the other hand, suppose a landlord does not demise the whole of the house, but everything in it that can be demised, except the staircases and passages, &c., as to which he gives the inmates the right of ingress and egress, but exercises no control over and does not reside in the house —I think the inmates are occupying tenants. Here, again, does the fact of the landlord repairing or paying rates and taxes make any difference? I think not. Of course he has a right to enter to make such repairs, but still, in my opinion, that does not prevent the occupier being in rateable occupation." And, indeed, to hold otherwise would be to impugn those cases, which I think are now settled, with regard to the occupancy of flats, where often the owner of a large house containing a block of flats takes upon himself, when he lets the flats, to pay the rates and taxes and to do the repairs as between himself and the tenants of the flats. In that position of affairs if this inmate was an occupying tenant under the Act, does, as a matter of law, the mere occupancy of part of the house by the landlord, of necessity and by itself, suffice to turn what would be otherwise an occupying tenancy into a case of a lodger holding? I think not. I cannot see for myself any reason why we should hold that as a matter of law, and I agree with the decision arrived at by the Irish Court of Appeal in *M'Laughlin* v. *Chambers* (1896) 2 I. R. 497), and with the very excellent reasons given by the judges there for the decision then arrived at. To hold otherwise would, in my opinion, lead to strange consequences. Take the case of the owner of two houses who lives in one and lets the other out in separate parts to different tenants so that they are clearly and beyond question occupying tenants. Suppose that one of those tenants goes out leaving a vacancy as to part of that house, and that the landlord, after some six months occupancy by the other tenants, chooses to move into the part of the premises that has become vacant. Would that mere fact, without any change of control at all, or any other change of circumstance, suffice, as a matter of law, to change the tenants' holdings from holdings as occupying tenants into occupancy as lodgers? In my opinion we are not compelled so to hold as a matter of law. The landlord's right of control is, in my opinion, the essential point to be considered in cases like the present. It has been frequently pointed out that to make an inmate, who has the exclusive right to the use and occupation of part of a house, a lodger, there must be some right of control on the part of the landlord. Take, for example, the

case of *Toms* v. *Luckett* (5 C. B. 23), where Maule, J. said: "Where the owner of a house, takes in a person to reside in a part of it, though such person has the exclusive possession of the rooms appropriated to him, and the uncontrolled right of ingress and egress, yet, if the owner retains his character of master of the house, the individual so occupying it occupies it as a lodger only, and not as a tenant. . . . The question depends upon whether or not the owner of the house resides upon the premises, retaining his quality of master, and reserving to himself the general control and dominion over the whole." Other judges are, to my mind, referring to the same thing when they say that in considering what is a lodger you must see that the person who is to be a lodger of another not only lodges in the same house, but lodges with that other, or that in order to establish the position of a lodger there must be some personal relationship between the lodger and the landlord. I think this essential right of control was clearly referred to and the importance of it pointed out by Sir George Jessel, M.R. in *Bradley* v. *Baylis* (*ubi sup.*), at p. 219 of the Law Reports, where he says: "It seems to me, as to unfurnished lodgings (and I will only deal with unfurnished lodgings, as it is the only class of cases with reference to which questions are likely to arise), where the owner of the house does not let the whole of it, but retains a part for his own residence, and resides there, and where he does not let out the passages, staircase, and outer door, but gives to the 'inmates' (I use that term for my present purpose) merely a right of ingress and egress, and retains to himself the general control, with the right of interfering—I do not mean an actual interference, but a right to interfere, a right to turn out trespassers, and so on—then I consider that such owner is the occupying tenant of the house, and the inmate, whether he has or has not the exclusive use of the room, is a lodger." The case of *Morfee* v. *Novis* (*ubi sup.*) I think is clearly distinguishable. In that case, not only was there no finding by the revising barrister that there was no right of control by the landlord over the inmate, but, on the contrary, there is, if not a finding, at least a clear intimation on the part of the revising barrister that, in his opinion, there was a right of control by the landlord over the part occupied by the inmate, and, indeed, such an occupation as would give the landlord the exclusive right to sue for trespass upon that part of the house. It further appears, as was pointed out by Brett, L.J., that there was no finding in that case that the inmate had the exclusive occupation of his rooms, but only that he had the exclusive use of his rooms; and, lastly, Cotton, L.J. points out that the immediate landlord did exercise a control over the whole house. In the present case, on the facts stated by the revising barrister, this inmate appears to me to be in the position of a tenant, and not of a lodger, and I agree that the appeal must succeed.

MATHEW, L.J.—I am of the same opinion. It was the object of the Acts of 1867 and 1878 to give the franchise to the occupant of part of a dwelling-house. Now what sort of occupation was contemplated in a case like the present where a person resides in one room in a dwelling-house? Clearly an exclusive occupation analogous to the occupation of an entire dwelling-house. The findings of fact here show in the clearest way that there was an exclusive occupation in the fullest sense of the term, without any interference or right of interference on the part of the landlord. Why is it that effect is not to be given to those findings? It is said that the revising barrister neglected an imperative rule of law—namely, that there cannot be an exclusive occupation of a room in a house if the landlord lives in another room in that house. In my opinion that is incorrect, and extraordinary results would arise if the residence of the landlord were the conclusive criterion of whether or not there was a separate occupation of another part of the house by the inmate. If the house had been let out in separate tenements, and one room became vacant, and the landlord took up his residence in that room, all the other inmates would lose the household franchise. This extraordinary result seems to me to forbid the acceptance of the suggestion that the residence of the landlord in the premises necessarily indicates that he has control over the room of the tenant. I agree that the appeal must be allowed.

Solicitors for the respondent, *Cunliffes* and *Davenport*, for *R. J. Fittall*, Town Clerk, Devonport.

Solicitors for the appellants, *Ayrton*, *Biscoe*, and *Barclay*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Dec. 14 *and* 19, 1905.

(Before BUCKLEY, J.)

THOMPSON AND ANOTHER *v.* HAMMERSMITH BOROUGH COUNCIL. (*a*)

Metropolis—Alteration of streets—Notice to treat—Power to take part of house where owner is altering or demolishing it—Michael Angelo Taylor's Act (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 82.

A local authority requiring part of a house for the purpose of widening a street under Michael Angelo Taylor's Act cannot compel the owner to sell such part alone if the removal of the part will substantially alter the character of the house.

Gordon *v.* Vestry of St. Mary Abbott's, Kensington (71 *L. T. Rep.* 196; (1894) 2 *Q. B.* 742) *and* Gibbon *v.* Vestry of Paddington (83 *L. T. Rep.* 136; (1900) 2 *Ch.* 794) *followed.*

The fact that, at the time when the local authority served its notice to treat, an agreement existed between the lessor and lessee of the house that the house was to be altered or reconstructed is immaterial. It is also immaterial that at the time when the lease was granted the lessees were aware that the local authority contemplated such a scheme of street-widening as would affect the premises.

Discussion of the judgment of Kindersley, V.C. in Thomas *v.* Daw (*L. Rep.* 2 *Ch., note, p.* 3).

WITNESS ACTION.

On the 16th June 1905 the Council of the Metropolitan Borough of Hammersmith (hereinafter called the defendants), in pursuance of their

(*a*) Reported by R. C. CARTER, Esq., Barrister-at-Law.

purpose of widening King-street, Hammersmith, purporting to act under the powers conferred by Michael Angelo Taylor's Act, gave notice to treat to the occupiers of No. 98, King-street, the plaintiffs in this action, in respect of that part of No. 98 which had a frontage on King-street. The part which the defendants claimed to purchase in their notice to treat was in length the whole line of No. 98 that faced King-street, and in depth was about 5ft. 2in. at one end of the line to about 7ft. 2in. at the other end of the line.

The plaintiffs were the lessees of No. 98 under a lease dated the 25th March 1905, which contained a covenant that they should at their own expense forthwith alter the demised premises in accordance with certain plans and subject to certain approvals. The alterations were in progress at the date of the notice to treat. The character of the alterations is set forth sufficiently in his Lordship's judgment.

At the time when the plaintiffs acquired the lease they had seen a tracing showing certain works proposed to be carried out by the defendants in connection with the widening of King-street, and in particular were aware that such widening would affect No. 98, King-street.

The effect of the acquisition by the defendants of the strip of frontage is set forth fully in his Lordship's judgment, and it will be sufficient to state here that a chimney and fireplaces connected with it would have been destroyed; that the first and second floors would have been materially affected; that certain rooms would not be nearly so good as they were before; that so far was it from the fact that there would have been substituted for the old rooms fair usable rooms, as one of the defendants' witnesses had alleged, that the new rooms would be practically useless.

At the time of the trial the defendants had sanctioned the purchase of part of No. 96, King-street, but had taken no steps in connection with the acquisition of any part of No. 100, King-street. These two houses were next to No. 98 on either side, and had the same line of frontage. If they remained as they were, and if the plaintiffs' strip were taken, the plaintiffs' house would be thrown back from the main frontage of the street.

The plaintiffs did not desire to sell only such part of the house as was mentioned in the notice to treat, and served the defendants with a notice requiring them to purchase the whole of the premises. The defendants refused to do so, and proceeded on the footing of a refusal to treat in the manner prescribed by Michael Angelo Taylor's Act.

This was an action by the plaintiffs asking for an injunction against the defendants restraining them from proceeding under their notice to treat.

Sect. 80 of Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.), so far as material, runs as follows:

> It shall and may be lawful to and for the commissioners or trustees or other persons having the control of the pavement of any parochial or other district from time to time and at all times hereafter to . . . widen any of the streets . . . within any parochial or other district . . . and if any houses, walls, buildings, lands, tenements, and hereditaments or any part thereof shall be adjudged by the said commissioners or trustees or other persons as aforesaid to project into, obstruct, or prevent them from so . . . widening the said streets, and that the possession, occupation, and purchase of such houses, walls, buildings, lands, tenements, or hereditaments will be necessary for that purpose, it shall and may be lawful to and for the said commissioners, &c.; and they shall have full power and authority to treat, contract, and agree . . . with the several owner or owners, occupier or occupiers, of all such houses, walls, buildings, lands, and hereditaments . . . for the purposes aforesaid, and to pay for the same such sum and sums of money as shall be agreed upon by the said commissioners, &c., and the owner or owners, occupier or occupiers thereof . . . and to pull down, use, sell, or dispose of such houses, walls, and buildings, and the materials thereof, and lay the sites thereof, and also all such other lands, tenements, or hereditaments, or so much thereof as they the said commissioners or, &c., shall think proper into the said streets.

Sect. 82 provides the proper procedure in case an owner of a house refuses to treat or agree with the commissioners.

Other facts are more conveniently set forth in his Lordship's judgment.

Buckmaster, K.C. and *Waggett* for the plaintiffs.—The defendants are not entitled to give notice to treat in respect of a portion only of the plaintiffs' premises. They must purchase the whole. The part which they wish to take is not severable without destroying the house as a house. It is a question of fact for the court speaking as a jury—will the removal of the slice in question leave the identity of the house unchanged? The case of *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (71 L. T. Rep. 196; (1894) 2 Q. B. 742) does not prejudice us, as it merely decides that under some circumstances part only of a house may be taken, though the owner may desire to sell only the whole. In that case the part of the premises to be taken was a stone porch, step, and cellar flap. The loss of them left the house very much as it was before. But even that case did not decide that they could take the porch, because it appeared that the loss of the porch would involve internal repairs. [BUCKLEY, J.—The kind of "part of a house" that could be taken might be one of the long covered ways leading from a house to the pavement in the Bayswater-road.] The decision in *Gibbon* v. *Paddington Vestry* (83 L. T. Rep. 136; (1900) 2 Ch. 794) shows that the part proposed to be taken in this case is a substantial part of the house. Further, there is a distinction to be drawn between part of a house and part of a plot of land, for the latter is *primâ facie* divisible, and the former is not, so that an argument in this context by analogy from land to houses is unsound. He also referred to

Pescod v. *Westminster Corporation*, 93 L. T. Rep. 160; (1905) 2 Ch. 475;

Gard v. *Commissioners of Sewers of the City of London*, 52 L. T. Rep. 827; 28 Ch. Div. 486.

Astbury, K.C., *Courthope-Munroe*, and *J. A. Langston* for the defendants.—In this case it is immaterial whether the identity of the house will be destroyed by removal of the part which is included in the notice to treat, seeing that the identity of the house is in any event to be destroyed by its demolition under a covenant in the lease, which was existent at the date of the notice to treat. *Quod faciendum est, factum est,*

and this house and the site of it should be treated as vacant land:

Thomas v. *Daw*, L. Rep. 2 Ch. 1.

In that case Kindersley, V.C. says: "At the time of the notice, it is true, No. 50 was not pulled down, but it was intended to be pulled down, and must for the purpose of this motion be considered as a house actually pulled down." [BUCKLEY, J.—The decision on appeal (L. Rep. 2 Ch. 1) seems to have been founded on different considerations.] Lord Chelmsford, L.C. said that sect. 80 gave power to take part only of a house. It is material to consider what purpose the house was destined for at the date of the notice. The evidence shows that the plaintiffs will have a better shop than before after the alterations have been made, and in spite of our having acquired part of the frontage. In any event the plaintiffs knew before they took the lease that the widening of the street was contemplated. They referred to

Stroud v. *Wandsworth District Board of Works*, 70 L. T. Rep. 190; (1894) 2 Q. B. 1;
Metropolitan District Railway v. *Fulham Vestry*, 73 L. T. Rep. 330; (1895) 2 Q. B. 443;
Teuliere v. *St. Mary Abbott's Vestry*, 53 L. T. Rep. 422; 30 Ch. Div. 642.

No reply was called for.

BUCKLEY, J.—The question I have to decide is whether the defendants are entitled to proceed under a notice to treat, dated the 16th June 1905, with respect to a house numbered 98, King-street, Hammersmith. It is a notice to treat by which the defendants desire to acquire a strip off the front of the house numbered 98, King-street, varying in depth from 5ft. 2in. at the eastern end to 7ft. 2in. at the western end. First, as to the law, sect. 80 of Michael Angelo Taylor's Act (57 Geo. 3, c. 29) does, but sect. 82 does not, add to the general words "houses, walls, buildings, lands, tenements, and hereditaments" the words "or any part thereof." In *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (71 L. T. Rep. 196; (1894) 2 Q. B. 742), however, it was decided in the Divisional Court that the words "or any part thereof" are by implication carried on into the words "such houses, buildings, lands," &c., in sect. 82, with the result that under that Act compulsory purchase may be made of part without taking the whole, thus differing from a purchase to which sect. 92 of the Lands Clauses Act 1845 applies. As a matter of decision that case ends there. The parties in that case were willing that the motion should be treated as the trial of the action, but the court declined so to deal with it, and, as a matter of interlocutory order, refused to restrain the vestry from proceeding upon their notice to treat, upon the ground that the court could not until the trial of the action determine the question whether that which the vestry proposed to take was or was not a part of the premises within the Act of Parliament. As a matter of dictum, however, the court there did go on to say what would satisfy the words "or any part thereof." They laid down that a house is *primâ facie* a unit incapable of division; that the vestry could take part of a house only when that part was separable from the house, so that it could be removed without destroying the house as a house. I need scarcely say that I should have had no hesitation in following this view, although it was expressed in a dictum only. But the matter does not stop there, because in *Gibbon* v. *Paddington Vestry* (83 L. T. Rep. 136; (1900) 2 Ch. 794) this matter was the subject of decision by Stirling, J. At the trial of the action in that case Stirling, J. held that the owner could compel the vestry to take the whole of the house when the part which they claimed the right to take was not, within the meaning of *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (*ubi sup.*), a part separable from the house, so that it could be removed without destroying the house as a house. As to the next point, let me suppose that the house in question is one to which the owner is at the date of the notice to treat making, or proposing to make, or is under covenant to make, alterations. The defendants argue upon some words of Kindersley, V.C. in *Thomas* v. *Daw* (L. Rep. 2 Ch., at p. 3) that in such a state of facts the matter is to be treated as if that which the owner was contemplating doing has been done. The Vice-Chancellor's words are these: "At the time of the notice, it is true, No. 50 was not pulled down, but it was intended to be pulled down, and must for the purposes of this motion be considered as a house actually pulled down." The Vice-Chancellor's decision was appealed from, and upon appeal, as I understand the judgment of Lord Chelmsford, the Lord Chancellor did not agree with that sentence He refers to it at p. 6 of the report, and, after saying that he is not disposed to agree exactly with the reasons which appear to have governed the Vice-Chancellor's decision, he goes on to affirm his decision—not upon the grounds which the Vice-Chancellor had assigned, but upon the ground, as appears at p. 8, that the commissioners had not satisfied the essential preliminary as to No. 50 in their adjudication, which is to be found at p. 5, and which was, not that the site of No. 50 was necessary, but only that part of the site of No. 50 was necessary for the purposes of the Act. Apart from that case, and regarding the matter upon principle, it seems to me that the rights of the defendants must be determined, not upon that which the owner had in contemplation when the notice to treat was served, but upon the rights which the owner had as owner of a house which, at the date of the notice to treat, was of a particular kind, and which the owner might or might not, as he was minded, alter as he pleased. By the word "owner" here I mean all the owners at the time in question—that is to say, for the purposes of the present case not the lessee only, but the lessor also. The defendants' rights are not, in my opinion, enlarged by reason of any intended voluntary alterations which the plaintiffs were to make, or were under covenant to make. At the most this consideration could be relevant only if the alterations in question would, if carried into effect, result in a new house of which the part claimed by the defendants was not an essential part. The fact that the plaintiffs are making, or are under covenant to make, certain alterations, does not authorise the defendants to say: "You must make further alterations which will cost you no more and will answer your purpose just as well, and which when made will render the part which we want no longer an essential part of the house." The plaintiffs are entitled to say that the matter is to be dealt with regarding the house in accordance with the situation actually existing at

the date of the notice to treat, or at the most as it will exist when the house has been altered in the way in which they mean to alter it. This being the law which, in my opinion, I have to apply, the relevant facts are as follows: The plaintiffs on the 15th May 1905 took a lease of this house, No. 98, King-street. They had then seen the deposited plan which is now before me, and therefore knew that such a widening as is here in question was in contemplation as regards their house. Their lessors, however, could and did give them a leasehold interest in such a house as was then there on the site. The defendants' rights are no larger by reason of the fact that the plaintiffs took a lease of a house as against which the defendants had such rights as Michael Angelo Taylor's Act gave them, and of which the defendants were asserting—if such were the fact—that they had a right to take this strip. The question is, What rights does the Act give them? Have they or have they not a right to take the strip? Those rights I have discussed above. The question, then, is whether the part which the defendants propose to take is separable from the house so that it can be removed without destroying the house as a house. Now, upon that the first comment which I have to make is this: The building as it stood on the 16th June 1905 was provided with and warmed by fireplaces set in a large chimney-stack, which was, judging by the position in which it stands, very ancient, and which was midway between the two small houses constituting the larger house as the plaintiffs intend to occupy it. By taking the strip in question the defendants would have destroyed the whole of the chimney-stack as well as all the fireplaces that warmed the rooms in the different parts of, at any rate, the old house. Of course, it is obvious that taking all this is taking such a part of the house as not to leave it such a house as it was before. But it is said, and said truly, that the plaintiffs were about to destroy the chimney-stack themselves in the alterations they were about to make. But mark, they meant to destroy the chimney-stack for the purpose of enjoying the space that would be left bare by its removal, and of making the rooms into one large shop. The defendants cannot, I think, say that for the purpose of determining their rights I must treat it as a thing destroyed, whatever view may be taken of *Thomas* v. *Daw*, where the proposal was to remove it not for the purpose for which the plaintiffs intend to remove in order, that is to say, to leave a large shop in the space formerly occupied by the chimney-stack, but for another purpose altogether—namely, that of throwing that space into the street. Of course, this point is enough to dispose of the whole case, if I am right in saying that the fact that the plaintiffs were themselves going to do the removal is immaterial, because of course the removal of this by the defendants—if it was to be their removal—would destroy all the chimney and fireplaces. Secondly, it is necessary here to describe quite shortly something as regards the premises. These were old premises consisting of three floors—a ground floor, first floor, and some attics. The wall which is called the back front of the house (I should call it the back wall of the house, but the surveyors call it the back front) was at the level of the ceiling of the ground floor carried upon girders so that the ground floor ran beyond it. The first floor and the attics did not run beyond it. The alterations which the plaintiffs proposed would have converted the three floors into two; would have raised the ceiling of the ground floor to some extent, and thrown the remains of the house into a first-floor room, so that there would have been a room extending from the front wall of the house in King-street to this back front at the back. If the defendants take this strip they will destroy what at present are the first and second floors, and what, as altered, will be the first-floor room of the house altogether. Mr. Chatfield Clarke, who was called for the defendants, was compelled to say that certainly those rooms, as rooms, would be nothing like as good as before. The best he could say was that they would be fair usable rooms. The depth of the room from back to front would be so affected by taking this strip as that the room would become practically useless, not at all the same as before. However, the defendants say: "Well, you can build a new back front 7ft. further back and the front wall will be 7ft. further back, and then you will have the same space as you had before." To my mind that is no answer at all. I do not think the defendants are entitled to say: "We will take a part of your house, and then we will show you how to build a new house"—for that is substantially what this is—"which will be just as good as the old one." Thirdly, consider what will be the effect as regards the ground floor. As I have said, the back front wall does not there extend down to the ground floor, so that you may get additional space there, I agree, and the plot is of such a considerable depth from north to south that you may to some extent perhaps make as good a shop on the ground floor. But it destroys the ground-floor front shop in this sense, that the front part, the large extra space which would be gained by this intended removal of the chimney-stack, will be absorbed into the street, and the shop itself be thrown further back. Now, that is a matter which, as regards the particular business which the plaintiffs desire to carry on, is one of moment; the principal part of the shop, the ground-floor premises, is to be used for the purposes of a show case where they want to put up tailor's dummies and show their goods, and so on, so that in front the ground-floor shop, it seems to me, would be largely affected. Fourthly, the strip if acquired will throw the front of No. 98 back to the extent I have said of 5ft. 2in. at one end to 7ft. 2in. at the other, and, unless No. 96 on one side and No. 100 on the other are thrown back to a like extent, nobody disputes that the value of the plaintiffs' premises, No. 98, as a shop will be largely affected. They will be left in a sort of recess set back from the main frontage to the street. The defendants as to that say: "Yes, that would be so; but we are going to set back No. 96 and No. 100 also." I dare say they intend to do so, but the position of affairs is this: That as regards No. 96, the house on the one side, they finally sanction the purchase of what they want there on the day when this cause was in the paper for trial and settle it on the evening before. And as regards the house on the other side, No. 100, they have not up to the present moment even given a notice to treat. Consider in what position the plaintiffs will be left as regards them. I do not for a moment suggest that the defen-

dants do not *bond fide* intend to do it. I have no doubt it is part of their scheme, but, supposing they did not do it, what right would the plaintiffs have to compel them to do it? They could not make them deal in the way I dare say they intend to deal with the shops on either side, and they cannot leave it at large. For all these reasons I arrive at the conclusion that the strip which the defendants propose to take is such as that the part is not separable from the house so that it could be removed without destroying the house as a house. I think that the case is governed by the decision in the Divisional Court in *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (*ubi sup.*) and the decision of Stirling, J. in *Gibbon* v. *Paddington Vestry* (*ubi sup.*). It seems to me, therefore, that the plaintiffs are entitled to the injunction they ask. In granting that injunction I do not in any way say what the defendants may be entitled to substitute for it. I only say that this notice to treat is one they cannot carry into effect. I therefore grant the injunction as asked by the indorsement of the writ, and order them to pay the costs.

Solicitors: for the plaintiffs, *Gueeotte, Wadham, and Co.*; for the defendants, *Watson, Sons, and Room.*

Jan. 19, 24, *and* 31.

(Before BUCKLEY, J.)

YOUNG *v.* CUTHBERT AND OTHERS. (*a*)

Education — "Non-provided" school — Power of managers to dismiss teacher—Consent of education authority—Education Act 1902 (2 *Edw.* 7, *c.* 42), *ss.* 7 (1) (*a*) (*b*) (*c*) (*d*) (*e*) (7), 17, *sched.* 1 (*a*) (6).

A local authority acting under the powers conferred on them by sect. 17 *of the Education Act* 1902 *appointed an education committee and delegated to them their powers.*

The education committee appointed a sub-committee, in exercise of the powers given by sched. 1 (*a*) (6) *of the Act, to deal with the appointment and dismissal of teachers.*

The sub-committee appointed a section to deal with the circumstances connected with the dismissal of teachers and to make recommendations to the sub-committee.

The managers of a "non-provided" school within their district gave notice of dismissal to their head mistress, having first obtained the consent of the sub-committee, but the consent of the education authority as required by sect. 7 (1) (*c*) *of the Act was not obtained for some time after the notice was given.*

In an action by the head mistress against the managers for an injunction to restrain them from dismissing her until the consent of the education authority had been obtained and until an opportunity had been given her to defend herself before the properly constituted authority:

Held, that the consent of the education authority is not a condition precedent to the dismissal of a teacher by the managers of a "non-provided" school under the Education Act 1902.

ACTION.

The Berkshire County Council became the "local education authority" for the county of Berks under the provisions of sect. 1 of the Education Act 1902 (2 Edw. 7, c. 42).

Sect. 1 provides:

For the purposes of this Act, the council of every county and of every county borough shall be the local education authority.

St. John's Home Day School, Clewer, was an elementary day school under the jurisdiction of the council, and was a "non-provided" school under the Act, being maintained, but not provided, by the local education authority.

The Education Act 1902 came into force in the county of Berks on the 30th Aug. 1903, and the education authority, acting under sect. 17 of the Act, delegated all its powers, except those of raising a rate and borrowing money, to an education committee.

Sect. 17 provides:

(1) Any council having powers under this Act shall establish an education committee or education committee constituted in accordance with a scheme made by the council and approved by the Board of Education. (2) All matters relating to the exercise by the council of their powers under this Act, except the power of raising a rate or borrowing money, shall stand referred to the education committee, and the council, before exercising any such powers, shall, unless in their opinion the matter is urgent, receive and consider the report of the education committee with respect to the matter in question. The council may also delegate to the education committee, with or without any restrictions or conditions as they think fit, any of their powers under this Act, except the power of raising a rate or borowing money.

The education committee, in pursuance of clause (*a*) (6) of the 1st schedule of the Act appointed a school management sub-committee to deal, amongst other things, with the appointment and dismissal of teachers. The sub-committee appointed a section to deal with the details connected with the dismissal of teachers, and to make recommendations to the sub-committee.

Sched. 1 (*a*) (6) provides:

An education committee may, subject to any directions of the council, appoint such and so many sub-committees, consisting either wholly or partly of members of the committee, as the committee thinks fit.

Under sect. (6) 2 of the Act there was appointed, in place of the former managers, a body of managers consisting of four foundation managers and of two other managers.

Sect. (6) 2 provides:

All public elementary schools not provided by the local education authority shall, in place of the existing managers, have a body of managers consisting of a number of foundation managers not exceeding four appointed as provided by this Act, together with a number of managers not exceeding two appointed by (a) where the local education authority are the council of a county, one by that council and one by the minor local authority.

On the 5th July 1900 the plaintiff, Miss Isabel Pearce Young, was appointed head mistress of the school under an agreement of that date made between the then managers of the school of the one part and the plaintiff (therein called the teacher) of the other part. Clause 5 of this agreement provided that the agreement might be terminated at any time by either of the parties on giving the other three calendar months' previous notice in writing to that effect, and, if such notice should be given by the managers, it

(*a*) Reported by W. HUNTER BOND, Esq., Barrister-at-Law.

should be given in accordance with a decision of a meeting called for that special purpose, and of which every manager should have had due notice.

Early in 1905 it was considered that the efficient working of the school under the plaintiff was difficult, and on the 12th Aug. and the 17th Oct. meetings of the managers were held with reference to the matter, at the latter of which the plaintiff attended at the request of the managers.

At this meeting a resolution was passed that, in view of the evident friction with which the school was being conducted, the plaintiff should be asked to resign, and that, if she refused, notice should be sent to the Berkshire Education Committee that the managers desired to terminate their agreement with her.

The plaintiff did not resign, and on the 23rd Nov. 1905 Miss Ramsay, one of the managers, at their request wrote to the secretary of the education committee asking for its consent to the dismissal of the plaintiff forthwith on payment of three months' salary in lieu of notice.

On the 25th Nov. the sub-committee met, and decided to recommend that the consent should be given.

On the 25th Nov. the secretary wrote: "The committee will approve the notice given by your managers to Miss Young to terminate her engagement."

On the 30th Nov. Miss Ramsay wrote to the plaintiff as follows:

The managers desire me to give you notice of the termination of your engagement as head teacher from the 1st Dec., and that this notice has the approval of the Berkshire Education Committee. They desire that you should withdraw from the school on Friday, the 1st Dec., and instruct me to inclose a cheque for three months' salary at 90*l.* a year.

On the 2nd Dec. the plaintiff replied acknowledging the receipt of Miss Ramsay's letter, and saying:

I have now obtained advice thereon and am advised that the notice is invalid and inoperative, and I shall therefore hold myself to be in the service of the managers without notice as heretofore, and shall be at all times willing to continue my duties as head mistress of the school.

The plaintiff accordingly continued her duties until the 4th Dec., when, on going to the school, she was told that the children had been given a holiday. The next day she found the school locked up, and received a letter from Miss Ramsay as follows:

If your services are, as you say, at the disposal of the managers, which they do not admit to be the case, they dispense with your attendance at the school.

On the 18th Dec. the plaintiff issued the writ in this action asking for an injunction to restrain the defendants from dismissing her until the consent of the education committee had been obtained, and until an opportunity had been given her to defend herself before the properly constituted authority; and on the same day gave notice of motion for an injunction in the same terms.

The motion came on for hearing on the 19th Jan. 1906, and, as one of the questions was whether the education authority had given their consent under sect. 7 (1) of the Act, and a meeting of the education committee was to be held next day, his Lordship directed that the motion should stand over until the 24th Jan. to see what the education authority would do.

On the 20th Jan. 1906 the Berkshire Education Committee passed the following resolution:

That the education committee hereby consent, in accordance with sect. 7 (1) (*c*) of the Education Act 1902, to the dismissal by the managers of Clewer St. John's School of Miss Isabel Pearce Young, the head mistress, notice of such dismissal having been given on the 30th Nov. last by the managers to Miss Young.

The plaintiff had applied through her solicitors for a hearing before the committee, but was refused.

Sect. 7 (1) (*c*) provides:

The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers; but in the case of a school not provided by them only so long as the following conditions and provisions are complied with: (*c*) The consent of the local education authority shall be required to the appointment of teachers, but their consent shall not be withheld except on educational grounds; and the consent of the authority shall also be required to the dismissal of a teacher, unless the dismissal be on grounds connected with the giving of religious instruction in the school.

At the hearing of the motion on the 24th Jan. the parties agreed to treat the motion as the trial of the action.

Buckmaster, K.C. and *Arthur R. Thomas* for the plaintiff.—The question here is whether or not under the provisions of the Education Act 1902 the managers of the school could dismiss the plaintiff without the leave of the education authority. Sect. 7 (1) (*c*) of the Act says that the consent of the authority shall be required to the dismissal of a teacher unless on grounds connected with religious instruction in the school, and this school is subject to the conditions of sect. 7 (1) as they are receiving the rate (rate A), and they cannot receive this rate and not comply with the conditions. The condition in sect. 7 (1) (*c*) is for the benefit of the teacher. [BUCKLEY, J.—It is not for the protection of the teacher, but for the protection of the person who pays—*i.e.*, the ratepayer.] Sched. 1 (*a*) (6) gives power to the education committee to appoint sub-committees, but they cannot delegate their powers to them; the sub-committee therefore could not give their consent. [BUCKLEY, J.—If they cannot delegate powers to the sub-committee, what is the good of such sub-committee, and why can they be statutorily appointed?] This is a public elementary school under sect. 7 of the Act of 1870, and the control of a public elementary school is in the education authority, not in managers. If the managers dismiss the teacher, that would prevent the school being a public elementary school. [BUCKLEY, J.—Does the school that will not comply with the conditions cease to be a public elementary school?] A mere breach by inadvertence would not prevent them being a public elementary school. There is a statutory duty imposed upon the education authority to see to the dismissal of teachers. In *Jones* v. *Hughes* (92 L. T. Rep. 218) the notice was given before the Education Act came into operation, and was a good notice.

W. F. Hamilton, K.C. and *Edward Ford* for the defendants.—The managers of the school would

be indictable for neglect for not repairing the school-house if the plaintiff's contention is right—namely, that there is a statutory duty imposed upon them:

Reg. v. *Price*, 1841, 11 A. & E. 727.

The managers have the power to dismiss the teacher. They must get the consent of the education authority, but it does not matter whether that consent is given before or after the notice of dismissal. If in this case the consent of the education authority had to be obtained before notice of dismissal was given to the teacher, it might result that six months would elapse before the managers could get rid of the teacher, as the education authority only meet once every three months, and three months' notice is required under the agreement. I submit that no statutory duty is imposed on the managers, and that, as the consent of the education authority has been given, the notice is a good notice, the consent being in the nature of an approbation.

Arthur R. Thomas in reply. *Cur. adv. vult.*

Jan. 31.—BUCKLEY, J., having stated the facts, continued as follows:—I have, therefore, now to give judgment at the trial of the action finally determining the plaintiff's rights in the matter. The plaintiff contends that the consent of the local education committee is, under the Education Act 1902, a condition precedent to dismissal by the managers, that such consent had not been given on the 30th Nov. 1905, and that consequently the notice of that date is invalid. I will assume, in the first instance, that on the 30th Nov. 1905 the consent of the authority had not been given, and upon that assumption will investigate what is the true construction of the section of the Act of Parliament bearing upon this matter. Sect. 7 of the Act of 1902 provides that the education authority shall maintain and keep efficient public elementary schools, but, in the case of a school not provided by them, only so long as certain following conditions and provisions are complied with. One of these conditions is (clause (1) (*c*) that the consent of the authority shall be required to the dismissal of a teacher unless the dismissal be on certain grounds, being grounds not relevant to this case. The plaintiff argues that the conditions and provisions which are found in clauses (*a*) to (*e*) of sect. 7 are affirmative statutory provisions binding as such upon the parties affected—in other words, that sect. 7 is to be read as if clauses (*a*) to (*e*) formed independent affirmative sections of the Act and were then followed by another clause providing that the authority shall maintain and keep efficient the school only so long as clauses (*a*) to (*e*) are complied with. In my judgment this is not the construction of the Act of Parliament. The contract between the managers and the teacher is a contract to which the education authority is not a party. The question is whether that contract between the managers and the teacher is to be read as if, by virtue of the statute, it contained a clause to the effect that the managers will not dismiss the teacher without the consent of the authority. Does the Act of Parliament introduce such a stipulation into the contract? The answer, I think, is in the negative. Sect. 7 contemplates that the conditions may or may not be complied with; it cannot be, then, that the statute is to be read as requiring that they shall be complied with. Reading the section quite shortly, and introducing only the relevant words, its frame is as follows: The local education authority shall maintain and keep efficient the school only so long as the consent of the authority shall be required to the dismissal of a teacher—meaning, I think, only so long as the managers, as between themselves and the authority, observe the condition that without the consent of the authority they will not dismiss. Let me take another of the conditions—say clause (*d*)—and see what is the true construction of the Act in that case. Suppose the managers do not keep the school-house in repair, what is the consequence? It will follow that the local authority will no longer be bound to maintain and keep efficient the school. But could proceedings be instituted against the managers for breach of a statutory duty by way of *mandamus* to compel them to keep the school-house in repair or by way of consequences for a misdemeanour? In my judgment, certainly not. Take again clause (*b*). Does that give the local authority statutory authority to inspect the school? I think not. The frame of the section is that the authority shall maintain the school so long as the authority shall have power to inspect the school. From this it results that if the managers refuse inspection the local authority ceases to be liable to maintain, but not that the school can be compelled to submit to inspection. There is another sub-section to be considered—viz, sect. 7 (7)—which provides that, subject as there mentioned, the managers shall have the "exclusive power of appointing and dismissing teachers." Exclusive of whom? Exclusive, I conceive, of the education authority. This shows that the managers have the dominant power, and that that is controlled only by the powers which the local education authority have under the section. If the consent of the local authority is a condition precedent to appointment or dismissal, the words "exclusive power" seem strangely inappropriate. The true meaning, I think, is that, unless the education authority intervene, the power of appointment and dismissal rests with the managers, and that the consent of the authority is required in the sense that, if the education authority interpose, the managers must choose between two alternatives—viz., either to yield to the wishes of the authority or to cease to receive maintenance from public funds. The words as to consent, whatever be their effect, are, I think, operative only as between the authority and the managers and do not give any right to the teacher. There is nothing in the Act to affect the contract between the managers and the teacher. The effect of the provisions of the Act is only to produce certain consequences as between the managers and the local authority if the former act without the consent of the latter in any case in which such consent is required. Thus far I have assumed that the consent of the local authority had not been given. [His Lordship here stated the facts as to Miss Young's dismissal, and the reasons why the managers stated in the letter of the 30th Nov. that the consent of the education committee had been obtained, and continued:] In my judgment the education committee, having regard to sect. 17 of the Act, could exercise all the powers of the local education authority. The education com-

mittee was for this purpose the original authority. Further, having regard to sched. 1 (*a*) (6), the sub-committee was, I think, a body which could determine, and not merely report to the committee upon, a question such as this consent. But I do not think that the "section" was other than a subordinate body. Its duty was to consider and recommend to the sub-committee. Its action required, I think, approval by the sub-committee. Under these circumstances it seems to me that on the 30th Nov. 1905 the consent of the authority had not been obtained. But in my judgment this is not a matter upon which the plaintiff can rely as invalidating the notice which was given her. This matter of consent was, as I have said, a matter arising only as between the authority and the managers. It was not a condition precedent to a good notice of dismissal. A subsequent consent by the authority to that which the managers had done under a provisional consent given by their subordinate section refers back, I think, and ratifies the act which the managers did, if any such ratification was required. Moreover, on the 9th Dec., being before the issue of the writ, the sub-committee had approved the action of the section. Further, and as a separate point, absence of consent, if there was such absence, at the relevant date, is not, I think, a matter which the plaintiff can set up. It gives her no right. It is a matter which would result only in consequences as between the school and the education authority. In my opinion the action fails and I dismiss it, and, as the defendants ask for costs, it must be dismissed with costs.

Solicitors for the plaintiff, *Baker* and *Nairne*.

Solicitors for the defendants, *Freeman* and *Son*.

KING'S BENCH DIVISION.

Dec. 11 *and* 12, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

REX *v.* SOMERS; *Ex parte* GENERAL ESTATES COMPANY. (*a*)

Highway—Local authority taking over repair and maintenance — Consent in writing of "owner" and "occupier"—Licensee—Highway Act 1862 (25 *&* 26 *Vict. c.* 61), *s.* 36.

A person who has a mere right of way under licence over a driftway, private carriage or occupation road, is not an "owner" or "occupier" within sect. 36 *of the Highway Act* 1862, *and so his consent in writing is not necessary before the justices can make an order under that section.*

CAUSE shown against a rule *nisi* for a writ of *certiorari* to bring up and quash an order made by justices whereby, under sect. 36 of the Highway Act 1862, it was ordered and declared that a certain private carriage and occupation road in the parish of Bleadon, in the county of Somerset, was a public highway to be repaired at the expense of the parish of Bleadon or otherwise as might be provided by the statutes relating to the repair of highways from time to time in force.

The rule was obtained by the General Estates Company on the following grounds: (1) That the order of the justices was made without jurisdiction; (2) that the company were occupiers jointly with the Great Western Railway Company of the road, and their consent in writing was not obtained and they at no time consented to the application to the justices to declare the road a public highway to be repaired at the expense of the parish; (3) that the provisions of sect. 36 of the Highway Act 1862 were not complied with in that no consent in writing, as required by the section, was obtained from the owners and occupiers of every part of the road.

The road in question was a portion of a driftway set out under the Bleadon inclosure award under the Act 28 Geo. 3, c. iv.

The Bristol and Exeter Railway Company acquired the freehold of the portion of the driftway (the subject of the order), and constructed a bridge to carry it over the railway.

The freehold of the remaining portion of the driftway was vested in the company.

The order of the justices only applied to that part of the driftway acquired by the Bristol and Exeter Railway Company, which had since been absorbed by the Great Western Railway Company.

By a deed of covenant of the 7th Jan. 1863, the Bristol and Exeter Railway Company granted to one Henry Davies, his heirs, and assigns a right of way for all purposes over the road in question for ever, the consideration for which was a payment of 50*l.* by Henry Davies and a covenant by him, his heirs, executors, and administrators to keep and preserve the road in good and substantial repair at all times for ever thereafter.

The General Estates Company were the successors in title of Henry Davies.

The freehold of a private carriage road connecting the portion of the driftway, the subject of the order, with a highway was also vested in the company.

Subject to the payment of certain charges to the company for traffic other than foot passengers, the public had for upwards of forty years used and still use the driftway or road the subject of the order, in conjunction with the private carriage road.

The company were the occupiers of the road in question jointly with the Great Western Railway Company. The road had been regularly kept in repair by the company and their predecessors in title since 1863. In respect of the freehold of certain other lands vested in the company, the company with their tenants were entitled to the use of a portion of the road independently of the deed of covenant of the 7th Jan. 1863.

Neither the company nor anyone on their behalf received any notice of the application to the justices for the order until after the order was made, nor did they or anyone on their behalf consent in writing or at all to the application by the Axbridge Rural Council for such order, which purported to have been made with the consent in writing of the Great Western Railway Company, such consent being given subject to any rights the General Estates Company had.

An affidavit of the justices, after stating the evidence on which the order was made continued:

It was proved to our satisfaction on the reading of the said consent [by the Great Western Railway Com-

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

pany] that the only rights which the General Estates Company Limited had over the said road was a right of way which had been granted by the Bristol and Exeter Railway Company, the predecessors in title of the Great Western Railway Company, to the General Estates Company Limited, or their predecessors in title, and, further, that there were numerous other owners and occupiers of land on the western side of the Great Western Railway Company's main line from Bristol to Exeter who from time immemorial had had and exercised rights of way and passage for agricultural purposes over the said private carriage and occupation road, and we were of opinion that parties having a mere right of passage over the said roadway were not owners or occupiers of any part of the said road within the meaning of the said Act.

By sect 36 of the Highway Act 1862:

Where the inhabitants of any parish are desirous of undertaking the repair and maintenance of any driftway, or any private carriage or occupation road, within their parish, in return for the use thereof, the district surveyor may, at the request of the inhabitants of such parish assembled in a vestry duly convened for the purpose, and with the consent in writing of the owner and the occupier of every part thereof, apply to the justices in petty sessions to declare such driftway or road to be a public highway to be repaired at the expense of the parish; and, upon such application being made, it shall be lawful for the justices to declare the same to be a public carriage road to be repaired at the expense of the parish.

Macmorran, K.C. and *Bonsey* for the Axbridge Rural Council showed cause.—All that passed under the deed of 1863 was a licence to Davies which could not be transferred. There was no easement created. They referred to

Ackroyd v. *Smith*, 10 C. B. 164;
Rangeley v. *Midland Railway Company*, 18 L. T. Rep. 69; L. Rep. 3 Ch. 306.

A licensee is not an occupier within sect. 36 of the Highway Act 1862. All the consent that was necessary was given.

C. A. Russell, K.C. and *W. Mackenzie* for the General Estates Company.—The company was an "occupier" within the section. That word must be construed in its fullest sense. They were "occupiers" of the road. They referred to

Charman v. *South-Eastern Railway Company*, 21 Q. B. Div. 524;
Manchester, Sheffield, and Lincolnshire Railway Company v. *Wallis*, 14 C. B. 213;
Selby v. *Crystal Palace District Gas Company*, 4 De G. F. & J. 246.

If the company could properly use the road they were occupiers of the road, and their consent in writing was necessary.

Lord Alverstone, C.J.—I think this rule must be discharged on my construction of sect. 36 of the Highway Act 1862. It was contended that under sect. 36 of the Highway Act 1862 the consent of all persons who had any special rights in a driftway, private carriage or occupation road, must be obtained before the justices can make the order contemplated by the section, even although such persons are not the owners or occupiers of the road in the legal sense of the term, and have only rights by licence. Sect. 36 deals with certain limited rights over property which is *primâ facie*, and in fact is nearly always, in the occupation of other persons. It contemplates that the road—whether driftway, carriage road or occupation road—is to become a public highway, the maintenance of which was to be undertaken by the inhabitants, as they have the use of it. On principle it seems to me that persons entitled to mere licences in respect of the road ought not to have anything to say in that matter. Their rights of way are not taken away; therefore there is no question of the destruction of their rights. The section is not dealing with persons who have mere rights of way; its object obviously is to deal with the servient owners, who, instead of having a few people passing over their property, might have the whole inhabitants of the parish making use of the road. The persons, therefore, whose consent under the section is necessary before the justices can make an order are the owners or occupiers of the servient property over which the rights of way are exercised, and not the persons who have these rights of way. That view of the section is in accordance with the general law. In Gale on Easements (p. 11, 7th edit.) it is stated: "Many personal rights which in their mode of enjoyment bear a great resemblance to easements, as, for instance, rights of way, may be conferred by actual grant, independently of the possession of any tenement by the grantee; but such rights, though valid between the contracting parties, do not possess the incidents of an easement. In case of disturbance of a personal right thus given, the remedy would appear to be upon the contract only." The persons mentioned there were not intended to be protected by this section, and I think the same principle would apply where the right was an easement in a strict sense. In this case the General Estates Company, the assignees of Davies, only got a right of passage under a licence, for they got merely a licence. With regard to the cases of *Charman* v. *South-Eastern Railway Company* (21 Q. B. Div. 524) and *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Wallis* (14 C. B. 213), which were relied upon, they deal with an entirely different branch of law—namely, the obligation of a railway company to fence their lines—and they are a very long way off the point the court has now to deal with, and they afford no help in showing who are owners and occupiers within sect. 36 of the Highway Act 1862. For many purposes I agree that the word "occupier" may be properly used in reference to persons only using the road. A cart which is delivering coals in front of a house might, while standing in the street, be said to occupy it; so also the occupant of a carriage passing along the road may be said to occupy the road; but such a use of the word does not assist us in construing the section before us. In view of that construction I come to the conclusion that the justices had before them the consent in writing of all persons who came properly within the words "owners" and "occupiers" of the road.

Lawrance and Ridley, JJ. agreed.

Rule discharged.

Solicitors: *G. M. Percy*; *Mead* and *Co.*, for *F. Wood*, Wrington.

Dec. 13 *and* 14, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

SMITH (app.) *v.* PERRY (resp.). (*a*)

Highways—Nuisance—Laying rubbish on highway —"Injury, interruption, or personal danger of any person travelling thereon"—Conviction for laying rubble "to the interruption and personal danger" of person travelling on highway—Duplicity—Highway Act 1835 (5 *& 6 Will.* 4, *c.* 50), *s.* 72.

By sect. 72 *of the Highway Act* 1835, *if any person shall lay any timber, rubbish, or other matter or thing whatsoever upon the highway, "to the injury of such highway, or to the injury, interruption, or personal danger of any person travelling thereon," he shall be liable to be fined:*

Held, that this clause creates, not four offences, but two offences only, namely, the doing of any of the specified acts to the injury of the highway, and the doing of them "to the injury, interruption, or personal danger of any person travelling" on the highway, the latter words creating one offence only; and, consequently, a conviction for laying rubble on the highway "to the interruption and personal danger" of any person travelling on the highway, is a conviction for one offence only, and is not void for duplicity.

In such case it is sufficient to support the conviction if police constables who know that the obstruction is there see the obstruction while passing along the highway, although there is no evidence that any other person is thereby interrupted or endangered.

CASE stated by the Court of Quarter Sessions for the County of Somerset, upon an appeal to them from a decision of the justices of Dunster, in the county of Somerset.

On the 1st July 1904, the appellant, who was the surveyor to the urban district council of Minehead, was summoned on an information for that he, on the 7th May 1904, at the parish of Minehead, in the county of Somerset, did lay a quantity of rubble upon a certain highway there situate, to the interruption or personal danger of any person travelling thereon, contrary to sect. 72 of the Highway Act 1835.

The appellant was convicted on the information, and the record of the conviction was drawn up by the clerk to the justices in the following terms:

The first day of July 1904. Woolston Smith, of Minehead, in the said county (hereinafter called the defendant), is this day convicted before this court for that he on the 7th May 1904, at the parish of Minehead, in the said county, unlawfully did lay a quantity of rubble upon a certain highway there situate, to the interruption or personal danger of any person travelling thereon. And it is adjudged that the defendant do for his said offence forfeit and pay to the clerk of this court at Dunster the sum of 11*s.*, and do also pay to William Perry, the prosecutor, the sum of 9*s* for costs. . . .

On the 6th July 1904, notice of appeal to quarter sessions was given and duly served, upon the grounds that he was not guilty of the offence, and that the alleged offence was not committed by him, but by other persons in the employ of the urban district council; that there was no evidence in law to support the conviction, and that the conviction was against the weight of evidence; that the conviction was bad in law upon the face of it for duplicity; and that it was bad in law upon the face of it for uncertainty.

On the 17th Sept. 1904 a copy of the notice of appeal and a copy of the conviction were lodged with the clerk of the peace for the county by the appellant; and on the 7th Oct. the clerk to the justices of Dunster filed the conviction with the clerk of the peace.

On the 15th Oct. 1904, four days before quarter sessions, an amended record of conviction was drawn up and signed by the convicting justices, and filed with the clerk of the peace on the 17th Oct.

In this amended record of conviction the word "and" was substituted for the word "or," and the record of the conviction then was for that he (the defendant) "unlawfully did lay a quantity of rubble upon a certain highway there situate, to the interruption and personal danger of any person travelling thereon"—the rest of the conviction being the same as before.

On the appeal coming before the quarter sessions for hearing on the 19th Oct., counsel for the appellant took the preliminary objection that the conviction was bad on the face of it as disclosing two offences stated alternatively.

Counsel for the respondent, however, contended that the amended conviction was the proper legal record of the justices' decision, as the first record of conviction had been wrongly drawn up by the justices' clerk and did not truly set forth the conviction, and it was the duty of the magistrates to draw up and file a record of the conviction in proper form, and they had power to do so, notwithstanding the fact that a previous erroneous record of the conviction had been drawn up and filed as aforesaid; and it was further contended by counsel for the respondent that the quarter sessions should ignore the original conviction and deal with the last conviction filed.

Counsel for the appellant contended that the Quarter Sessions Act 1849, which provided in sect. 7 for the amendment of convictions, only applied to mistakes in drawing up the order or conviction, and not to a mistake in point of substance, and that the justices not having shown by the original conviction of which offence they convicted the appellant, they could not then alter their decision and convict him of both; and, further, that the original conviction having been filed with the clerk of the peace it was too late to amend or substitute another conviction.

Counsel for the respondent argued that he did not rely upon the section in the Quarter Sessions Act 1849, but upon the general power vested in justices in petty sessions to draw up and file a correct record of the conviction.

The justices in quarter sessions were of opinion that the first record of the conviction had been drawn up in error and did not correctly represent the decision of the justices, and that there was evidence that the appellant unlawfully did lay a quantity of rubble upon the highway to the interruption and personal danger of any person travelling thereon, and that the facts justified such conviction.

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

They therefore upheld the respondent's contention, and decided that the second record of the conviction was the proper legal record of such conviction.

They were further of opinion, and so held, that in any event they had power to amend the first record of the conviction under the Quarter Sessions Act 1849, and they determined to treat it as such.

Thereupon counsel for the appellant contended that the conviction was equally bad on the face of it, on the ground that it disclosed two offences stated cumulatively, and he relied on the decisions in *Cotterill* v. *Lempriere* (62 L. T. Rep. 695; 24 Q. B. Div. 634); *Rex* v. *Slater* (67 J. P. 299), and *Rex* v. *Wells* (91 L. T. Rep. 98).

The justices in quarter sessions held that the words in sect. 72 of the Highway Act 1835 (under which the appellant had been convicted)—namely, "shall lay any timber . . . rubbish, or other matter or thing . . . upon such highway . . . to the injury, interruption or personal danger of any person travelling thereon," did not create two offences but one, and they accordingly rejected the contention of the appellant's counsel, and held that the conviction was not bad on the face of it but was good in law.

The depositions of the witnesses taken before the convicting justices, were then by consent put in as evidence of the facts in the case, and were inserted as part of the case.

The only depositions were those of a sergeant of police and a police constable. Their evidence was to the effect that they were on duty on the night of the 6th May, and that about a quarter to one o'clock in the morning, on the road in front of the Hotel Metropole, at Minehead, they found a large manhole about 5ft. square and 2ft. in depth, and there was a large heap of rubble about 18in. or 2ft. high, round the hole extending for some 4ft. or 5ft. into the roadway. The night was a very dark night, and there was no light or lamp to warn anyone of the danger on passing by there. There was no barrier or plank or other protection to prevent anyone going into the hole, and some 16ft. of the road was obstructed by the heap of rubble and a water cart beside it. The defendant admitted to the police sergeant that he was responsible for it. Both the police officers admitted that they knew the rubble was there, as one of them had seen it there on the previous night, though there was then a lamp there. No person was seen by the witnesses travelling on the road at the time.

It was contended by counsel for the appellant that the Minehead Urban District Council and not the appellant (who was their surveyor) should have been proceeded against, on the ground that the offence disclosed (if any) was in fact committed by workmen who, like the appellant, were in the employ of the urban district council, but the quarter sessions decided that the appellant was properly summoned and held as a fact that he had directed the operations of the men who placed the rubble on the highway, and that they were under his orders and control. It was further contended by counsel for the appellant that there was no evidence that any person was travelling on the highway, or that any person was interrupted or endangered, and he relied on the case of *Hill* v. *Somerset* (51 J. P. 742).

For the respondent it was contended that it was not necessary to give evidence of any person having in fact been interrupted or endangered, but that in any event the police officers were persons travelling on the highway who were interrupted and endangered.

The Court of Quarter Sessions held that there was evidence to justify the inference that some person was interrupted and endangered, and that the police officers were persons travelling on the highway and were interrupted and endangered.

They accordingly affirmed the conviction and ordered the appellant to pay the costs, and the question for the court was whether they were right.

Sect. 72 of the Highway Act 1835 (5 & 6 Will. 4, c. 50), provides:

> If any person . . . shall lay any timber, stone, hay, straw, dung, manure, lime, soil, ashes, rubbish, or other matter or thing whatsoever upon such highway, to the injury of such highway, or to the injury, interruption, or personal danger of any person travelling thereon . . . every person so offending in any of the cases aforesaid shall for each and every such offence forfeit and pay any sum not exceeding forty shillings, over and above the damages occasioned thereby.

S. G. Lushington for the appellant.—The amended conviction is bad upon the face of it, as it states two offences cumulatively. This clause of sect. 72 of the Highway Act 1835 creates four distinct and separate offences, the first being the doing of any of the acts in question "to the injury of such highway," and the other three being the doing of any of these acts, first, "to the injury"; secondly, to the "interruption"; and thirdly, to the "personal danger" of any person travelling on the highway; so that the last words of the clause "to the injury, interruption, or personal danger of any person travelling thereon," constitute three distinct offences. Doing an act to the "interruption" of any person travelling on the highway, is a totally different thing from doing the act to the "personal danger" of any person travelling on the highway. There may be injury without interruption; there may be interruption without personal danger, and there may be personal danger without either injury or interruption. If it is sought to convict a person of doing the act to the "interruption" and to the "personal danger" of any person travelling on the highway—two offences—he must be summoned for both and there must be two separate convictions. In Oke's Magisterial Formulist (8th edit., p. 172) in the form there given the word "or" is inserted. In the forms as to highways, form 44, as to laying timber, &c., on the highway, says that the form is to conclude as in form 40, and in that form the words are "to the injury of the highway," "or to the injury or personal danger or interruption of the persons travelling thereon," the latter clause thus showing three offences. By sect. 10 of the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43) every complaint "shall be for one matter of complaint only, and not for two or more matters of complaint; and every such information shall be for one offence only, and not for two or more offences." There cannot be two or more offences charged in the same summons, and there can only be one conviction for one offence (Paley on Convictions, 8th edit., pp. 196, 291), and the

offence cannot be charged disjunctively or in the alternative: (*Ib.*, p. 196). In *Cotterill* v. *Lempriere* (62 L. T. Rep. 695; 24 Q. B. Div. 634), it was held that where a statute creates two distinct offences and provides the same penalty for both, a conviction stating the offence in the alternative is bad; and in *Rex* v. *Slater* (67 J. P. 299) a conviction was held to be bad either as showing more than one offence, or as being uncertain. In *Rex* v. *Wells* (91 L. T. Rep. 98) where a statute imposed a penalty upon every person who drives a motor-car on a public highway "at a speed or in a manner which is dangerous to the public," it was held that the statute created two offences, and that a conviction for driving "at a speed, or in a manner which was dangerous to the public," was bad as being a conviction for two offences. Again, the cases show that it must be proved not only that was there a possibility of danger, but that in fact there was danger to or interruption of some persons on the highway. Sect. 72 also makes it an offence if a person makes any fire within 50ft. of the highway, and it was held in *Stinson* v. *Browning* (13 L T. Rep. 799; L. Rep. 1 C. P. 321) that there is no offence unless it is done to the injury of the highway, or to injury, interruption, or personal danger of persons travelling on the highway. Willes, J. says that "the nuisance is not such *per se*, but it is a nuisance only if done to the injury of the highway, or to the injury, interruption, or personal danger of persons travelling thereon" (35 L. J. at p. 153, M. C.); and in *Hill* v. *Somerset* (51 J. P. 742) where a person was summoned under this same section—sect. 72—for unlawfully assisting in making a fire on the highway, it was held that there could not be a conviction unless it was shown that passengers were endangered or interrupted. In the present case there was no evidence either of the interruption of or personal danger to, any persons on the highway. The mistake in this case in drawing up the conviction was not a mistake which could be amended under sect. 7 of the Quarter Sessions Act 1849 (12 & 13 Vict. c. 45). That section applies only to amendment in matters of form, and does not apply to amendment in matters of substance. "12 & 13 Vict. c. 45, s. 7, only applies to a mistake in drawing up the order, but not to a mistake in point of substance": (per Cockburn, C.J. in *Reg.* v. *Padbury*, 5 Q. B. Div. 126, at p. 128). The defect here, that of duplicity, was a defect in substance, and not a mere defect in form, and it could not be amended. The original form of conviction was bad as stating two offences alternatively, and a fresh conviction cannot be substituted for it (*Ex parte Austin*, 44 L. T. Rep. 102); but even if substituted the second form is also bad as stating two offences cumulatively.

Wethered (*Avory*, K.C. with him) for the respondent, was called upon only as to the point whether the words in sect. 72 indicate four offences. The words of the clause create two offences only—namely, the doing of these acts, first, to the injury of the highway, which is one offence; and, secondly, to the annoyance of any person travelling on the highway, which is the second offence. The latter part of the clause creates one offence only. It is therefore not the case that the appellant was convicted of two offences, as he was convicted of doing the act to the interruption and personal danger of any person travelling on the highway, which is one offence only, as is shown by the judgment of Smith, J. in *Hill* v. *Somerset* (*ubi sup.*), where he uses only one word "endangered" to describe all the offences in that clause. [He was stopped.]

Lushington in reply.

Lord ALVERSTONE, C.J.—We have frequently had under discussion the cases of *Stinson* v. *Browning* (*ubi sup.*) and *Hill* v. *Somerset* (*ubi sup.*), which have been cited to us. They are not very satisfactory authorities, but at any rate they can only be considered as authorities with regard to the particular offences then being considered. Here we are dealing with a long section—Sect. 72—which contains some fifteen paragraphs or more, indicating several different offences, in some of which there is no allegation that the offence is the doing of the acts to the danger or annoyance of anyone, while in others there is such an allegation. In my opinion the common- ense view of this paragraph is that which counsel for the respondent has indicated—namely, that there are two classes of offences dealt with, injury to the highway and annoyance or injury to passengers on the highway, I may illustrate the point in this way. Suppose a man is summoned for putting timber on the highway, with an allegation that it is to the danger of persons travelling thereon, and it should turn out that although there was a distinct interruption of a person on the highway, it did not amount to a dangerous interruption, because the passenger could see it and with some trouble could get round it, in such a case it would be a very unfortunate result if the justices could not convict. It seems to me that the sensible view of this particular sub-section is to hold that it is aimed at the putting timber, &c., on the highway, in the one case to the injury of the highway and in the other case to the personal interruption or danger of any person travelling thereon. This view is, I think, supported by the grammatical construction of the section, and it seems to me that on the true construction of this clause, when we have got injury to the highway as one subject-matter and danger to the public as the other subject-matter, there are only two offences mentioned and not four. If there had been four offences intended, then I think we should have expected to find the construction of the clause different with regard to the word "or." As to the question that there was no evidence to support the conviction, it seems to me that it is hopeless to contend that there was no evidence. There was sufficient evidence to support the conviction. With regard to the other point that the error in drawing up the conviction was an error in substance and could not be corrected, that is disposed of by our decision that there are only two offences created by this sub-section. Of course, if counsel for the appellant could have made out that this was a matter of substance, and that the conviction had been amended in a matter of substance, the case would have been different; but the error in drawing up the conviction was a mere mistake in form, and the justices could therefore correct it. The appeal must therefore be dismissed.

LAWRANCE, J.—I entirely agree.

RIDLEY, J.—I agree.

Appeal dismissed.

Solicitors for the appellant, *Sismey* and *Cook*, for *Incledon*, *Alms*, and *Newbery*, Minehead.

Solicitors for the respondent, *Rawle*, *Johnstone*, and *Co.* for *Joyce*, *Davis*, and *Risdon*, Williton.

Wednesday, Dec. 13, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY (apps.) *v.* THORNTON URBAN DISTRICT COUNCIL (resps.) (*a*)

Tramroad—Rating—General district rate—Land occupied by tramroad—Exemption as to three-fourths of net annual value—"Land used only as a railway"—Public Health Act 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*)—*Blackpool and Fleetwood Tramroad Acts* 1896 *and* 1898 (59 & 60 *Vict. c. cxlvii.*; 61 & 62 *Vict. c. cl.*).

By the Public Health Act 1875, *s.* 211, *sub-s.* 1 (*b*) "*the occupier of any land used only as a railway constructed under the powers of any Act of Parliament, for public conveyance, shall be assessed*"—*to general district rates*—"*in respect of the same in the proportion of one-fourth part only of the net annual value thereof.*"

A company, incorporated by Act of Parliament for the purpose of making and working a tramroad and tramway, under the powers of their Act constructed a tramway through the streets of a town, and at the end of this tramway and connected therewith they constructed a tramroad across country on land which was their own property, having been acquired by them for that purpose under their statutory powers. The tramroad at the other end joined on to another tramway through a town, which was leased and worked by the company. The whole line—tramways and tramroad—was worked as one continuous route by the overhead electric system, and carriages could pass and passengers be conveyed from one end to the other without break. Certain provisions of the Railway Acts were incorporated and made applicable to the tramroad, which for those special purposes was "to be deemed to be a railway."

Held, that the tramroad was not a "railway," that the land occupied by the tramroad was not "used only as a railway" within the meaning of the section, and that the company were not entitled to be assessed to a general district rate at one-fourth part only of the net annual value.

CASE stated by the Court of Quarter Sessions for the county of Lancaster, upon an appeal heard and determined by the quarter sessions held by adjournment at Preston, against a certain rate or assessment made on the 16th July 1904, being the general district rate for the urban district or township of Thornton.

The case was stated for the opinion of the court upon a point of law arising out of an appeal by the Blackpool and Fleetwood Tramroad Company (hereinafter called "the tramroad company") against a rate or assessment, being a general district rate made by the urban council of the urban district of Thornton (hereinafter called "the council").

(*a*) Reported by W. W. OBR, Esq., Barrister-at-Law.

On the 16th July 1904 the council made a general district rate upon all property in their district for the purpose of defraying the expenses incurred by them in the execution or by virtue of the Public Health Acts, and the tramroad company were thereby rated (*inter alia*) as owners and occupiers of certain premises in the rate mentioned — namely, tramway track Cleveleys, rateable value, 708*l.*; waiting-room, rateable value, 105*l.*; accumulator house, rateable value, 56*l.*

The tramroad company duly appealed against the rate. A copy of the notice of appeal formed part of the case.

The grounds of the appeal, so far as material, were as follows:

(5) That the said tramroad company have not been allowed the benefit or deductions provided for by sub-sect. 1 of sect. 211 of the Public Health Act 1875, to which the said company are entitled.

(6) That the said tramroad company in the said rate or assessment are assessed in the full net annual value for their said lines or railway instead of in the proportion of one-fourth part only of such net annual value thereof as provided by sub-sect. 1 of sect. 211 of the Public Health Act 1875.

The appeal came on for hearing on the 21st Oct. 1904, when the several facts stated in this case were proved or admitted.

The tramroad company was a company incorporated under the Blackpool and Fleetwood Tramroad Act 1896 (59 & 60 Vict. c. cxlvii.) (here inafter called "the Act of 1896") for the purpose of making, maintaining, and working the tramroad and tramway (hereinafter respectively called "the tramroad and tramway") described in, authorised by, and subject to the provisions of the Act aforesaid, and of the Blackpool and Fleetwood Tramroad Act 1898 (61 & 62 Vict. c. cl.).

The tramroad as defined by the Acts was constructed on lands the exclusive property of the company except where it passed over certain roads and public highways by means of level crossings which the company were authorised to make, and such lands were acquired by them under the provisions of the Act of 1896, and were fenced off from the adjoining lands. Passengers by the tramway in Fleetwood and the tramway hereinafter mentioned in Blackpool entered the cars from the street, and there were stopping places and stations along the route of the tramroad. Where the latter crossed the public roads named in sect. 47 of the Act of 1896, there were no gates across the roads nor across the tramroad, but the company had been permitted by the Board of Trade to construct and maintain cattle guards at such crossings and to employ flagmen to control the traffic at all of them but two.

The tramway as defined by the Acts was situate in the township of Fleetwood, and was constructed wholly upon the surface of streets and roads within the township.

The tramroad and tramway, in accordance with the provisions of the Act of 1896, made a junction together, and the tramroad also made a junction with a certain other tramway constructed along the surface of certain streets and roads. The last-mentioned tramway within the borough of Blackpool was the property of the Corporation of Blackpool, and was held and worked under a lease by the company. The

tramroad and tramways aforesaid were worked by the company as one continuous route, and passengers could book and were conveyed from one end to the other without break. The tramroad and tramways aforesaid were shown on a plan annexed to the case. [This plan showed the tramway in the township of Fleetwood (marked green), the tramroad (marked red) between the township of Fleetwood and the township of Blackpool, and the tramway (marked blue) through the streets of Blackpool all forming one continuous line.]

The tramroad and tramway were each of them worked and used subject to the provisions in that behalf set forth in relation thereto in the Acts of 1896 and 1898, and the Acts incorporated therewith.

The land forming the premises referred to in the rate as "tramway track, Cleveleys—rateable value 708*l.*" was a portion of the tramroad which was situate within the urban district of Thornton. The land was used for no other purpose than for the tramroad, which was wholly situate on such land, save and except where it crossed a public road as aforesaid.

The premises referred to in the rate mentionad as "accumulator house, Rossall-road, rateable value 56*l.*," was a building in which the electrical energy used for the working of the tramroad or tramways was stored or accumulated.

The tramway track and the accumulator house were used for no purposes other than aforesaid.

It was stated on behalf of the appellants, and not disputed by the respondents, that the company paid passenger duty in respect of passengers carried upon the tramroad under the Act 5 & 6 Vict. c. 79 (the Railway Passenger Duty Act 1842), but their liability to pay such duty under that Act or otherwise, and the circumstances and extent of their payment, were not explained to the justices nor admitted by the respondents.

For the respondents it was contended: That the land in question was not land "used as a railway constructed under the powers of any Act of Parliament" within the meaning of sect. 211, sub-sect. 1, of the Public Health Act 1875.

The appellants contended: That the tramroad was and could only be worked as a railway, and that it was entirely separate from the tramways, and was in fact and in law used as a railway, and therefore the premises were lands used only as a railway, and the company, as owners thereof, should not be assessed in respect of the same to a greater extent than in the proportion of one fourth part only of the net annual value thereof.

It was agreed that the quarter sessions were bound by the authority of the case of *Swansea Improvements and Tramway Company* v. *Swansea Urban Sanitary Authority* (66 L. T. Rep. 119; (1892) 1 Q. B. 357), to read the material words of sect. 211 of the Public Health Act 1875 as follows—namely, "or used only as a railway," &c.

The justices in quarter sessions were of opinion that the lands were not so used, and therefore were not used as a railway within the meaning of that section, and they dismissed the appeal.

The question for the court was whether the "tramway track, Cleveleys," and the "accumulator house, Rossall-road," were lands used only as a railway constructed under the powers of the Act of Parliament for public conveyance within the meaning of sect. 211, sub-sect. 1 of the Public Health Act 1875, and whether the company, as owners thereof, ought to be assessed in respect of the same in the proportion of one-fourth par only of the net annual value thereof under the provisions of that section.

During the argument counsel for the appellants stated that the appellants did not claim exemption in respect of the waiting-room and accumulator house, as those had been held not to be part of the railway, and the argument was as to the exemption of the tram road.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

Sect. 211. With respect to the assessment and levying of general district rates under this Act the following provisions shall have effect—namely, (1) general district rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor, and shall be assessed on the full net annual value of such property, ascertained by the valuation list for the time being in force, or, if there is none, by the rate for the relief of the poor made next before the making of the assessment under this Act, subject to the following exceptions, regulations, and conditions—namely, (b) the occupier of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof.

The following sections of the local Acts were (amongst others) referred to.

The Blackpool and Fleetwood Tramroad Act 1896 (59 & 60 Vict. c. cxlvii.):

Sect. 2. The following Acts and parts of Acts (that is to say): The Companies Clauses Consolidation 1845 [in part]; the Lands Clauses Acts; the provisions of the Railways Clauses Consolidation Act 1845, with respect to the temporary occupation of lands near the railway during the construction thereof, and with respect to mines lying under or near to the railway, and with respect to the carrying of passengers and goods upon the railway and the tolls to be taken thereon; sect. 3 (interpretation of terms) and parts 2 and 3 of the Tramways Act 1870—so far as they are applicable to and are not expressly varied by or inconsistent with the provisions of this Act are incorporated with and form part of this Act, and shall apply to the undertaking of the company: Provided that the provisions of the Railways Clauses Consolidation Act 1845 herewith incorporated shall apply only to the tramroad by this Act authorised and for the purposes thereof the tramroad shall be deemed to be a railway, and the company shall be deemed to be a railway company: Provided further, that the provisions of the Tramways Act 1870 herewith incorporated shall apply only to the tramway by this Act authorised, and shall not apply to any interference with any telegraphic line of Her Majesty's Postmaster-General. . . .

Sect. 6. Subject to the provisions of this Act the company may make, form, lay down, work, use, and maintain in the lines and according to the levels shown on the deposited plans the tramroad and tramway hereinafter described. . . . The tramroad and tramway hereinbefore referred to and authorised by this Act are—A tramroad a double line 6 miles, 5 furlongs, 1·5 chains in length, commencing in the township

and borough of Blackpool and parish of Bispham, near the Gynn Inn, at or near the junction of Queen's Drive and Warbreck-road, and terminating in the township of Fleetwood and parish of Thornton, at or near the junction of Copse-road and West-street, Fleetwood: A tramway (on the deposited plans referred to as tramway No. 3), a double line 5 furlongs 1·25 chains in length, wholly situate in the township of Fleetwood and parish of Thornton commencing by a junction with the tramroad at its termination aforesaid, and proceeding thence in a north-easterly direction into and along West-street, . . . and terminating at or near the intersection of Upper Lune-street and Bold-street, near the Euston Barracks.

Sect. 7 dealt with the tramway in the township of Blackpool, and it recited that the corporation of Blackpool had made application in the then session of Parliament for an order to authorise the construction of tramways within the borough of Blackpool, including the tramway in the borough described in the order as tramway No. 8; and that an arrangement had been come to between the corporation and the promoters of the Bill to the effect that the powers conferred by the Act upon the company incorporated by the Act to make the portion of the tramroad which was within the borough of Blackpool should not be exercised if the corporation within eighteen months from the passing of the Act constructed the tramway No. 8 (which was the tramway in Blackpool) extending to the borough boundary, and permitted the company to form a junction between that tramway and the tramroad, and that the comany should within two months after the completion by the Blackpool Corporation of this tramway in Blackpool, accept a lease of the same from the corporation.

Sect. 47 (as to level crossings of the tramroad) . . . (4) Sect. 5 of the Railway Clauses Act 1863 shall apply to the said level crossings as if the tramroad were a railway within the meaning of that Act.

Sect. 48. If at any time the Board of Trade are of opinion that by reason of the increase of traffic on the tramroad or any road crossed by the tramroad on the level, any alteration of the level crossings or the mode of working the same is expedient, the company shall be subject to all such rules and regulations with regard to the mode of working such crossing as may from time to time be made by the Board of Trade, and sect. 48 of the Railways Clauses Consolidation Act 1845 and sect. 7 of the Railways Clauses Act 1863 shall be incorporated with this Act, and shall apply to the tramroad in the same manner as if it were a railway.

Sect. 49. The company in constructing the tramroad may deviate from the lines thereof shown on the deposited plans . . . and may deviate from the levels thereof shown on the deposited sections to the extent and subject to the conditions prescribed in the case of a railway by sects. 11, 12, and 14 of the Railways Clauses Consolidation Act 1845, and these sections shall apply to the tramroad as if the same were a railway within the meaning of the Act.

Sect. 50. The company shall for the purposes of constructing the tramroad have the same powers as are given by sect. 16 of the Railways Clauses Consolidation Act 1845 in the case of a railway, and that section shall apply to the tramroad as if the same were a railway within the meaning of that Act.

Sect. 71 entitled a passenger travelling upon the tramroad or tramway to take with him personal luggage not exceeding 28lb. in weight; sect. 72 enabled the company to take rates for the conveyance of small parcels.

Sect. 82. The provisions of the Railway and Canal Traffic Act 1854 and the Railway and Canal Traffic Acts 1873 and 1888 shall apply to the company as if they were a railway company and to the tramroad and tramway authorised by this Act as if the tramroad and tramway were railways.

Sect. 85. Nothing herein contained shall be deemed or construed to exempt the company or the tramroad and tramway from the provisions of any general Act relating to tramways and tramroads now in force or which may hereafter pass during this or any future session of Parliament, or from any future revision or alteration under the authority of Parliament of the maximum tolls or charges authorised by this Act.

The Blackpool and Fleetwood Tramroad Act 1898 (61 & 62 Vict. c. cl.) provides:

Sect. 3. The expression "the undertaking" shall mean the undertaking of the company as authorised by the Act of 1896. For the purposes of this Act the word "contingencies" in section one hundred and twenty-two of the Companies Clauses Consolidation Act 1845 shall be construed to include the contingency of the undertaking being sold to the local authority under section forty-three of the Tramways Act 1870 at a sum less than the aggregate amount of the capital and debts of the company.

Danckwerts, K.C. (*C. C. Hutchinson* with him) for the appellants.—The tramways in Blackpool and in Fleetwood are ordinary street tramways, and are subject to the Tramways Acts. The portion of the line between Blackpool and Fleetwood is a tramroad—and is so called in the Act—and is subject to the Railway Acts. It is a tramroad across country, and is a railway. It has two sets of rails like a railway, and the cars are so constructed that they can run either on the tramroad or on the tramway, and are worked by the overhead electric system. Sect. 2 of the special Act incorporates the Lands Clauses Acts and certain provisions of the Railways Clauses Act 1845, and the proviso is all important that the incorporated provisions of the Railways Clauses Act should apply only to the tramroad, and "the tramroad shall be deemed to be a railway and the company shall be deemed to be a railway company"; and there is the further proviso that the incorporated provisions of the Tramways Act 1870 should apply only to the tramway authorised by the Act, that tramway being the tramway at the Fleetwood end (marked green on the plan). The company had power to make the tramway (marked blue) at the Blackpool end, but were not to make it if the Blackpool corporation made it (sect. 7), and the corporation did make it. Sect. 6 gave power to make the tramroad and tramway authorised by the Act, each being a double line. Sect. 47 deals with level crossings, and sect. 5 of the Railways Clauses Act 1863 is to apply to the level crossings "as if the tramroad were a railway within the meaning of that Act." Then sect. 48 provides that if the Board of Trade are of opinion that by the increase of traffic on the tramroad any alteration in the level crossings is expedient the company shall be subject to the regulations made by the board, and sect. 48 of the Railways Clauses Act 1845 and sect. 7 of the Railways Clauses Act 1863 shall "apply to the tramroad as if it were a railway." Sect. 71 deals with passengers' luggage upon the tramroad or tramway. Sect. 72 deals with small parcels, and sect. 73 requires a

list of rates to be exhibited. These provisions are applicable to a railway rather than to a tramway. Sect. 82 is almost conclusive that the provisions of the Railway and Canal Traffic Acts 1854, 1873, and 1888 shall apply to the company "as if they were a railway company and to the tramroad and tramway as if the tramroad and tramway were railways." A railway may be defined to be a way constituted of rails upon which something runs in the shape of carriages. In *South Wales Railway Company* v. *Swansea Local Board* (4 E. & B. 189) it was held, under the corresponding section — sect. 88 — of the Public Health Act 1848, that the "railway" meant the way on which the carriages go, including the line, but that the adjuncts, such as the stations, were not included. In *Newport Dock Company* v. *Newport Local Board* (2 B. & S. 708; s.c. *Reg.* v. *Newport Dock Company*, 6 L. T. Rep. 456) the dock company had railways within the docks, which also communicated with an outside railway in order to effect a junction. In the Act the railways were described as railroads or tramroads, and it was held that they were exempt to the extent of three-fourths. That was a tramroad, and it was held to be "a railway constructed for public conveyance." In *Swansea Improvements and Tramway Company* v. *Swansea Urban Sanitary Authority* (66 L. T. Rep. 119 (1892) 1 Q. B. 357) the thing in question was a tramway in the streets communicating with a railway, and it was held that the land occupied by the tramway was not "used only as a railway," and was therefore not exempt as a railway, inasmuch as a tramway was something essentially different from a railway, as was pointed out by Wills, J. This is not within any of the cases a tramway; there is a careful distinction drawn throughout between a tramroad and a tramway; it is a tramroad and it is constructed for public conveyance under an Act of Parliament, and is, as to such conveyance, entirely liable to the Railway Clauses Acts, while a tramway is not, and the power of purchase is confined to that which is a tramway, and does not extend to that which is a tramroad. One of the distinguishing features between tramroads and tramways is the power of the local authorities to purchase. If it is not a tramway there is no decision whatever against the appellants. It is a tramroad, and the only decision on the point—the *Newport Dock* case—is in favour of the appellants.

E. Sutton for the respondents.—On the construction of these local Acts this undertaking, which is called a tramroad, in fact comes under the Acts relating to tramways, and does not come under the Acts relating to railways, except for certain particular purposes in respect of which and for which alone the tramway is to be considered a railway. Sect. 3 of the Act of 1898 provided that for the purpose of this Act the word "contingencies" in sect. 122 of the Companies Clauses Act of 1845, should be construed to include the contingency of the undertaking being sold to the local authority under sect. 43 of the Tramways Act 1870. That means the whole undertaking, as "undertaking" is defined as meaning "the undertaking of the company as authorised by the Act of 1896." If it is a tramway the local authority have power to buy under sect. 43 of the Tramways Act. It would be under the Tramways Act that the power to buy would come, and the whole undertaking was evidently intended to be sold to the local authority. [Lord Alverstone, C.J.—All that is said there is that "contingency" shall include the possibility of the undertaking being sold under sect. 43. That will not give the local authority power to buy, and sect. 43 gives the local authority power only to buy what has already come under sect. 2 of the Act of 1896.] Reading sect. 85 with that, it is submitted that the whole undertaking comes under the Tramways Act. If it is used as a tramroad it is not used as a railway. It is only when it is used as a railway constructed under the powers of some Act for public conveyance, that it is exempt, and an undertaking which is used for the purpose of a tramroad, and is only "to be deemed to be" a railway for certain specific purposes, is not a railway for this purpose. When a thing is said to be deemed to be a certain thing it does not mean that it is the thing which it is to be deemed to be, but it means that it is not that thing except for the particular purposes specified. So, when in some of the sections it is said that the tramroad "is to be deemed to be a railway," that means that the Legislature did not intend that it should be a railway, but that only for certain specific purposes and specific Acts incorporated with the special Act, it should be deemed to be that which in fact it was not—namely, deemed to be a railway—though in fact it was not a railway, but a tramroad. Whenever a railway company is mentioned in these sections, the expressions used are that the tramroad shall "be deemed to be" a railway, or (as in sects. 47 and 48), that certain provisions of the Railways Clauses Act 1863 are to apply "as if the tramroad were a railway," or (as in sects. 49 and 50), that certain sections of the Railways Clauses Act 1845 are to apply to the tramroad "as if the same were a railway within the meaning of that Act"; thereby implying that, except for those special provisions the tramroad would not be a railway. If this were a railway it would not have been necessary to refer to these special sections of the Act of 1845; and if the Legislature had simply incorporated these Acts and made this a railway, those special sections would not have been wanted. Nowhere does the Act say that it is to be deemed to be a railway for the purposes of sect. 211 of the Public Health Act 1875. [He referred to sects. 2, 3, and 5 of the Conveyance of Mails Act 1893, as emphasising the distinction between tramroad and railway.]

Danckwerts, K.C. in reply, referred to the judgment of Lord Alverstone, C.J., in *Yorkshire (Woollen District) Electric Tramways* v. *Ellis* (92 L. T. Rep. at p. 205; (1905) 1 K. B. at p. 401), as to whether a carriage used on a light railway was a tramway carriage.

Lord Alverstone, C.J.—Upon the whole I think that this decision must be affirmed. I agree with counsel for the appellants, that it is rather difficult to draw the dividing line between these things by mere reference to Acts of Parliament of this character, because, in the last case he mentioned, the case of *Yorkshire (Woollen District) Electric Tramways* v. *Ellis* (*ubi sup.*), which was a case relating to carriages on light railways, it no doubt was quite correct to say that there were a large number of Acts of Parliament which have developed or allowed the

construction of lines of railway which were obviously the light railways which many people would almost have confounded with tramways, but which were obviously intended to be made under the Railway Acts, or subject to the Railway Acts. Then, again, there are the Acts of Parliament which govern tramways, and I think it may very fairly be said that the dividing line between that which is a railway and that which is a tramway is rather difficult to draw. Counsel for the appellants feeling that, said that some day or other it might be contended that the decision in the case of *Swansea Improvements and Tramway Company* v. *Swansea Urban Sanitary Authority* (*ubi sup.*), before Wills and Hawkins, JJ., which held that tramways are not railways, ought to be reconsidered and might not be affirmed. Now, in this case the particular structure, as to which there would be nothing absurd in calling it a railway, was made to form a connection at the two ends with what, for the purpose of the case, were undoubtedly tramways, and it did not differ very much in construction from them. Carriages might run on both, that is, on the rails of the tramway at the north end, along the rails on the tramroad and on the rails of the tramway at the south end; and the mode of traction at any rate might be the same on both the tramroad and the tramways, so that the tramroad had nothing in the physical construction of the lines of rails to enable us to decide the question absolutely as to whether it was a railway or not. Then, coming to the sections of the local Acts which have been referred to, those sections which apply certain clauses of the Railway Acts to certain things and to the structure in question, to my mind are inconsistent with the view that this structure is a railway for all purposes. I think the argument that counsel for the respondents has used that the number of separate provisions saying that for the purpose of certain sections the tramroad should be deemed to be a railway, tells quite as much against the view that it is a railway in the light of the law. As is often said, things that are by an Act of Parliament to be deemed to be certain things, are not those things; it is the case of the Act of Parliament making them for certain purposes what they are not. Seeing that we have in this case this kind of intermediate structure, called a tramroad, between a railway and a tramway, I am inclined to think that the justices have come to the right conclusion in holding that this was not land used solely as a railway. I think I ought to say with regard to the particular argument for the respondents based upon sect. 3 of the amending Act of 1898, that I am not so very much impressed by that argument, because a general section enlarging the meaning of "undertaking," or stating that amongst the contingencies to be contemplated with regard to the whole undertaking, the purchase by a local authority was one, seems to me to be a double-headed argument, and to tell as much against the respondents' contention as in their favour. It is also subject to the observation that a section of that kind is insufficient to give to a local authority powers to buy a tramway. With that observation I think on the whole the balance of the argument is rather in favour of this not being land used solely as a railway constructed under the powers of an Act of Parliament for public conveyance. I think therefore that this appeal should be dismissed.

Lawrance, J.—I agree.

Ridley, J.—I agree.

Appeal dismissed. Leave to appeal.

Solicitors for the appellants, *Chester, Broome,* and *Griffithes, Sutton, Elliott, Turnbull,* and *Mayne,* Manchester.

Solicitor for the respondents, *John Hall,* Thornton.

Thursday, Dec. 14, 1905.

(Before Lawrance and Ridley, JJ.)

Great Central Railway Company (apps.) v. Banbury Union (Assessment Committee) (resps.). (*a*)

Railways—Rating—Poor rate—Line connecting two railways for interchange of traffic—Cost of construction—Taking cost of construction into account as an element of rateable value—Net profits of line.

A railway line eight miles in length was constructed under statutory powers by the appellant railway company from a station on their own line to a station on the line of another railway company, in accordance with an arrangement made between the two companies for the more convenient interchange of traffic between their two main lines.

There were no stations or sidings on this connecting line, nor did the line itself originate any traffic, and the whole traffic thereon consisted of through traffic passing from the line of the one company to the line of the other company.

It was admitted that no person or company other than these two companies could be found to acquire the line, and the only advantage of it to either of the companies arose during the existence of an agreement for the mutual interchange of traffic.

The money for the construction of the line had been advanced at a specified rate of interest to the appellant company by the other company.

Upon an assessment of this line to poor rate, interest on the cost of construction was taken into account as an element of rateable value:

Held, that interest on the cost of construction of the line was not an element to be taken into consideration in ascertaining the rateable value, but that the proper basis of rateable value was the net earnings of the line within the parish, as ascertained by the mileage proportion of the receipts by the companies in respect of all traffic passing over the line after making the proper allowances.

Case stated by the justices of the Court of Quarter Sessions of the Peace for the County of Oxford, held at Oxford on the 23rd and 30th July 1904.

The appeal was against a poor rate made on the 19th May 1904 for the parish of Wardington, in which that part of the appellants' line of railway which lay in the parish was rated at 1390*l.* gross estimated rental, and 795*l.* rateable value.

The total length of the line, which ran from the parish of Eydon in the county of Northampton to the parish of Warkworth in the county of

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

Oxford, was 8 miles 18 chains, of which 1 mile 47 chains was in the parish of Wardington. This line of 8 miles 18 chains was connected at the northern end with the appellants' line at Woodford, and at the southern end with the line of the Great Western Railway Company at Banbury, thus forming a main-line route from the north to the south and west of England.

The line was constructed by the appellants in accordance with an arrangement made with the Great Western Railway Company for the more convenient interchange of traffic, and under the powers of the Great Central Railway Act 1897 (60 & 61 Vict. c. liv.), and was opened for traffic in 1900. The Act may, if necessary, be referred to, and shall be deemed to form part of this case.

The cost of constructing the line was approximately 280,000*l.*, and, in pursuance of the arrangement and under the provisions of the Act, the Great Western Railway Company advanced to the appellants the said sum of 280,000*l.*, at the rate of interest of 3½ per cent. per annum. It was not suggested that there had been any change in the conditions affecting the two companies since the passing of the Act.

The map or plan which accompanied this case, and was to be deemed part of it (coloured as thereon described), showed the through communications on the appellants' and the Great Western railways between the northern towns and the south and west of England.

There were no stations or sidings on the line, nor did the line itself originate any traffic. The whole traffic on the line consisted of through traffic passing from the appellants' system to that of the Great Western Railway Company and *vice versâ*.

It was admitted that persons or companies other than the appellants and the Great Western Railway Company could not be found to acquire the line. It was not disputed that the only advantage or use of the line to the appellants and the Great Western Railway Company arose during the existence of an agreement for the mutual interchange of traffic, and that in the absence of such an agreement the line would be of no value, and could not be let to either the appellants or the Great Western Railway Company.

For the appellants it was contended that, inasmuch as the line was an integral portion of the undertaking of the appellants, its rateable value in the parish of Wardington must depend on the actual net earnings of the line within the parish, such earnings being obtained owing to the mutual agreement for interchange of traffic above mentioned, and that to ascertain such net earnings there must be allocated to the line in the parish a mileage proportion of all rates and fares received by the appellants and the Great Western Railway Company for the whole journey in respect of all traffic passing over the line, and from the receipts so ascertained there must be deducted the usual and proper allowances for working expenses, Government duty, rental of stations separately assessed, trade profits, interest on tenant's capital, and the statutory deductions for maintenance and renewal.

Assessed on this principle the agreed rateable value of the line was 64*l.* per mile, and the rateable value of the line within the parish of Wardington was 102*l.*

For the respondents it wns contended that the assessment committee in ascertaining the rateable value of this property were entitled to take into account the 3½ per cent. interest paid by the appellants to the Great Western Railway Company on the sum of 280,000*l.*, advanced by the latter to the appellants for the purpose of constructing the line in question in accordance with the Great Central Railway Act 1897, and that the interest might properly be regarded as evidence of the rent which either the appellants or the Great Western Railway Company were prepared to pay for the said line, and that as such it was uncontradicted, and that the interest, being at the rate of far more than 1000*l.* per mile, was evidence that the appellants would be willing to give a rent for the line in the parish sufficient to support the rate appealed against, and that the geographical position of the line, as shown by the plan, indicated that the line had a value apart from the actual net earnings on the line, and in the alternative that the line might reasonably be expected to let to the appellants, or to the Great Western Railway Company, at a percentage of the gross receipts carried on the line which would justify the assessment appealed against.

The Court of Quarter Sessions overruled the contention of the appellants that the mileage proportion of receipts should be the sole basis of valuation. They held that interest on the cost of construction of the line was a matter which they were entitled to take into account as an element of calculation in ascertaining the rateable value, and, having so taken it into account, they determined that the property would properly be assessed at 1390*l.* gross estimated rental and 795*l.* rateable value.

The question for the opinion of the court was whether the appellants were right in their contention that the rateable value of the line within the parish should be ascertained in accordance with the principle stated in this case, or whether in the particular circumstances herein stated the interest on the cost of construction of the line was an element which might properly be taken into account in ascertaining the rateable value.

It was agreed that if the court should be of opinion that the appellants were right in their contention, the appeal should be allowed, and the assessment of the line within the parish reduced to 593*l.* gross estimated rental, and 102*l.* rateable value.

The Great Central Railway Act 1897 (60 & 61 Vict. c. liv.) in the preamble recited:

And whereas it is expedient that the railway No. 2 hereinafter authorised and the capital to be raised for the purposes thereof should be formed into a separate undertaking in manner and upon the terms and conditions hereinafter set forth: And whereas the said railway No. 2 will form a junction between the Extension to London Railway of the company and the railways of the Great Western Railway Company (in this Act referred to as "the Great Western Company"), and will by affording improved means of communication and facilities for the exchange of traffic between the systems of those companies be of public advantage, and it is expedient that provisions should be made as contained in this Act for ensuring the completion of the said railway No. 2.

Sect. 6. Subject to the provisions of this Act the company may make and maintain in the lines and

according to the levels shown on the deposited plans and sections the railways and deviation railway and works hereinafter described with all proper stations, sidings, . . . The railways and deviation railway hereinbefore referred to and authorised by this Act are: . . . A railway (No. 2) eight miles three furlongs nine chains or thereabouts in length, situate in the counties of Northampton and Oxford, commencing by a junction with the Extension to London Railway of the company now in course of construction in the parish of Eydon, in the county of Northampton, at a point one hundred and ten yards or thereabouts measured in a south-easterly direction along that railway . . . and terminating by a junction with the Oxford and Birmingham Branch of the Great Western Railway, in the parish of Warkworth, in the county of Northampton. . . .

Under the heading "Railway No. 2 separate undertaking":

Sect. 63. The railway No. 2 and works connected therewith by this Act authorised, together with all lands, buildings, and property to be purchased for the purposes thereof, may form a separate undertaking distinct and apart from the rest of the undertaking of the company, and two hundred and twenty thousand pounds of the capital of three hundred and fifty thousand pounds by this Act authorised to be raised other than the capital for the Nottingham joint station shall form a separate capital, and no mortgage, debenture stock, or liability of the company in respect of the general undertaking shall be a charge upon or in any way affect such separate undertaking or the receipts and revenue arising from traffic passing over the same.

Sect. 64. The said amount of two hundred and twenty thousand pounds shall be called "Banbury Branch Stock," and shall be issued as a separate stock entitled to a dividend not exceeding three pounds ten shillings per centum per annum, and if the separate net receipts accruing in respect of the traffic upon the said separate undertaking shall not be sufficient to pay the stipulated dividend the company shall make good the deficiency out of their mileage proportion of the through rates in respect of traffic passing on or over the separate undertaking from or to the general undertaking of the company, and the subject of the terms and conditions on which the said stock is issued shall be indorsed on the certificates of the said stock.

Balfour Browne, K.C. (Sir *Edward Boyle*, K.C. and *T. M. Snagge* with him) for the appellants.—The quarter sessions were wrong in disregarding the mileage proportion of the receipts, and in taking into account the cost of construction. The proper basis of the assessment was the actual net earnings of that portion of the line that is within the parish, and it is wholly immaterial what the line originally cost. The question is what a hypothetical tenant might reasonably be expected to give for it as a tenant from year to year, and, in determining what rent he would give for it, the original cost of construction would not in the least enter into his calculations. He would consider what profit he could make out of it, and not what it had originally cost. The first question the hypothetical tenant would ask would be, What were the earnings of the line? The sole earnings of this line arose from the interchange of traffic between these two companies, and, having regard to the circumstances, there would be no competitors for the line outside these companies; it would be useless to any other person or company and it is of use to these companies only so long as this agreement for the interchange of traffic lasts. Therefore the rate is to be assessed by first ascertaining in the usual way the net earnings of the line in the parish, and then making the usual deductions. He referred to

North and South-Western Junction Railway Company v. *Brentford Union*, 57 L. T. Rep. 429; 18 Q. B. Div. 740; and 60 L. T. Rep. 274; 13 App. Cas. 592.

Ryde (*Cecil Walsh* with him) for the respondents (the assessment committee).—The quarter sessions were right in taking into consideration the cost of construction when arriving at the rateable value. The real question here is, What is the rent which the Great Central Company or any other company might be expected to pay for this line as tenant from year to year, and whether in arriving at the result the quarter sessions took into account an element which they ought not to have taken into account? They took into consideration the cost of construction of the line as an element of calculation, and all the respondents contend for is that it was permissible for them to look at the cost of construction as an element of value. The cost of constructing the line was about 280,000*l.*, and the Great Western Company paid that sum to the Great Central Company in respect of the cost. There is no suggestion that the Great Central Company made a bad bargain, or that the bargain made between these companies turned out to be a bad bargain, and therefore it must be assumed that the price paid was a fair price, and the interest a fair interest thereon. Construing that cost into rent, it is reasonable to assume that the interest paid on such cost is what the line is worth to the appellants or the Great Western Company, and is therefore evidence of what the hypothetical tenant would give as rent for the line. Although the sum actually paid is not conclusive evidence of the rateable value, yet it is an important element in arriving at the rateable value, but it is open to the parties to show by evidence that it does not fairly represent the annual rent:

Reg. v. *Eastern Counties Railway Company*, 22 L. T. Rep. O. S. 223n.; 23 L. J. 96n. M. C.

In *South-Eastern Railway Company* v. *Dorking Overseers* (3 E. & B. 491), it was held that other matters besides the profits of the line itself in the parish might have been taken into consideration. Lord Campbell, C.J. said (at pp. 513-14): "I am of opinion that the liability of the appellants to be assessed to the relief of the poor in the parish of Dorking in respect of the portion of the Reading line in that parish, cannot be confined to the net profit derived by the appellants from the traffic passing through that parish." That case shows that the appellants' principle (as stated in the case), as to the net earnings within the parish being the proper basis of assessment, is wrong. In addition to the earnings in the parish there must also be taken into account the value of this line to the appellants as bringing more traffic on their main line by reason of the facilities it gives for through traffic:

London and North-Western Railway Company v. *Cannock Churchwardens*, 9 L. T. Rep. 325.

If that case is right then the appellants' contention must be wrong. The fact that other companies would be willing to pay a large rent for the branch line—and in this case the

Great Western Company would be so willing—is to be taken into account:

Reg. v. *London and North-Western Railway Company*, 29 L. T. Rep. 910; L. Rep. 9 Q. B. 134, per Blackburn, J., at p. 144.

In this case both these companies want this line and they can get it for 280,000*l.*, and that they are willing to pay for it; that fact brings the case within the principles laid down by Blackburn, J., whose judgment not only supports the respondents' contention but annihilates the contention for the appellants, as set out in the case. The decision of the Court of Appeal in *North and South-Western Junction Railway Company* v. *Brentford Union* (57 L. T. Rep. 429; 18 Q. B. Div. 740), which was the case relied on by the court below, supports the respondents' contention; and in *Mersey Docks and Harbour Board* v. *Birkenhead Union* (84 L. T. Rep. 542; (1901) A. C. 175), although the facts are different from those in the present case, the principle of law is the same. This court cannot overrule the decision of the court below, and that decision is binding on this court, unless the court finds that the quarter sessions have excluded some element of value which in law they ought to have included, or have included some element which ought to have been excluded; but so long as that cannot be shown then the decision of the quarter sessions stands. If the cost of construction was an element which in law could properly be taken into consideration—and it is submitted that it was—then the decision must stand. In any event the valuation cannot go back to the 102*l.*, but the case would have to be sent back to the sessions to fix the amount.

Balfour Browne, K.C. in reply.—Every one of the cases cited for the respondents is different from the present case. The lines in those cases were all feeding lines, lines which contributed traffic to the main line; but it is quite obvious that this line is not a feeding line. In *London and North-Western Railway Company* v. *Irthlingborough Churchwardens* (35 L. T. Rep. 327) Blackburn, J. said: "The second finding of the, quarter sessions is, that this line was constructed at a cost of 17,000*l.* per mile; this, however, is quite irrelevant to the question of rating, which depends only upon what a hypothetical tenant would pay by the year." That shows that the cost of construction ought not to be included; and he afterwards points out that where there are no direct rateable profits, the line in a parish is liable to be rated on the basis of receipts from the traffic on the other parts of the line. The judgment of Lord Esher, M.R. in *North and South-Western Junction Railway Company* v. *Brentford Union* (*ubi sup.*), was expressly disapproved of by Lord Halsbury, L.C. in the House of Lords in the same case (60 L. T. Rep. 274; 13 App. Cas. 592), and therefore that case as decided in the Court of Appeal may be taken as having been expressly overruled; but it is because of that judgment in the Court of Appeal that the quarter sessions decided as they did, deciding the matter upon that case, while in fact that case was overruled by the House of Lords.

[Sects. 63 and 64 of the special Act were referred to during the argument].

Lawrance, J.—In this case I think the judgment should be for the appellants. The case seems to me, when divested of all the arguments by which it has been surrounded, to be an extremely simple one. Of the two companies—the Great Western and the Great Central Railway Companies—the Great Central Railway Company was anxious to have a line to connect its system with the Great Western system, and running from Banbury to Woodford on the Great Central system. The Great Western Company, I imagine, were as anxious in one sense to have this line—it would be for the convenience of them both—for the exchange of traffic from one line to the other. They were the only two companies that were concerned in the slightest degree; no third party could by any possibility have worked the line, or have had any interest in it, because it was a matter that was entirely interesting only to these two railway companies. An Act of Parliament was obtained for the making of the line by the Great Central Company, and in order to find the capital for making the line it was agreed between the Great Central Company and the Great Western Company that the Great Western Company should advance the sum of 280,000*l.* and get 3½ per cent. per annum. There can be no doubt whatever that that was done. The Great Western had an interest in the matter, and it was worth their while to do it. That having been done, the question arises now: What is the proper principle on which these eight miles of railway shall be assessed? This is a link which only connects these two lines, and it has not, as I understand, a station on it, or any possibility of contributing anything to the railway by itself. The railway comes from one station on the Great Central line to another station on the Great Western line, and has no independent power, if I may so call it, of earning any money for itself. It is said by the appellants here, and their contention before the justices was, that the rateable value must depend upon the actual net earnings of the line within the parish. I need not go through the deductions which were made—they were the usual deductions. I have not had time to look at the shorthand notes of the case before the quarter sessions, a copy of which we have; but there is a considerable body of evidence, and I assume that some of the evidence was directed to this point, and it seems to have been adopted by the learned chairman of quarter sessions, who put this as one of the alternatives: Is that right, or is the contention of the respondents right, that "inasmuch as you (the appellants) have agreed to pay 3½ per cent. on the 280,000*l.*, you are in fact paying a rent, and we (the respondents) have the right to look upon that rent and say that is an element to be taken into consideration, and is proof of the value of this line." In my judgment, that is not the way in which to look at it. It seems to me that in this case, and in every case where it can be done—in some cases it is impossible—you have to look at what a person who was in a position to buy this line, and who could have bought it and worked it, would have given for it as rent, if you like, for a railway, or what would a particular hypothetical tenant give? When the hypothetical tenant came to look at it, the first thing he would say would be, What can I make out of it—what are the earnings of this line? I agree with the appellants' counsel that it is a matter of no consequence at all to him what it cost. He says: "I

do not mind if it cost 280,000*l.*, or if it cost 500,000*l.*; it makes no difference to me. My power of making a profit out of it is neither greater nor less because it cost too much or because it cost too little; the question is, What is its rateable value at the present time?" I can imagine a case in which a railway would be worth more than it was making—that is to say, worth more to some people. There might be competitors who would be very anxious to get the line, and who would give more for it than the thing itself is worth, looked at from a business point of view—that is to say, it would be worth more to them for a particular reason; and in most of the cases to which our attention has been called—I do not propose to refer to them by name now—there were competitors. In one of them there were said to be three competitors who were anxious and ready and willing to buy the line, and those facts ought to be taken into consideration. Here, for the reasons I have given during the argument, in my judgment, there is no such competition. The two companies were working together. The moment they cease working together the value of this line is entirely gone so far as regards both of them—it absolutely ceases. Therefore there was no competition at all which could enter into the matter; and in looking for a hypothetical tenant you could not put a finger on some other railway, and say, This railway might buy it, or a new company might come across here and do this, that, or the other. This line was a line from one station of one company to another station of the other company, with no other station in between; and it was a line which no independent company or person could by any possibility come in and work. Therefore the question is, What would a hypothetical tenant give for the line? It seems to me that, to arrive at that conclusion, one has entirely to overlook that cost of construction as being out of the question altogether in this case—that is to say, as being no part of the elements that are to be taken into consideration here. It should be taken into consideration if it does affect the price to be paid, or the rent to be paid, by the hypothetical tenant—a person who is coming to rent it—it is quite right that rent and interest on capital should be taken into consideration then, but not as a matter of law and necessity. In this case a man would be guided simply and solely by what he might be supposed to make out of the railway; and therefore I think the conclusion arrived at by the quarter sessions was wrong, and that the appellants' contention in the case was the right one—namely, that that was the sum a hypothetical tenant in my judgment would, under all the circumstances of the case, pay; and taking into consideration—that is to say, not excluding the consideration of, the 3½ per cent. paid upon 280,000*l.*, because if that had any bearing upon the case, as I say, it ought to have been considered. In my judgment it has no bearing on the case, and would have no influence on the mind of a tenant who was about to take this thing over. I therefore think the appellants are entitled to judgment, according to the contention contained in the case.

Ridley, J.—I agree. On the one hand I have been satisfied by counsel for the appellants that there are not, in fact, any advantages which have been omitted to be taken into account, or which are omitted in the appellants' contention to be taken into account, in ascertaining the net earnings on the piece of line in question. I therefore think that we must come to this conclusion on that part of the case—that if we affirm the principle upon which the appellants have argued the case, we must come to the conclusion that the assessment of the line is 593*l.* gross and 102*l.* rateable value. Upon the other part of the case, the contention of the respondents that it was right to take into account the interest paid on the capital required for the construction of this line, I am satisfied that contention is wrong. I entirely follow the reasons given by my brother Lawrance, and I would add merely this: That, although counsel for the assessment committee has quoted cases to us which he contended before us show that the opposite conclusion is the correct one, I do not think they show anything of the sort. I will mention one or two of them shortly in order to show what I mean. The first one is the case of the *South-Eastern Railway Company* v. *Dorking Overseers* (*ubi sup.*). In that case, the railway having been constructed between Reading and, I think, Reigate, the South-Eastern Company took a lease of it at a rate equal to 5*l.* 10*s.* per cent. on the capital raised, which was 600,000*l.* for 1000 years. The lease continued for, I think, a period of five years. After that there came a different arrangement, by which the South-Eastern Company bought the other company altogether on terms arranged by way of annuities, and the case was argued upon the question of what principle was the value of the railway to be assessed on. The court agreed in saying that by neither the rent nor by the amount of the annuities was the railway to be assessed; I mean that it was not the right figure. But it is impossible to contend from that case that, because the rent agreed to be paid by the South-Eastern Company was equal to 5½ per cent. on the capital raised—namely, the 600,000*l.*—therefore the interest on capital is the right test. Surely it is very plain that if you add to the facts that exist in this case the additional fact that the one company has agreed to lease from the other at a rent that is equivalent to such and such interest on the capital, then there is evidence that the percentage payable on the capital is an element to be taken into account in some way in ascertaining the rent; but otherwise it seems to me that interest on capital has nothing to do with it. I do not quite see how any man wanting to know what particular premises were worth could proceed by way of saying to himself, What did it cost to put them up? Unless it could be shown, as I have been putting it, that the percentage on the capital that had been raised for putting up the premises was in some way equivalent to the rent, it cannot be a material consideration. Then in the case of *Reg.* v. *London and North-Western Railway Company* (*ubi sup.*) the facts were these: There were two railways there. A railway from Bletchley to Bedford and another one from Bedford to Cambridge having been made by independent companies and become vested in the London and North-Western Company, one of the companies being paid 4 per cent. on 365,000*l.* and the other one 4 per cent. on 290,000*l.*, the case goes on to say: "Either of these interests thus guaranteed would, if regarded as rent, and taken as the basis of

rateable value, give a much larger rateable value per mile than that contended for by the appellants." But the court, in dealing with that position, simply put it in this way—that there was evidence before them that this sum, if regarded as rent, would, in point of fact, have been given, and would have been perhaps exceeded, by reason of the fact that there were three competitors—the Great Northern, the Midland, and the Great Eastern Railway Companies — who were anxious to get the benefit of that line, and who would, in point of fact, have given as much as that figure. But that was far from this position, that the court regarded that figure which was interest on the capital as being rent. It was not so; it was because there were elements of fact in the case which showed that by reason of the competition the rent could be raised to that figure, and perhaps more, that the court gave the decision they did. I will read what Quain, J. said: "We do not decide that the rent as given, or which these parties would be willing to take it at, is conclusive, but simply that it is an element to be taken into consideration. We are told that several railway companies would compete for it, because it is so valuable as influencing the traffic on their respective lines, and they would be therefore willing to acquire it on the same terms and pay the same rent for it as the appellants do now." I think that is quite different from what counsel for the assessment committee was contending for as I understood—that that case was an authority for the principle that you could take into account, as showing the rent the price paid which has been paid as capital. The *Irthlingborough* case (*ubi sup.*) followed that, in which there is the positive statement of Blackburn, J., which has been quoted by counsel for the appellants, to the effect that you ought not to take into account the cost of construction. I agree with the judgment which has been given by Lawrance, J.

Appeal allowed. Leave to appeal.

Solicitor for the appellants, *Dixon H. Davies.*

Solicitors for the respondents, *Hopwood* and *Sons*, for *Edward Lamley Fisher*, Banbury.

Friday, Dec. 15, 1905.

(Before LAWRANCE and RIDLEY, JJ.)

LONDON AND NORTH-WESTERN RAILWAY COMPANY (apps.) *v.* AMPTHILL UNION (ASSESSMENT COMMITTEE) AND OTHERS. (*a*)

Railways—Rating—Poor rate—Assessing portion of line in parish—Principle of assessment—Parochial method—Contributive value—Cost of construction of line—Case stated by quarter sessions—Omission in order as to statement of case.

A line of railway was to be constructed by a railway company under the powers of an Act passed in 1845, *and for the purpose of that construction the company, who were to construct the line, were to receive from another company incorporated under the Act a certain sum, which was the estimated expense of making the line, and were to pay 4 per cent. interest on that sum as a "rent" to the company which advanced the capital. That sum having all been spent, and having proved insufficient to complete the line, the company spent a further and larger sum in completing the line, and the line became vested in the appellants. There were three competing railway companies connecting with the line, but it was proved that none of these companies would pay any higher sum by way of rent than was represented by the parochial method, nor would they work the line on a fixed proportion of gross earnings. In rating to poor rate a portion of this line that passed through a certain parish:*

Held, that the rateable value of the portion of the line within the parish ought to be ascertained upon the parochial principle, that is, by taking the profits resulting from the receipts and expenses in that particular parish and making the usual allowances and deductions therefrom, and that neither the contributive value accruing from the occupation of the line in that parish in securing traffic and earning profits on other parts of the system, nor the original cost of the construction of the line ought to be taken into consideration.

Where a Court of Quarter Sessions consent to state a case for the opinion of the High Court the order of the quarter sessions sent up with the case to the High Court ought to state the fact that a case has been stated by them, to give the High Court jurisdiction.

CASE stated by the quarter sessions for the county of Bedford.

An appeal by the appellants, the London and North-Western Railway Company, against a certain rate or assessment made for the relief of the poor of the parish of Aspley Guise, in the county of Bedford, on the 27th May 1904, was heard at the following Michaelmas quarter sessions for the county of Bedford, when the court confirmed the rate and dismissed the appeal, subject to the opinion of the King's Bench Division of the High Court of Justice upon the following case.

The appellants are the owners of the lines of railway from Bletchley to Bedford and from Bedford to Cambridge, which, with other lines of the appellants, are worked as part of the London and North-Western system. The line from Bletchley to Bedford is a double line sixteen miles in length. The line from Bedford to Cambridge, which is thirty miles in length, is a single line from Bedford for seven miles to Sandy, where it crosses and forms a junction with the line of the Great Northern Railway, and is thence a double line to Cambridge, where it runs into the station of and forms a junction with the Great Eastern Railway.

The line from Bletchley to Bedford passes through the parish of Aspley Guise in the respondent union, and was assessed in the rate under appeal at 675*l.* gross and 375*l.* rateable value per mile.

The line from Bletchley to Bedford was constructed by the London and Birmingham Railway Company under the powers of the Bedford and London and Birmingham Railway Act 1845 (8 & 9 Vict. c. xliii.). This Act and the other Acts hereinafter mentioned may, if necessary, be

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

referred to, and are to be deemed to form part of this case. By sects. 3 and 4 of that Act an independent company called "the Bedford Railway Company" was incorporated with a capital of 125,000*l.*, which was the estimated expense of making the railway from Bletchley to Bedford. It was also provided by sects. 17 and 18 of the Act that the railway from Bletchley to Bedford should be constructed by the London and Birmingham Railway Company, and (by sect. 26) that when and so soon as the railway should be completed it should vest in and become the absolute property of the London and Birmingham Railway Company.

By sect. 27 of the above-mentioned Act it was further provided that from the time of the completion of the said railway the London and Birmingham Railway Company should annually, by equal half-yearly payments, pay to the Bedford Railway Company a sum called in the Act a rent which should be equal in amount to 4 per cent. per annum on the said capital of 125,000*l.*, or so much thereof as should have been expended in and about the formation of the railway, including therein the purchase of lands and expenses incident thereto, the expenses incurred in and about the obtaining of the Act, the payment of interest on calls, and every other expense incidental to the making and completion of the railway, and that the London and Birmingham Railway Company should also pay to the Bedford Railway Company one moiety of the surplus profits which should arise and come from the working of the intended railway in the then preceding half-year after payment of all expenses incurred in and about the working and maintenance of the railway, the interest of subsisting loans, and advances to either of the companies upon mortgage or bond by exercise of the powers of borrowing therein contained, and the percentage by way of rent upon the capital expended as aforesaid, together with such sum for interest and depreciation of stock as therein provided. By sect. 28 of the same Act the rent and moiety of surplus profits were made a charge upon the railway and recoverable by distress as for rent in arrear.

The sum of 125,000*l.*, which was the capital of the Bedford Railway Company and the estimated cost of constructing the railway, having all been expended, the London and Birmingham Railway Company spent a further sum of 240,000*l.* on the construction of the line as it now exists. At this time neither the Midland Railway from Bedford to Hitchin nor from Bedford to London was in existence. The Great Northern Railway was only just authorised, and no line from Hitchin to Cambridge had been authorised.

The London and Birmingham Railway Company was with other companies amalgamated into one company in 1846 under the name of the London and North-Western Railway Company.

Under the provisions of the London and North-Western Railway (Joint and Various Powers) Act 1877 (40 & 41 Vict. c. xci.) the share capital of the Bedford Railway Company — namely, 125,000*l.*—which by the former Act was divided into 2500 shares of 50*l.* each, was converted in 1878 into 125,000*l.* London and North-Western Railway Four per Cent. Consolidated Guaranteed Stock, such conversion including the contingent half profits beyond 4 per cent.

By sect. 40 of the London and North-Western Railway (Additional Powers) Act 1879 (42 & 43 Vict. c. cxlii.) the Bedford Railway Company was dissolved and ceased to exist.

The line of railway from Bedford to Cambridge was authorised by the Bedford and Cambridge Railway Act 1860 (23 & 24 Vict. clxxxiii.), and was taken over by the London and North-Western Railway under a subsequent Act in 1864, the Bedford and Cambridge Railway Act 1864 (27 & 28 Vict. c. lxii.).

The appellants contended that for the purpose of rating, the line of railway from Bletchley to Bedford must be treated in the same way as any other part of the London and North-Western Railway system, and that the rateable value of that portion of the line which is within the parish of Aspley Guise ought to be ascertained by adopting what is known as the parochial principle—that is to say, by taking the receipts and expenses within the parish and making the usual allowances. That neither the cost of construction upwards of fifty years ago, nor any calculation based on such cost, ought to be taken into consideration at all, nor was there any reason to depart from the parochial system.

It was proved that none of the other companies connecting with the railway—namely, the Great Eastern, the Great Northern, or the Midland—would pay any higher sum by way of rent than was represented by the parochial method, nor would they work it on a fixed proportion of gross earnings.

The respondents contended: (1) That the letting value or rateable value of a parochial section of a line of railway extending into several parishes was not necessarily limited or measured by the profits resulting from the receipts and expenses in the particular parish, and that the appellants by occupying the line from Bletchley to Bedford running through the parish of Aspley Guise secured traffic and earned profits on other parts of their system which they would not have secured and earned if they were not occupiers of the line from Bletchley to Bedford. (2) That as the appellants were paying interest at 4 per cent. on the sum of 125,000*l.*, the share capital of the Bedford Railway Company, and interest say at 4 per cent. on the additional sum of 240,000*l.* which had been spent on constructing the line from Bletchley to Bedford, they were in substance paying a rent at the rate of about 900*l.* per mile for the line (that being the equivalent of the interest at 4 per cent. on the two sums of 125,000*l.* and 240,000*l.*), that this payment (though not conclusive) was some evidence of the sum which the appellants would be willing at the date of the rate to pay for the line in order to secure traffic which they would not otherwise get, and that the appellants would at least be willing to pay all the expenses of maintaining the line, and in addition to give a rent at the rate of 375*l.* per mile, which was the sum at which they were assessed in the rate, and that if the appellants would not give the rent of 375*l.* per mile other railway companies would be willing to do so. (3) That the line might reasonably be expected to let to the appellants or to other railway companies at a rent equal to 40 per cent. of the gross

receipts (the tenant undertaking to pay all the expenses of maintaining the line), and that the gross receipts being admitted to be 2250*l.* the assessment appealed against could be supported upon this basis also. (4) That even if the letting value or rateable value of the line in each parish were limited or measured by the profits resulting from the receipts and expenses in that parish, the rateable value of the line in the parish of Aspley Guise calculated on the parochial principle was at least equal to 375*l.* per mile, which was the amount stated in the rate.

The Court of Quarter Sessions gave the following judgment:—

The court is of opinion that the assessment and rate appealed from should be confirmed, and this appeal be dismissed with costs. As this is an important case, and we understand the appellants desire to have the law definitely ascertained as to what is the proper mode of assessment, the decisions in the High Court being very conflicting, we will give the reasons for our decision, so that if we are wrong the appellants will not suffer should they choose to question our judgment in a higher court. The appellants have contended that the only legal mode of assessing this portion of the line is that based upon the parochial principle—namely, by taking into consideration the receipts and expenses in this parish, and making the usual allowances. We have not adopted this mode, but have been guided by the fact that the appellants do in fact pay interest upon the sum of 125,000*l.* mentioned in the Acts of Parliament relating to this line and referred to in the course of the hearing of this appeal, and interest upon the further sum of 240,000*l.* spent by them as stated by their counsel in finishing the line, both which classes of interest we consider in the nature of rent. This interest or rental at 4 per cent. comes out at over 900*l.* net per annum per mile of this line, including stations, the appellants doing their own repairs. Since we consider the appellants as possible hypothetical tenants from year to year of this line, we do not think under these circumstances that the assessment in question, which works out at 675*l.* gross and 375*l.* rateable per mile, is excessive, as in our opinion, based upon the before-mentioned sum of 900*l.* being treated as rent, the line might reasonably be expected to let from year to year at the said gross sum of 675*l.* per mile, the landlord and tenant taking upon themselves the respective statutory burdens. If requested we will grant a case, and to save the expense of a rehearing, should the High Court decide our mode of assessing is wrong, and that the line should be assessed upon the parochial principle of receipts and expenses within the parish, we find that the proper assessment would then be 400*l.* gross and 150*l.* rateable per mile. . . . We have carefully considered the decision we have given, and we must decline to go beyond the wording.

If the court should be of opinion that the mode of assessment adopted by the Court of Quarter Sessions as hereinbefore stated was wrong, the order of sessions confirming the rate appealed against and dismissing the appeal was to be quashed, and the assessment was to be reduced to 400*l.* gross and 150*l.* rateable value, and the appeal to the Court of Quarter Sessions allowed, unless the High Court otherwise ordered; otherwise the order of the Court of Quarter Sessions was to stand.

The following sections of the Bedford and London and Birmingham Railway Act 1845 (8 & 9 Vict. c. xliii.), an Act for making a railway from the town of Bedford to join the London and Birmingham Railway near Bletchley, in the county of Buckingham, were referred to:

By sect. 3 a company was incorporated as "the Bedford Railway Company" for the purpose of making the line in question.

Sect. 4. And whereas the estimated expense of making the said railway is one hundred and twenty-five thousand pounds; be it enacted, That the capital of the company shall be one hundred and twenty-five thousand pounds.

Sect. 5. And be it enacted, That the number of shares into which the capital shall be divided shall be two thousand five hundred, and the amount of each share shall be fifty pounds.

Sect. 17. And whereas it has been agreed between the said companies that the intended railway shall be constructed by the London and Birmingham Railway Company, and shall be completed in an efficient manner with all reasonable despatch after the passing of this Act; be it therefore enacted, That the London and Birmingham Railway Company shall purchase all the land that may be required for the purposes of the said intended railway, and shall execute the works thereof with all reasonable despatch, and for such purposes shall have, use, and exercise the powers and be subject to the regulations and restrictions hereby and by the said recited Acts, or any of them, granted to and imposed upon the company constituted by this Act, as fully and effectually in all respects as if they, the said London and Birmingham Company, and not the Bedford Railway Company, were the company constituted by this Act.

Sect. 18. The company hereby incorporated shall from time to time, when required, pay to the London and Birmingham Railway Company all such sums of money to the extent of but not exceeding the capital of the Bedford and London and Birmingham Railway Company as the said London and Birmingham Railway Company shall have expended or become liable to pay in or by reason of the execution of the works of the said railway. . . .

Sect. 25. The period for the completion of the railway shall be five years from the passing of the Act.

Sect. 26. When and so soon as the said railway shall be completed the same shall vest in and become the absolute property of the said London and Birmingham Railway Company, who shall thenceforth, with reference to the said railway, be considered to be the company constituted by this Act within the meaning of this and the said Railways Clauses Consolidation Acts, and shall also be the promoters of the undertaking within the meaning of the said Lands Clauses Consolidation Act.

Sect. 27. From the time of the completion of the said railway the London and Birmingham Railway Company shall annually, by equal half-yearly payments, pay to the Bedford Railway Company a rent which shall be equal in amount to four pounds per centum per annum on the said capital of one hundred and twenty-five thousand pounds, or so much thereof as shall have been expended in and about the formation of the said Bedford Railway . . . ; and the London and Birmingham Railway Company shall also pay to the said Bedford Railway Company one moiety of the surplus profits which shall arise and come from the working of the said intended railway in the then preceding half-year after payment of all expenses incurred in and about the working and maintenance of the said railway, the interest of all subsisting loans and advances to either of the said companies upon mortgage or bond, by exercise of the powers of borrowing hereinbefore contained, and the said percentage by way of rent upon the capital expended as aforesaid, together with such sum for interest and depreciation of stock as is hereinafter provided.

Sect. 28. The said rent and moiety of the surplus profits shall be a charge upon the railway, and if they

or either of them or any part of them shall be in arrear by the space of twenty-one days next after any of the days appointed for their payment, it shall be lawful for the Bedford Railway Company to enter upon the railway and in the usual manner as for rent in arrear to distrain and sell all or a sufficient part of the effects of the London and Birmingham Railway Company that shall be thereon, or at, in, or upon any of the stations, buildings, or lands thereunto belonging, or occupied or used therewith for the purposes of the said railway, and out of the proceeds of sale to reimburse themselves their costs, charges, and expenses, and retain the amount due to them in respect of such rent or moiety of surplus profits, and pay the residue, if any, to the London and Birmingham Railway Company.

Objection was taken by the court that the order of quarter sessions contained no statement that a case had been stated.

LAWRANCE, J.—The order made by quarter sessions as sent up by the clerk of the peace contains no provision for the statement of a special case, and no statement as to a case having been stated. The difficulty is that there is nothing before the court on which it can properly proceed. The court has no seisin of the case on this order.

Ryde for the respondents.—The judgment of the quarter sessions says: "If requested we will grant a case, and to save the expense of a rehearing should the High Court decide," &c., so that the judgment of the court as pronounced did grant a case, although when the clerk of the peace came to draw up the order apparently he omitted that part. It is really little more than a clerical error. The court has a case before it which at any rate sets out that the case was granted. That case speaks for itself, and it is signed by the chairman of quarter sessions.

Sir *Ralph Littler*, K.C. for the appellants.—It is really a technical matter, and neither side desires to take advantage of it.

LAWRANCE, J.—We have no doubt as to what the quarter sessions intended to do; but we have still less doubt that they did not carry it out.

RIDLEY, J.—It should have been entered in the order that a case was to be stated. When the quarter sessions gave judgment, they said they would grant a case, but when the order was drawn up they omitted that statement. That is the exact difference, and we must take care that the order is amended before the order of this court is drawn up. The court then consented to hear the argument in the case upon the understanding that the order should be sent to the clerk of the peace to be amended by him and returned amended before the order of the court was drawn up.

Sir *Ralph Littler*, K.C. (*Page*, K.C. and *H. D. Bonsey* with him) for the appellants.—The respondents say that the appellants, in paying the 4 per cent. on the capital sum, were in substance paying a rent. The payment of the 4 per cent. is in no legal sense a "rent"; it is merely put in as "rent" in view of another provision in the Act that, if the payment should be in arrear, it should be recoverable by distress as if it were rent in arrear (sect. 28). The company, instead of taking over the shares, were to pay perpetually this 4 per cent., which, though called a rent, cannot be in the usual sense a rent, as by sect. 26 the line vested absolutely in the company making the payment, and the company could not pay a rent in respect of their own property. The object was simply to secure the interest on the capital expenditure. The circumstances have completely altered, as at first there was no competition; now there is the competition of the other railways. The appellants do not say that the parochial system is the only method of rating, but it is the usual and proper method; and, as it is found that none of the other companies would give more as rent than the amount based on the parochial system, that completely distinguishes this case from the *Bedford* case relating to this same line—namely, the case of

Reg. v. *London and North-Western Railway Company*, 29 L. T. Rep. 910; L. Rep. 9 Q. B. 134.

This is exactly the converse of what was found in that case, because there it was found that there was a competitive value, whereas here it is found that there is no competitive value, because the only persons who could have been tenants of the line were these three railway companies; and it was found as a fact that they would not give anything more for the line than the appellants were giving for it, and would not pay any higher rent than was represented by the parochial system. In their first contention the respondents say that the rateable value of the part of the line that is within the parish is not necessarily to be measured by the profits earned within that parish, but that profits earned by means of that branch on other parts of the system ought also to be taken into account. The question of contributive value was really settled in 1881 by the judgment in the case of *Great Western Railway Company* v. *Churchwardens and Overseers of the Parish of Ilminster and the Assessment Committee of the Chard Union* (unreported), in which the respondents contended that in rating the appellants' railway they were entitled to take into account not only the actual earnings of the railway within the parish, but also some portion of the gross receipts earned in other parishes in respect of traffic arising or terminating at Ilminster. That was precisely the contention raised here, and Field, J. then said that the point had been settled twenty years ago. He said: "This point has been determined in the *Great Eastern Railway Company* v. *Haughley Overseers* (14 L. T. Rep. 548; L. Rep. 1 Q. B. 666), *Reg.* v. *Llantrissant Inhabitants* (20 L. T. Rep. 364; L. Rep. 4 Q. B. 354), and another case . . . in which I had the misfortune to go into the question from the beginning to the end I put it on the only ground which seemed available, and the Court of Queen's Bench said, although it was ingenious, it was unsound." That disposes of the point as to contributive value. Then, as to the second contention, it really comes to this, that, because a bargain was made in 1845 to pay a certain sum, therefore that was some evidence as to what the appellants would at the date of the rate pay for the line. What a person chose to give for a thing sixty years ago is no evidence of what it is worth now. There is no case in which it has been held that the original cost can be taken into account; the cases say that it ought never to be taken into account, and Blackburn, J. has said so in one of his judgments. There is absolutely no connection between original cost

and rental. It is expressly found that none of the other competitors would give more than the price ascertained on the parochial system, and there is, therefore, only the appellants themselves who would not give more than the market price. That disposes of the other contentions for the respondents.

W. C. Eyde (*Stimson* with him) for the respondents.—The 125,000*l.* was found not by the Birmingham company, but by the Bedford company, and the liability to pay the 4 per cent. on that sum did not begin till the line was completed. When that sum was spent, then the option before the railway company was either to pay nothing at all or to add more money of their own to complete the line, and they elected to add the 240,000*l.* to complete the line, and on those terms to pay interest on the 125,000*l.* If they had elected not to spend 240,000*l.* they would never have had to pay interest on the other sum. If the line had cost only the 125,000*l.*, then the company would have been bound to pay 4 per cent. on that, and also half profits (sect. 27), and that 5000*l.* interest plus half the profits would have been evidence of the rent. It was worth their while to spend in all 360,000*l.*, and the interest on that must be taken to be what they thought it worth in rent at that time. If it was worth their while in 1845 to pay all this money for the line when there was no serious competitor, it is now much more worth their while to pay this sum when they have the Midland Railway competing with them. The multiplication of competitors, so far from diminishing the value of the line to the appellants, really increases it; and, although it is found that the other companies would not give more for it, it is enough if one company will give it. In the *Bedford* case (*ubi sup.*) Blackburn, J. said that if there were competitors it might drive up the rent which a competitor would give, though it might also diminish the profits of each. It may be that the more competitors there are the profits will not be greater, but the desire of each to get the whole traffic will increase the sum which each would be willing to give, and Blackburn, J. said that the rate is to be supported if they will give a rent, although enough might not be earned to support the rate. That is this case. The only difference between that case and the present is that there it was found that there were three competitors who would take it on the same terms, whereas here it is found that there is at least one person—the appellants—who would take the line on the same terms as the appellants, and in considering who are hypothetical tenants the actual occupier must be taken as one of them: *Reg.* v. *London School Board* (55 L. T. Rep. 384; 17 Q. B. Div. 738). It is sufficient, in ascertaining the competitive rent, if the actual occupier will give the rent. There is an express finding that this line would let at 675*l.* gross. That was a question of fact for the quarter sessions; the evidence as to that was admissible, and it being a question of fact as to what was the proper amount this court cannot interfere. That is as to the competitive rent. Then as to contributive value, the *Ilminster* case has been referred to, but that case has been overruled. If contributive value is to be excluded altogether, then the decision in the *Brentford* case, in which the Court of Appeal let in contributive value, was wrong.

LAWRANCE, J., having stated the facts, continued.—The question that arose at the sessions was: What is the principle upon which this piece of line is to be assessed? It was contended by the appellants that it must be treated as any other part of the London and North-Western Railway system—that is to say, upon the parochial principle. On the other hand, it was said that the rateable value of the parochial section of the line was not necessarily limited by the profits resulting from the receipts and expenses in the particular parish, and that the appellants, by occupying the line from Bletchley to Bedford, earned profits on other parts of their system which they would not have secured and earned if they were not occupiers of the line from Bletchley to Bedford. The Court of Quarter Sessions gave judgment for the respondents; and it is said by the learned counsel for the respondents that they have found as a fact that the company were paying interest or rental at 4 per cent. upon 125,000*l.* and upon 240,000*l.* So far from looking upon that as a finding of fact, I think, when they mentioned that they merely mentioned that as showing what had guided them in arriving at the conclusion of figures to which they had arrived—"We have not adopted this mode"—that is, the parochial principle—"but have been guided by the fact that the appellants do in fact pay interest upon the sum of 125,000*l.* in the Acts of Parliament relating to this line and referred to in the course of the hearing of this appeal, and interest upon the further sum of 240,000*l.* spent by them, as stated by their counsel in finishing the line, both which classes of interest we consider to be in the nature of rent." That is not a finding of fact. That is an opinion, and that is the very ground upon which this appeal is founded, or the principal ground upon which this appeal is founded. Are they right in looking upon that as rent which is paid by the appellant company at the present time? In my judgment it is the same case as we had yesterday—the case of the *Great Central Railway Company* v. *Banbury Union*. It is not a rent. What it was in reality when worked out is the cost of construction of the line, nothing more or less, call it what you like in the history of the making of the line. Part of the time it is treated as rent and so forth, but it was in fact simply and solely the cost of construction of the line—namely, 240,000*l.* and 125,000*l.* That being so, then comes the question, What is the proper principle upon which this piece of line should be rated? I can only repeat what I said yesterday. I have to look at the hypothetical tenant, and ask what would the hypothetical tenant give for it. Upon that there is a finding and a direct finding of fact by the sessions in par. 11 of the case, in which it is said that "none of the other companies connecting with the railway—namely, the Great Eastern, the Great Northern, or the Midland—would pay any higher sum by way of rent than was represented by the parochial method, nor would they work it on a fixed proportion of gross earnings." That being so, that eliminated everybody from any competition that there might have been. It might have been to the interest of one of those lines to have given more than another, but they were not competitors for it, and therefore they seem to me not to come under what was said in the case of *Reg.* v. *London and North-Western*

Railway Company (*ubi sup.*) by Blackburn, J., who stated that if there are competitors that is a matter to be taken into account. No doubt it is. It is a matter of considerable importance to find whether there would be other competitors or not. But the case here distinctly shows that there are no competitors, and that the only persons to take the line would be the appellants. Therefore, I think—and here it is on the same ground as the case we decided yesterday—that the rateable value would be that which the hypothetical tenant would give, and that would be upon the parochial system. I need not deal with the figures. They come out at 150*l.* rateable value per mile instead of 375*l.* The only other matter to deal with is a matter which we dealt with yesterday in the *Great Central Railway Company* v. *Banbury Union*. It is the contention of the respondents "That the letting value or rateable value of a parochial section of a line of railway extending into several parishes was not necessarily limited or measured by the profits resulting from the receipts and expenses in the particular parish, and that the appellants by occupying the said line from Bletchley to Bedford running through the parish of Aspley Guise secured traffic and earned profits on other parts of their system," and so forth. That seems to me to be entirely disposed of by the case to which our attention has been called of the *Great Western Railway Company* v. *Churchwardens of Ilminster* (unreported). That was the only point dealt with by Lord Field. He says: "I thought this case had been decided twenty years ago," and very little discussion took place upon it, and it seems to have been agreed by all parties. Mr. Grantham, who was counsel on the other side, does not seem to have offered any great resistance to it, and it was held that that principle had no application. Perhaps there is no subject in which it is possible to find so many contradictory judgments as in the case of rating. I do not think any man had greater experience in matters of the kind than Lord Field, and he described the cases in which he had been on the one side and on the other, but the greater number of cases have decided that that system has no operation. Therefore, under the circumstances, looking at the facts, this 365,000*l.*, in my judgment, really was the cost of construction of the line, and would not enter into the consideration of the rateable value of the line at the present moment. I think the sessions were wrong.

RIDLEY, J.—I agree. I think that if the annual payment created by sect. 27 of the Act of Parliament is to be taken into consideration—which is extremely doubtful—but assuming it to be taken as rent, still it is not to be accepted as the rent which a tenant from year to year would give for the railway under the Parochial Assessments Act, unless there be evidence to show that such tenant of the line would in point of fact make such payment. In the *Bedford* case (*ubi sup.*) there was such evidence, and the payment in question in that case was therefore allowed by the court to be the proper rent. Here the evidence is that the tenant would not give so large an amount, but would give no more than the figure arrived at by the parochial principle. Our decision to-day is in accordance with that case, and with the *Great Central* case in which judgment was given yesterday. The order of this court ought not to be drawn up until we have the amended order of the Court of Quarter Sessions.

Appeal allowed with costs, including costs in the Quarter Sessions. Leave to appeal.

Solicitor for the appellants, *C. de J. Andrewes.*

Solicitors for the respondents, *Crossman, Prichard, Crossman*, and *Block*, for *Alfred T. Trethewy*, Ampthill.

Thursday, Dec. 14, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

DAVIES (app.) *v.* SEISDON UNION (ASSESSMENT COMMITTEE) AND OTHERS (resps.) (*a*)

Rating—Poor rate—Sewerage farm—Construction by sewerage board of sewage works and plant on farm—Farm let to tenant at fair rent—Basis of rating farm—Right of rating authority to include the value of facilities to board.

A sewerage board, constituted by Act of Parliament for dealing with the sewage of a district, purchased a farm which they converted into a sewerage farm, and, after spending a considerable sum of money in constructing on the farm certain works and plant for carrying the sewage from their mains and distributing it over the farm, they let the farm as a sewerage farm on a tenancy from year to year to a tenant at a rent which was a fair rent for the advantages which the tenant got under his lease, including the value of the sewage, and more than it would have been if the tenant had not got the manurial value of the sewage.

Under the lease the tenant was bound so to use the farm and to give such facilities to the board as would enable them to carry out their statutory duties in disposing of the sewage, and during the tenancy the board continued to discharge their sewage on to the farm by means of the works and plant on the farm.

Upon the assessment to poor rate of the hereditaments in the hands of the tenant, including the agricultural land and the works and plant thereon:

Held, that the rent paid by the tenant under the lease was the best evidence of what a hypothetical tenant would give for the sewerage farm as it stood, and that that rent was therefore the true basis upon which the hereditaments in the hands of the tenant should be rated, and that beyond that sum there ought not to be included in the assessment any sum as representing the annual value of the advantages and facilities accruing to the sewerage board from the fact that the farm afforded them the means of disposing of the sewage and thereby enabled them to perform their statutory duties.

CASE stated by the Court of Quarter Sessions for the county of Stafford upon the hearing of an appeal by them at Stafford on the 19th Oct. 1904, wherein Edward Davies was the appellant and the assessment committee of Seisdon Poor Law Union and the parish council of the parish of Kinver were the respondents.

The appeal was against a poor rate for the parish of Kinver made on the 2nd May 1904, in

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

which rate or assessment the appellant, Edward Davies, was rated or assessed in respect of land, house, buildings, sewerage works and plant, occupied by him at Whittington Hall Farm, in the parish of Kinver in the Seisdon Union, in the sum of 336*l.* 15*s.* for agricultural land, and 337*l.* for buildings not being agricultural land, as the rateable value thereof

The rate and assessment appealed against, so far as material, appeared in the rate book as follows:

Name of occupier, Davies, Edward.

Name of owner, Upper Stour Valley Main Sewerage Board.

Description of property rated, Land, House, Buildings, Sewerage Works and Plant.

Name and situation of property, Whittington Hall Farm.

Estimated extent, 433a. 0r. 33p.

Gross estimated rental, 788*l.*

Rateable value of agricultural land, 336*l.* 15*s.*

Rateable value of buildings and other hereditaments not being agricultural land, 337*l.*

Upon the hearing of the appeal it was ordered that the gross estimated rental of 788*l.*, and the rateable values of 336*l.* 15*s.* for agricultural land and 337*l.* for buildings not being agricultural land, should be reduced to 479*l.*, as the gross estimated rental, and 380*l.* as the rateable value of the agricultural land, and 46*l.* as the rateable value of the buildings and other hereditaments not being agricultural land, and that the rate book be amended accordingly, and that the appeal be allowed with costs, subject to this case.

The Whittington Hall Farm and the houses, buildings, and sewerage works thereon, except a small portion of land in the parish of Wolverley rated at a gross estimated rental of 3*l.* and a rateable value of 2*l.* 15*s.*, were situated within the parish of Kinver, and belonged to the Upper Stour Valley Main Sewerage Board, which was a sewerage board duly constituted by statute for the purpose of dealing with the sewage from the following districts or places—namely, the Netherton and Woodside wards of the borough of Dudley, the Rowley Regis, Lye and Wollescote and Quarry Bank urban districts and certain parishes in the Halesowen Rural District, all of which were situated outside the parish of Kinver and the Seisdon Union, and are hereinafter collectively referred to as "the district." The district was defined by a provisional order, which was confirmed by the Local Government Board's Provisional Orders Confirmation (No. 7) Act 1892, and the Upper Stour Valley Main Sewerage Board is hereinafter referred to as "the sewerage board."

For the purposes of carrying out the duties imposed upon them, the sewerage board acquired the Whittington Hall Farm mentioned in the rate, which farm was let in the manner hereinafter mentioned to the appellant Edward Davies.

After the farm was so acquired it was converted by the sewerage board into a sewerage farm for the purpose of dealing with the sewage of the district, and for this purpose the sewerage board laid down and constructed upon the farm carriers, distributors, catchpits, and sluices, consisting of brick or pipe channels and appliances (hereinafter called "the plant"). The plant was constructed under and upon the surface of the farm for carrying the sewage from the mains of the sewerage board to suitable places and disposing thereof on the farm. The sewage brought to the farm by the sewerage board was distributed upon the farm by means of the plant, and was there dealt with by the system known as the broad irrigation system.

The sewerage board had spent in laying down and equipping the plant and in making roads on the farm (in addition to the cost of the farm) the sum of 8962*l.* or thereabouts. The sewerage board were able to borrow this money at a rate of 3¼ per cent. per annum.

The Whittington Hall Farm contained about 433 acres 3 roods and 17 perches or thereabouts, in the parish of Kinver, and 1 acre 3 roods in the parish of Wolverley, and had been let to the appellant by the sewerage board and the former owners thereof for many years. By a lease dated the 16th March 1903 the rent was fixed at 460*l.* per annum. By an agreement dated the 27th Feb. 1904 the rent was in March 1904 increased to the sum of 490*l.* per annum, and, subject to this variation in the rent, the tenancy was and still is continued upon the terms of the lease so far as the same are applicable to a tenancy from year to year.

The sewerage board were duly rated in respect of the whole of their premises, mains, and works (used in dealing with their sewage) other than the plant upon the farm.

The sewerage board were at one time rated in respect of the plant (on the farm), but upon appeal to quarter sessions the rate was amended, upon the ground that the sewerage board were not in occupation of the plant, but that the plant was in the occupation of the tenant of the farm.

In a subsequent rate the present appellant, as tenant of the farm, was rated separately for the plant, under the heading "sewage works and plant," in the sums of 364*l.* gross estimated rental and 291*l.* 5*s.* 0*d.* rateable value, as for "buildings and other hereditaments not being agricultural land." But, on an appeal to quarter sessions, which was by consent referred to Mr. A. T. Lawrence, K.C. as arbitrator, the rate was ordered to be amended by striking out the assessment.

The sewerage board during the tenancy of the appellant continued to discharge their sewage by means of the plant on to the farm, and thereby were enabled to perform their statutory duties. The rent payable by the appellant under the lease was fixed after negotiation, and was a fair rent for the advantages which the appellant got under the lease, including the value of the sewage. The rent was more than it would be if the appellant did not get the manurial value of the sewage.

It was contended before the justices by the appellant that the hereditament must be assessed as it stood in the hands of the appellant, and that the rate must be made upon the basis of the rent which a tenant might reasonably be expected to give for the farm as a sewage farm, and that the best evidence of such rent was the actual rent which the appellant paid under the lease, and that the respondents ought not to include in the assessment (as they had done) any sum which represented the annual value of the advantages accruing to the sewerage board (over and above the rent of the farm) in respect of the facilities afforded to them by the user of the

farm as a sewage farm for the performance of their statutory duties.

The respondents, on the other hand, contended that to assess the appellant on the basis of the actual money paid under the lease was to treat the farm merely as an agricultural holding, and to leave out of account the fact that under the terms of the lease the appellant was bound to so use the farm, and by and upon it to give such facilities to the sewerage board as to enable them to carry out their statutory duties, for which facilities they would be willing to pay; that the farm in the hands of the sewerage board would be equal in value to the money paid by the appellant, plus the annual value of such facilities, and that in the hands of the tenant the value of the obligations imposed by the lease upon the tenant (which would equal the value of those facilities) must be added to the actual money paid by the appellant for the purpose of arriving at the rateable value of the farm.

The court of quarter sessions held that the actual sum paid by the appellant was the true basis upon which the hereditaments should be rated, and that they ought not to take into account the annual value of the advantages and facilities accruing to the sewerage board in connection with the plant, and they reduced the rate accordingly

The question for the opinion of the court was: Whether the justices in quarter sessions ought to have taken into consideration, beyond the sum payable by the tenant as agricultural tenant under the lease, the fact that the farm afforded a means of disposing of the sewage of the sewerage board, and thereby enabled them to fulfil their statutory duties in that behalf.

If the court should answer the question in the affirmative, the order was to be quashed, and the court should make such order therein as the court should think fit; but if the court should answer the question in the negative, the order of quarter sessions was to be affirmed.

By art. xiii. of the Upper Stour Valley Main Sewerage District Provisional Order for forming a united district under sect. 279 of the Public Health Act 1875, which was confirmed by the Local Government Board's Provisional Orders Confirmation (No. 7) Act 1892 (55 & 56 Vict. c. cxcviii.) it was provided:

The purposes for which the United District is formed are the purchase of lands, and making, erecting, maintaining, and working such main sewers, works, machinery, and plant as may be required for conveying sewage from the several constituent districts to a convenient place or places where it may be purified, and for purifying the same, by precipitation and filtration, or otherwise, in such manner that it may be discharged into any stream, river or watercourse without breach of the Rivers Pollution Prevention Act 1876, or of any other provisions of the law. . . .

The indenture, made on the 16th March 1903 between the sewerage board and the appellant as lessee, recited that the board had been constituted for the purposes mentioned in art. 13 of the order, and that it had been agreed

That the lessee being acquainted with sewage farming shall and that he does hereby admit that, so far as it relates to unexhausted manures and the consumption of feeding stuffs and also to the use and employment of sewage matter, the Agricultural Holdings Act 1883 does not and shall not apply to the holding under this lease, and that at the termination thereof no compensation shall be due in respect of such matters,

And the indenture witnessed that in consideration of the rent and covenants thereinafter reserved and contained, and on the part of the lessee to be paid and performed, the board thereby demised and leased unto the lessee all the farm called Whittington Farm, except and always reserved unto the board (amongst other things) free and uninterrupted ingress, egress, and regress for the board, their surveyor, servants, and workmen over the land for the purpose of repairing, or erecting any of their machinery, buildings, works and conveniences on the lands as might thereafter be requisite or desirable

To hold the said lands and premises with the appurtenances thereto belonging or appertaining unto the lessee, his executors, administrators, and permitted assigns as from the 25th day of March 1903 for a term of one year, determinable, nevertheless, as hereinafter mentioned, yielding and paying therefor the rent of 460*l.* for the year, free and clear of all deductions and outgoings (except tithe land tax and landlord's property tax) and payable on the 29th day of September 1903 or immediately on the determination of this lease or the tenancy thereunder, in the event of the same being determined by re-entry under the proviso in that behalf hereinafter contained. [Then there was a proviso for re-entry in certain events.] And that the lessee would at all times keep the lands well cultivated and cropped in a skilful manner as a sewage irrigation farm, and also would at all times during the term in a proper and skilful manner as a sewage irrigation farmer and to the satisfaction of the surveyor irrigate and manure the lands and utilise all such sewage and sewage water as might be during the tenancy delivered thereon by the board so that the same sewage and sewage water might be freed from all excrementitious or other foul or noxious matter and clarified and purified and kept inodorous by application to the land in such manner that they might properly be discharged by the lessee into any stream, river, or watercourse without breach of the provisions of the law for the time being, and so that such sewage and sewage water might not at any time be or become injurious to health or a damage or annoyance to any person whatsoever; that the lessee should keep the premises in repair, and that he would from time to time, during the term, receive and pass and distribute on the lands all the sewage and sewage water which should be delivered upon the lands by the board and use and dispose of the same in manner thereinbefore provided, and that the lessee would at his own costs and charges take charge of and keep the outfall carrier, distributing carriers, main drains, &c. flushed and freed from obstructions, and keep clean and oiled the turbine and pumping machinery, and keep clean the sluices, pipes, and carriers on the lands; and also would not commit or permit any public or private nuisance on the demised premises, and would at all times during the term keep the board indemnified against all actions, suits, costs, claims, and demands whatsoever, both legal and equitable, arising from the breach of the lessee's covenants which should be brought against the board by reason of any nuisance, damage, or annoyance caused by the sewage or sewage water or the odours arising therefrom, from the time such sewage or sewage water should come upon the lands until they should be duly and properly discharged free from noxious matter into some stream or river.

By an indenture of the 27th Feb. 1904 it was recited that it had been agreed between the parties that the tenancy of the farm should be continued from the expiration of the former lease upon the terms thereof so far as the same were

applicable to a tenancy from year to year, subject to the alterations herein contained, and the board agreed to let, and the lessee agreed to take, the farm upon a tenancy from year to year, commencing from the 25th March 1904 and determinable at the end of any year by six months' notice to quit given by either party, at the yearly rent of 490*l.* payable by equal half-yearly payments, and subject to and with the benefit of the provisoes, covenants, and conditions contained in the former lease, so far as the same were applicable to the tenancy from year to year under this agreement.

The Parochial Assessments Act 1836 (6 & 7 Will. 4, c. 96) provides:

Sect. 1. Whereas it is desirable to establish one uniform mode of rating for the relief of the poor throughout England and Wales, and to lessen the cost of an appeal against an unfair rate: Be it enacted, that . . . no rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent provided always, that nothing herein contained shall be construed to alter or affect the principles or different relative liabilities (if any) according to which different kinds of hereditaments are now by law rateable.

Alexander Glen, K.C. (*Disturnal* with him) for the assessment committee of Seisdon Union.—The quarter sessions were wrong in not including in the assessment the annual value of the facilities to the sewerage board whereby they were enabled to carry out their statutory duties. This case is similar to the case of *Reg.* v. *Rhymney Railway Company* (L. Rep. 4 Q. B. 276). There the owners of docks and wharves let the wharves to a railway company, and by the agreement certain wharfage dues were reserved to the landlords, and were paid direct to them by the owners or consignees of the goods, and it was held that the railway company, as sole occupiers of the wharves, were liable to be assessed to the poor rate in respect of the full rateable value of the premises, including the wharfage dues, without regard to the amount of benefit which they themselves derived from the occupation. Mellor, J., in delivering the considered judgment of the court, said (at p. 282): "If the trustees had made no demise of the wharves, but had themselves remained in possession of them, as well as in receipt of the wharfage dues, they would have been rateable in respect of the entire value of the wharves, taking into account the dues in question. So, if the trustees had included in their demise to the appellants the right of receiving the wharfage dues, the appellants, even though liable to pay an increased rent equal to the amount of the dues, would in like manner have been rateable for the entire value of the wharves as enhanced by the dues"; and, speaking of another case, he said (at p. 283): "We then pointed out the fallacy of confounding the rateable value of the property occupied with the remunerative value to the particular occupier." That is precisely the case here. If this sewerage board had not made any demise of this farm to the appellant, but had remained in occupation of it themselves, they would have been rateable in respect not only of the agricultural land, but of the entire hereditament consisting of land, buildings, and plant. The quarter sessions have confounded the remunerative value to the particular occupier with the rateable value of the property. This hereditament was not merely an agricultural farm; it was a hereditament created for the purpose of getting rid of the sewage, and not merely to grow grass. It is a mixed hereditament; there is the irrigated land, which is useful to the farmer, and there are the works. The tenant in this case is not to be taken as in the position of the hypothetical tenant. Suppose this farm were in the market without these works upon it, and suppose there were the hypothetical landlord and the hypothetical tenant of it, then, if the sewerage board were the hypothetical tenant, what would they have to pay? They would have to pay an agricultural rent to begin with, and then they would have to start to construct these works; if the sewerage board were unable to come to terms with their hypothetical landlord they would have to go elsewhere and pay an agricultural rent, plus the 291*l.*, which represents the interest on the cost of the works. So that what the sewerage board as the hypothetical tenant of this farm would have to pay would be the agricultural rent, plus a percentage on the cost of the works which would be required. That is what the hypothetical tenant would give if the hypothetical tenant were the sewerage board. Now, suppose that the hypothetical tenant were not the sewerage board, but some other person, then in the first place he would pay at least an agricultural rent and he would get from the sewerage board a sum for getting rid of the sewage for them; that sum he would get from the board, and he would have to pay to the hypothetical landlord so much for that privilege. The sum that the tenant would receive from the sewerage board for erecting these works and getting rid of the sewage for the board would be the percentage on what it would cost the sewerage board to construct the works themselves, and this extra sum would go, in addition to the agricultural rent, as rent to the hypothetical landlord. In this case also the hypothetical landlord would receive from the hypothetical tenant the agricultural rent plus a percentage on the cost of the works. The rent which the tenant pays under the lease is not the conclusive test as to the rent which the hypothetical tenant would give; that would be treating the hereditament merely as an agricultural farm, which it is not, and would be leaving out of account the fact that in the lease there are many restrictions imposed upon the tenant, and, if these were removed, a higher rent would be obtainable. The question is as to the value of the rateable hereditament, and it has a value in part from the selling of the grass and in part from these works. He referred to

Leicester Corporation v. *Beaumont Leys Churchwardens*, 70 L. T. Rep. 659.

W. C. Ryde and *H. R. Ward*, for the appellant, were not called upon.

Lord ALVERSTONE, C.J.—In my opinion the points that have been raised by counsel for the Seisdon Union are points which have been negatived by many decisions for a long series of years, and to adopt them would be to upset the principles of rating which have been now recognised certainly for a generation. The standard of rating is in the Parochial Assessments Act of 1836, "The rent at which the same"—that is, the hereditaments—"might reasonably be expected to let from year to year free of all usual tenant's rates and taxes and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." In this case it appears, from the statement of facts, that the assessment committee first rated the sewerage authority, the sewerage board, in respect of these mains and carriers, and the Court of Quarter Sessions decided (and it must be taken for the purpose of this case to be rightly decided, because that decision was acquiesced in and there is no suggestion that it was wrong) that the sewerage board were no longer in occupation of these conduits, and that therefore their lessee was the person to be rated in respect thereof. Thereupon the next thing the assessment committee did was to rate the lessee, the tenant, at 29*l.*, being the annual value of the buildings and hereditaments not being agricultural land, which was based upon the capital cost of these conduits and as interest thereon. Under no circumstances could that have been the right method of rating, although capital cost may be a matter to be taken into consideration under some circumstances, as has been laid down for many years. That went before A. T. Lawrence, J. (then Mr. A. T. Lawrence, K.C.), sitting as arbitrator, and he naturally, and most properly, struck the whole assessment out, and there was an end to that method. Now, the assessment committee appear to have said: "Although we cannot rate the sewerage board as occupiers, and although we cannot rate you as the tenant in respect of those mains and conduits or channels, we shall ask to have exactly the same figure added on to the agricultural land." A more extraordinary attempt to violate the law of rating I have never heard of for a very long time. I entirely agree with the main part of the argument of counsel for the assessment committee. The contract of lease is in no way conclusive; it is only evidence which the sessions might have found to be quite wrong. They might have found that it was rent plus service—if that is a proper expression—for merely receiving sewage, and they might have said that this tenant has got a valuable occupation by means of that, and ought to pay more than the 490*l.* a year rent. If they had said that, we should have had no right to interfere. But what have they found? It is agreed that the rateable hereditament in the occupation of the tenant is not a pumping station, is not a rising main, or anything of that kind, but is carriers which carry the sewage about his fields through which he distributes it. What is the value, not to this tenant, but to the hypothetical tenant, of that? It is the right of enjoying the receipt of sewage through those carriers, and to any extent to which his occupation is enhanced by that fact, it has to be taken into consideration. There are a number of cases, both reported and unreported, where effect has been given to that, and I entirely agree with the next argument for the assessment committee that among the tenants, or possible hypothetical tenants, would be the sewerage board, who might wish to make use of this particular method or opportunity of getting rid of their sewage. Where I differ is, conceding those propositions, that you are in consequence to estimate the rental which is to be paid on any different basis than that which the Parochial Assessments Act has laid down. Now, bearing in mind what the Parochial Assessments Act has laid down, what do these justices say? I read pars. 9 and 10, for I have seldom seen a case more clearly stated in regard to a rating matter: "The sewerage board during the tenancy of the appellant continue to discharge their sewage by means of the said plant on to the said farm, and thereby are enabled to perform their statutory duties." It is not suggested that the tenant gets anything from the board discharging their statutory duties. "The rent payable by the appellant under the said lease was fixed after negotiation, and is a fair rent for the advantages which the appellant gets under the said lease, including the value of the said sewage. The said rent is more than it would be if the appellant did not get the manurial value of the said sewage." I understand that to mean this: We have considered that the rent of the agricultural land being *x*, 490*l.* is *x*, plus a fair amount which the hypothetical tenant would pay for getting the sewage through these conduits, which, in my judgment, is the right way of estimating what rent would be paid for the use by a tenant of such conduits. It then proceeds: "It was contended before us by the appellant"—that is, Mr. Davies, the present respondent—"that the hereditament must be assessed as it stands in the hands of the appellant, and that the rate must be made upon the basis of the rent which a tenant might reasonably be expected to give for the farm as a sewage farm." In my opinion, that is applying to this particular case the test in the Parochial Assessments Act, "and that the best evidence of such rent was the actual rent which the appellant paid under the lease." Whether it is the best evidence or not is perhaps only repeating what has been said by many judges, that under ordinary circumstances the actual bargain is the best evidence. That it is evidence nobody can dispute. Then, "and that the respondents ought not to include in the said assessment (as they have done) any sum which represented the actual value of the advantages accruing to the said sewerage board (over and above the rent of the said farm) in respect of the facilities afforded to them by the user of the said farm as a sewage farm for the performance of their statutory duties." In one shape or another, counsel for the assessment committee has most ingeniously asked us to say that that which the sewerage board paid in order to get these works constructed, and the interest thereon, have to be taken into consideration, and he cited the case of *Reg* v. *Rhymney Railway Company* (*ubi sup.*). The *Rhymney* case has absolutely nothing to do with this point. In that case the rates which were in dispute arose from the occupation of the land, not from advantages

outside. It was held that the hypothetical tenant must be assumed to receive them all, and the fact that the real tenant only kept some in his pocket, and the landlord received the other part, did not prevent the parish from having the benefit of the whole. That principle has been recognised over and over again, and it is really the basis of the decision in the case of *Jones* v. *Mersey Docks and Harbour Board* (12 L. T. Rep. 643; 11 H. L. Cas. 443), in which it was decided that beneficial occupation might be rateable at a fair amount quite independent of actual pecuniary value. In my opinion, the quarter sessions have applied the proper test, and as far as the questions of fact go we have no right to interfere with them. They have arrived at their decision, following out principles which I believe this court has often recognised, and it seems to me that the attempt of the assessment committee, who are the appellants in this court, has been to endeavour by this argument to get behind the decision of the court as to who were occupiers of these works and plant, and behind a decision of A. T. Lawrence, J. (then Mr. A. T. Lawrence, K.C.) in striking the mains out of the assessment; but, what is much more important, they are also seeking to apply a standard which, as I believe, is negatived in scores of cases which will be found collected in the ordinary books on rating. I think, therefore, that there is no ground for this appeal of the assessment committee to this court.

LAWRANCE, J.—I entirely agree.

RIDLEY, J.—I agree.

Appeal of the assessment committee dismissed. Leave to appeal.

Solicitor for the Seisdon Union, *Herbert Taylor*, Wolverhampton.

Solicitors for the appellant, *Dennison, Horne, and Co.*, for *George Green*, Cradley Heath.

Friday, Dec. 15, 1905.

(Before LAWRANCE and RIDLEY, JJ.)

ELIAS AND ANOTHER (apps.) *v.* DUNLOP (resp.). (*a*)

Revenue—Excise—Retail sale of beer—Licence for one shop—"Soliciting, taking, or receiving orders" at unlicensed premises—Person who has licence for one shop soliciting orders at unlicensed shop—Liability for act of servant—Revenue Act 1867 (30 *&* 31 *Vict. c.* 90), *s.* 17.

Sect. 17 *of the Revenue Act* 1867 *provides that: "If any person shall solicit, take, or receive any order for spirits, wine, or other article, for the dealing in, retailing, or selling whereof an excise licence is by law required, without having in force a proper excise licence authorising him so to do," he shall be liable to a penalty.*

Held, that this section requires a proper excise licence to be taken out with respect to the shop or premises at which the soliciting or accepting of orders takes place, although the person who so solicits or accepts the order is himself duly licensed to deal in or sell the particular article at other premises; and, consequently, a person commits a breach of this section who, although he has in force in respect of one shop a proper excise licence for the retail sale of beer for consumption off the premises, solicits or accepts, either by himself or by his assistant or servant, at another shop, in respect of which he has no such licence, orders for beer for the selling whereof an excise licence is required, which orders are to be forwarded to and to be executed from the licensed premises, and in such case the licensed person for whom the order is accepted is equally liable whether the order is accepted by himself or by his assistant in the shop.

CASE stated by justices of the peace for the county of Middlesex, sitting as a court of summary jurisdiction at Edgware, for the Gore division of the county.

The appellants (Richard Elias and John Elias) were summoned before the justices on two summonses for offences alleged to have been committed on the 23rd Sept. 1904 and the 1st Oct. 1904 respectively, in contravention of the Inland Revenue Act 1867, s. 17. Both the summonses were heard by the justices on the 8th Feb. 1905, and copies of the same were annexed to this case.

The respondent (Dunlop), who was the informant, was an Inland Revenue officer, and the appellants were grocers and provision dealers carrying on business at two sets of premises in Harrow, one set being at Nos. 2 and 3, Greenhill-parade, the other set being at High-street.

The charges made in both summonses were the same save in respect of the date of the alleged offences, and were that the appellants on the 23rd Sept. and the 1st Oct. 1904 respectively, being persons duly authorised by licences to sell beer by retail at certain premises in Harrow, did at certain other premises not being the premises specified in any of their licences—to wit, at Nos. 2 and 3, Greenhill-parade, Harrow—solicit, take, and receive an order for beer in a quantity less than four gallons and a half for the retailing and selling whereof an excise licence was by law required, without having an excise licence in force authorising them so to do.

The following facts were proved or admitted before the justices:—

The appellants in respect of their premises at High-street held licences as spirit dealers, spirit retailers in bottle, beer dealers, wine dealers, tobacco dealers, and also a retail beer licence for beer to be consumed off the premises; in respect of their premises at Nos. 2 and 3, Greenhill-parade, they held all the above licences except the retail beer licence.

Both inside and outside their premises at Nos. 2 and 3, Greenhill-parade, the appellants displayed crates of four quart flagons of beer, and inside the premises were displayed the prices of the beer per crate.

The appellant Richard Elias managed the premises at Nos. 2 and 3, Greenhill-parade. All retail orders for beer taken at Nos. 2 and 3, Greenhill-parade, were forwarded to the appellants' premises at High-street for execution. The manager at the appellants' premises at High-street executed or did not execute any order so forwarded at his discretion. No cash was accepted at the premises Nos. 2 and 3, Greenhill-parade, in respect of any retail orders for beer. The crates kept there were merely for window display, and no retail orders were executed therefrom, and no beer other than the crates was kept or stored at

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

Nos. 2 and 3, Greenhill-parade, all the beer other than those crates being stored at the High-street premises. Invoices for retail beer orders were sent out from the High-street premises on a High-street premises invoice when such orders had been accepted at Nos. 2 and 3, Greenhill-parade, and money paid for any such orders was paid to and passed through the books of the High-street premises.

On the 23rd Sept. the respondent went to Nos. 2 and 3, Greenhill-parade, and ordered some groceries. The respondent at the same time asked an assistant of the defendants what beer he had, and the assistant thereupon showed him a printed list quoting prices for crates of beer, quoted per crate of four bottles. The respondent then ordered four quart bottles of beer, and asked that the groceries and beer should be sent together. The assistant said the beer would have to come from the other shop, and that would delay the delivery. The respondent then asked that the beer should be sent the following day. The order was in fact accepted at Nos. 2 and 3, Greenhill-parade, and forwarded to and executed at the appellants' premises at High-street, and the beer was delivered the following day from the High-street premises, together with the groceries, at the respondent's lodging at Stanley-road, Harrow. The respondent paid for the beer on delivery, and the money was paid into the High-street branch. One receipt was given to the respondent for the groceries and beer.

On the 1st Oct. 1904 one Walter Hirt went to the appellants' premises at Nos. 2 and 3, Greenhill-parade. He gave an order for groceries to an assistant behind the counter, and at the same time gave an order for a crate of flagons of beer—four quart flagons. He paid for the groceries at the time he ordered them, and also offered to pay for the beer at the same time, but the assistant refused to take the money, and said, "We don't take cash for beer here; I can take your order here and send it," and added he could pay on delivery. This order was in fact accepted at Nos. 2 and 3, Greenhill-parade, forwarded to and executed at the appellants' premises at High-street, and the invoice when delivered was an invoice from High-street.

Subsequently a superintendent of the Inland Revenue called on the appellants at their shop at Greenhill-parade, and asked for an explanation. The appellant Richard Elias then said they had been advised by their solicitor that on the authority of the case of *Stephenson* v. *Rogers* (80 L. T. Rep. 193) they might take orders for retail quantities of beer at their premises Nos. 2 and 3, Greenhill-parade, so long as the orders were passed on to the retail premises at High-street, and provided that they took no money at the Greenhill-parade shop, and that the orders were executed from the High-street shop.

Upon these facts the justices were of opinion that the appellants had, both upon the 23rd Sept. 1904 and on the 1st Oct. 1904, taken and received orders for beer by retail at Nos. 2 and 3, Greenhill-parade, without having in force a proper excise licence authorising them so to do, contrary to sect. 17 of 30 & 31 Vict. c. 90 (the Revenue Act 1867), and they therefore convicted the appellants and fined them the sum of 2*l.* 10*s.* on each of the summonses, and total costs 2*l.* 17*s.* 6*d.*

The question for the opinion of the court was whether there was evidence upon which the justices could have found that the appellants committed the offences against sect. 17 of 30 & 31 Vict. c. 90 on the above dates. If the court should find in the affirmative, then the convictions were to be affirmed; if the court should find in the negative, then the convictions were to be quashed.

The Revenue Act 1867 (30 & 31 Vict. c. 90) provides:

Sect. 17. If any person shall solicit, take, or receive any order for spirits, wine, or other article for the dealing in, retailing, or selling whereof an excise licence is by law required, without having in force a proper excise licence authorising him so to do, he shall forfeit the penalty imposed by law upon a person dealing in, retailing, or selling such article without having an excise licence in force authorising him so to do; . . . Provided always, that nothing herein contained shall be deemed to apply to the sale of any spirits or foreign wine while the same shall be and remain in the warehouse or warehouses in which the same shall have been deposited, lodged, or secured according to law, before payment of duty upon the importation thereof, where such spirits or foreign wine shall be sold in a quantity not less than one hundred gallons at one time, or to impose a penalty upon a *bonâ fide* traveller taking orders for goods which his employer is duly licensed to deal in or sell.

The Excise Act 1860 (23 & 24 Vict. c. 113) provides:

Sect. 37. And whereas doubts have arisen whether persons licensed to sell beer by retail are liable to any penalty for or on account of selling beer at any other place than the house or premises specified in the licence granted to them in that behalf: Be it enacted, that if any person whatever shall sell beer by retail, that is to say, in any quantity less than four and a half gallons, or in less than two dozen reputed quart bottles, at one time, at any other house or place than the house or premises specified in a licence duly granted to him in that behalf, he shall be deemed to sell beer by retail without having an excise retail licence in force authorising him so to do, and shall accordingly be subject and liable to the penalty of twenty pounds for every such offence, anything in any former Act or Acts to the contrary notwithstanding; and in any information or other proceeding for the recovery of such penalty it shall be sufficient to charge that he sold beer by retail without having an excise licence in force authorising him so to do, and it shall not be necessary further or otherwise to describe such offence.

The Customs and Inland Revenue Act 1890 (53 & 54 Vict. c. 8) provides:

Sect. 9. Every excise licence to carry on any trade or business (except the trade or business of an appraiser, auctioneer, or hawker) which shall hereafter be granted shall only authorise the person to whom the licence is granted to carry on the trade or business mentioned therein in one set of premises to be specified in the licence.

R. B. Murphy for the appellants.—The question is whether if a person takes or accepts orders at premises in respect of which he has no licence to sell beer for consumption off the premises, which orders are transmitted to and executed at premises in respect of which he has such a licence, he comes within this section as a person who solicits, takes, or receives an order for this beer without having in force a proper excise licence. The case is not covered directly by authority, as the section has only been considered

in two cases, *Stuchbery* v. *Spencer* (55 L. J. 141, M. C.) and *Killick* v. *Graham* (75 L. T. Rep. 29; (1896) 2 Q. B. 196). In the latter case there are expressions used by Grantham and Collins, JJ. which, if they were not dicta merely, would conclude the matter, but the point raised here was not raised there. This is not a prosecution for selling at a place where the person has no licence to sell, and it does not raise the question which was raised in the cases of *Pletts* v. *Campbell* (73 L. T. Rep. 344; (1895) 2 Q. B. 229), *Pletts* v. *Beattie* (74 L. T. Rep. 148; (1896) 1 Q. B. 519), and *Stephenson* v. *Rogers* (80 L. T. Rep. 193), so that there is no inquiry as to whether a sale took place on premises other than those for which the appellants had a licence. It is entirely a different state of circumstances that is raised here, because the matter arises under a different section, and the court has not to consider the finding of the justices that the orders were accepted at the unlicensed premises. There is no question as to where there was an appropriation to the contract, or a contract for sale, or a complete sale, and there is no question of selling; those questions are dealt with under another section, sect. 3 of the Licensing Act 1872. Sect. 17 of the Act of 1867, under which this prosecution is brought, is intended to apply to a completely different set of circumstances. There is no mention whatever in the section as to the locality at which a person shall solicit an order, or as to a person soliciting orders at one place which are to be executed at another place where in fact that person has a licence; and the appellants' contention is that where a person has an excise licence in respect of one set of premises, he may, without contravening the provisions of this section, take orders himself at some other place or shop which he has, such orders to be executed at the place in respect of which he has an excise licence. If in fact he has an excise licence in respect of the premises from which the beer is to be delivered and where the order is to be executed, then he is not committing an offence against this section if he solicits or takes the order at another place where he has no licence. At the end of the section there is an express exemption for a *bonâ fide* traveller taking orders for goods which his employer is licensed to sell. The section was not intended to deal with the case of a man who had an excise licence himself, and who himself solicits orders at another place; but it was intended to deal with an entirely different state of things, namely, the case of a servant or *employé*—not being a *bonâ fide* traveller—who, having no licence himself, solicits or takes an order for his master who has a licence at some other place. The terms of the conviction show that what the justices really had in their minds was the question of a sale at premises other than the licensed premises. A conviction under that form might be correct if the charge had been for selling at a different place from the licensed premises—for example, if it had been under sect. 37 of the Excise Act 1860, which prohibits the sale of beer at any place other than that specified in the licence. That Act expressly says that it is an offence if a person sells beer at premises other than those in respect of which he is licensed, and if the Legislature had intended in this Act to deal with the case of a person who himself has a licence and himself solicits orders at a place in respect of which he has not a licence, then they would have said so in express terms, as they have done in the case of sales in sect. 37 of the Excise Act 1860, in which they anticipated the point that might be taken with regard to sales by a licensed person at an unlicensed place. That shows that the Legislature thought that, if they did not put in some provision of that kind, a licensed person could not have been convicted if he had sold beer at an unlicensed place. Here there is no such provision, but there is an Act which is intended to deal with the case of servants or agents soliciting orders when they have not a licence. *Killick* v. *Graham* (*ubi sup.*) is an essentially different case, as there the person who solicited orders was not himself licensed, but was only an agent; here he is licensed. If a servant or agent had been proceeded against different considerations would have arisen, but those considerations do not arise here, where the licensed persons themselves are proceeded against. [RIDLEY, J. referred to the case of *Noblett* v. *Hopkinson* (92 L. T. Rep. 462; (1905) 2 K. B. 214).]

Rowlatt for the respondent.—The conviction was quite right. In this case it was the assistant behind the counter who took the order in each case, and it is said for the appellants that, although the assistant who took the order might have been convicted, his principals for whom the order was taken cannot be convicted under this section. It is not the case of a licensed person himself soliciting an order, but it is the case of his assistant, who himself committed an offence under this section, and the question is whether the appellants, for whom the assistant took the order, did not also commit an offence under the section. It is submitted that both the assistant who took the order and the principal for whom it was taken committed an offence under sect. 17. It is argued for the appellants that the section is aimed only against servants, agents, and persons who solicit, and is not aimed at the persons who employed them to solicit. We contend that the section is aimed against both the servant who actually solicits an order and the principal or employer who employs him to solicit. By sect. 9 of the Customs and Inland Revenue Act 1890, an excise licence only authorises the person to whom it is granted to carry on the particular trade in one set of premises to be specified in the licence; so that every excise licence has to specify the place where the trade has to be carried on, and is not granted for any other place. Sect. 37 of the Act of 1860, which rendered it an offence to sell beer by retail at any place other than the licensed premises, applied both to the principal and to the agent. It certainly applied to the principal; but that referred only to the transaction of a sale. Then sect. 17 of the Act of 1867—the section now in question—although not clearly drawn, has the effect which is indicated in the dicta in *Killick* v. *Graham* (*ubi sup.*), which have been referred to; and it simply puts soliciting or taking or receiving orders on the same footing as carrying through the actual sale, and applies both to principal and agent. The words in that section, "without having in force a proper excise licence authorising him so to do," simply mean authorising the person to take that order at that place. [RIDLEY, J.—The section does not say so, and that is what makes the difficulty. In sect. 37 it

is said that the licensee is only to sell beer at the one place; here sect. 17 does not say so.] The law being already that the licensed person must not sell beer at an unlicensed place, this section comes in and says he must not take an order where he cannot sell it, and the penalty imposed by the section for taking the order is the same as for selling it without a licence. That is the sensible view of the legislation, and, if it were not so, the result would be that a person employing a large number of people all over the country to take these orders might be exempt, while the persons taking the orders would be liable. What have been called dicta in *Killick* v. *Graham* (*ubi sup.*) were really steps in the argument by which the court arrived at their decision. It was there assumed that the watchmaker (the principal) had incurred the penalty under this section, and the attention of the court was directed to the question whether the section extended to hit the secretary of the watch club in the provinces; and it was clearly assumed that, if the watchmaker was the principal of the man committing the offence, he (the principal) would commit an offence also. That the order was taken at these unlicensed premises is clear, because it is found that it was accepted there, so that the facts found would support a conviction under the earlier section dealing with sales. The case of *Stallard* v. *Marks* (38 L. T. Rep. 566; 3 Q. B. Div. 412), which was a case of selling and not of taking orders for spirits under this section, shows that a person who does these acts—whether of selling or of taking orders—either by himself or by his agent, commits the offence, subject to the exemption in favour of the *bonâ fide* traveller, which enures for the benefit of the principal as well as of the traveller.

Murphy in reply.

LAWRANCE, J.—In this case I think that our judgment should be for the respondent. The case is not without difficulty, and we have been referred to numerous cases which have been decided with regard to this matter. The matter which the justices had before them was this: The appellants carried on business in two places in Harrow, and one of those places of business was licensed for the sale of wine, spirits, beer, and so forth, but for the other place of business there was no retail beer licence. At the shop which was not licensed for the retail sale of beer to be consumed off the premises, there were put up notices of the prices of beer and so forth, and there were samples of beer there with the prices. People who came to that shop seem to have been in the habit of inquiring, and in this particular case at all events the person did inquire, the prices of beer, and the shopman (who is not the person who is now charged) took an order for a quantity of beer from a customer who had bought other goods at that shop, which order, the shopman said, would have to be dealt with at the shop which was licensed. He took that order and it was sent on to the other shop, and the goods were supplied. Now, sect. 17 of the Revenue Act of 1867 says that if any person shall "solicit, take, or receive any order" for spirits, wine, or other article, for the dealing in, retailing, or selling whereof an excise licence is required, without having in force a proper excise licence, he shall forfeit a penalty. The only proviso, upon which stress has been laid, is that as to the taking of orders for goods by a *bonâ fide* traveller—that is to say, that this may be done by a *bonâ fide* traveller taking orders for goods. Nobody can for a moment suggest that in this case the person taking the order was a *bonâ fide* traveller. There is no question of a traveller here at all. The question is whether there was a soliciting, taking, or receiving of orders at this place for which there was no licence. It is found as a fact by the justices that that was so, and the evidence certainly seems to me to justify them in coming to that conclusion. Therefore I think that the respondent is entitled to our judgment.

RIDLEY, J.—I am of the same opinion. At first I had considerable doubt in this matter, and the argument for the appellants certainly made me for a considerable time hesitate as to what our decision should be. If we take the section by itself, it looks as though it did not refer to a place, but to a person who is receiving an order for spirits, wine, or other article which required a licence, without having such licence, and then, in that case, we should have had very carefully to see whether this decision could possibly be supported. But when we come to look at the previous legislation and to understand what I think must be the meaning of the words "a proper excise licence," I think this section does contain words which make it necessary to recognise that it is dealing with a place. The previous legislation is partly the Excise Licences Act of 1825 (6 Geo. 4, c. 81), s. 10, which says that no one licence for selling intoxicating liquors shall apply to more than one house. If there had been any doubt about that, a subsequent section was passed in the Excise Act of 1860 (23 & 24 Vict. c. 113)—namely, sect. 37—to do away with such doubts, and that section provided that if any person should sell beer by retail at any other house or place than the house specified in the licence, he should be deemed to sell beer by retail without having a licence. This section of the Revenue Act of 1867 in using the words "a proper excise licence," I think refers really to these previous sections—that is, to a licence which is a local one only, and of which there will be a breach if the sale is effected at any other house; and it is intended to extend the provisions relating to a sale to the receiving of an order. In my opinion that is the object of the section. There have been, I suppose, cases where the sale has not been complete; where there has only been an order, so that a person selling at one house when he has had a licence for another house was enabled to say: "The sale was not complete; it was only an order that I asked for." Such cases, perhaps, are similar in circumstances to the case of *Noblett* v. *Hopkinson* (*ubi sup.*), which recently came up for decision in this court. In such cases, I think, the intention of sect. 17 of the Revenue Act of 1867 was to make soliciting or receiving an order as much a breach of the previous Excise Act as the sale would have been. Therefore I cannot accede to the argument that has been put before us on behalf of the appellants in this case. When we come to consider the case of *Killick* v. *Graham* (*ubi sup.*), a decision which was given by my brother Grantham and the present Master of the Rolls (then Collins, J.), although at first sight it certainly does give

reason for thinking that our decision in this case ought to be the other way, still I think the court in that case were of opinion that the principal in such a case would himself have been liable for a breach of the Act, and I believe, on consideration, that is the true view of the matter. I am not quite sure what I should have said if there had been no such previous decision, but I think that that decision having been given, it certainly does remove my doubts, and I now see why that decision was right, and I think that this case also should be decided in the way we are now deciding it. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Neve, Beck,* and *Kirby.*

Solicitor for the respondent, *Solicitor of Inland Revenue.*

Dec. 18 *and* 19, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

BROWN (app.) *v.* LEGGETT (resp.). (*a*)

Poison—Vermin killer—Poisonous vegetable alkaloid—Compound—Resolution of Pharmaceutical Society—Pharmacy Act 1868 (31 *&* 32 *Vict. c.* 121), *ss.* 2, 17, *sched. A, parts* 1 *and* 2.

By sect. 17 *of the Pharmacy Act* 1868: "*It shall be unlawful to sell any poison either by wholesale or by retail unless the box, bottle, vessel, wrapper, or cover in which such poison is contained be distinctly labelled with the name of the article and the word 'Poison,' and with the name and address of the seller of the poison; and it shall be unlawful to sell any poison of those which are in the first part of sched. A to this Act, or may be hereafter added thereto under sect.* 2 *of this Act, to any person unknown to the seller unless introduced by some person known to the seller*"; *and certain formalities are to be observed. Part* 1 *of the schedule comprises* (inter alia) "*all poisonous vegetable alkaloids and their salts.*"

By sect. 2: "*The several articles named or described in the sched. A shall be deemed to be poisons within the meaning of the Act, and the Council of the Pharmaceutical Society of Great Britain . . . may from time to time, by resolution, declare that any article in such resolution named ought to be deemed a poison within the meaning of this Act. . . .*"

In pursuance of sect. 2 *the society on the* 1*st Dec.* 1869 *declared by resolution that certain articles named therein ought to be deemed poisons within the meaning of the Act, which resolution was duly approved and advertised. The articles were* (inter alia) *every compound containing any poison within the meaning of the Pharmacy Act* 1868 *when prepared or sold for the destruction of vermin, and the resolution further declared certain other articles ought to be deemed poisons in the first part of sched. A.*

The appellant sold a compound prepared and sold for the destruction of vermin, which compound contained a poisonous vegetable alkaloid.

Held, that there had not been a sale of a poison within part 1 *of sched. A.*

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

CASE stated on an information preferred by the respondent against the appellant charging him with unlawfully selling a certain poisonous vegetable alkaloid, being a poison named in the first part of sched. A to the Pharmacy Act 1868—to wit, veratrine—to one Margaret McCann, who was then a person unknown to him, the said Margaret McCann not being then introduced to him by some person known to him, contrary to the form of the statute.

The following facts were proved or admitted:—

The appellant was a registered chemist and druggist, carrying on business at a shop in Leeds, and was duly qualified.

On the 27th July 1904 the appellant sold at his shop to Margaret McCann a packet containing 228 grains of a substance known as "Rankin's Ointment," to which was affixed a label distinctly and legibly printed in the words following: "Rankin's ointment for destroying vermin on the head. Trade 15,658 Mark. Tins 6*d.* and 1*s.* Poison. Not to be applied where the skin is broken. Price 6*d.*"

Rankin's ointment is a compound prepared and sold for the destruction of vermin.

Margaret McCann was a person then unknown to the appellant, and was not then introduced to him by any person known to him.

The packet contained 2 2 5 grains (equivalent to rather more than 1 per cent.) of certain poisonous vegetable alkaloids.

On analysis these were found to consist to a very large extent (about 90 per cent.) of pure alkaloid veratrine, which is a poisonous vegetable alkaloid. This quantity was sufficient, if the ointment in the packet were taken internally by an adult human being, to cause purging and vomiting and possibly a fatal result.

By sect. 17 of the Pharmacy Act 1868 (31 & 32 Vict. c. 121):

It shall be unlawful to sell any poison either by wholesale or by retail unless the box, bottle, vessel, wrapper, or cover in which such poison is contained be distinctly labelled with the name of the article and the word "Poison," and with the name and address of the seller of the poison; and it shall be unlawful to sell any poison of those which are in the first part of sched. A to this Act, or may be hereafter added thereto under sect. 2 of this Act, to any person unknown to the seller unless introduced by some person known to the seller"; and certain formalities are to be observed.

Part 1 of the schedule comprises (*inter alia*) "all poisonous vegetable alkaloids and their salts."

By sect. 2 of the Pharmacy Act 1868:

The several articles named or described in the schedule A shall be deemed to be poisons within the meaning of the Act, and the Council of the Pharmaceutical Society of Great Britain . . . may from time to time, by resolution, declare that any article in such resolution named ought to be deemed a poison within the meaning of this Act; and thereupon the said society shall submit the same for the approval of the Privy Council, and if such approval shall be given, then such resolution and approval shall be advertised in the *London Gazette*, and on the expiration of one month from such advertisement the article named in such resolution shall be deemed to be a poison within the meaning of this Act.

In pursuance of sect. 2 the society on the 1st Dec. 1869 declared by resolution that certain articles named therein ought to be deemed poisons

within the meaning of the Act, which resolution was duly approved and advertised.

The following is a copy of the resolution:

By virtue and in exercise of the powers vested in the Council of the Pharmaceutical Society of Great Britain the said council do hereby resolve and declare that each of the following articles—namely: Preparations of prussic acid, preparations of cyanide of potassium, and of all metallic cyanides, preparations of strychnine, preparations of atropine, preparations of corrosive sublimate, preparations of morphine, red oxide of mercury (commonly known as red precipitate of mercury), ammoniate mercury (commonly known as white precipitate of mercury), every compound containing any poison within the meaning of the Pharmacy Act 1868 when prepared or sold for the destruction of vermin, the tincture and all vesicating liquid preparations of cantharides, ought to be deemed a poison within the meaning of the Pharmacy Act 1868; and also that of the same the following articles: Preparations of prussic acid, preparations of cyanide of potassium, and all metallic cyanides, preparations of strychnine, preparations of atropine, ought to be deemed a poison in the first part of the schedule A to the said Pharmacy Act 1868.

It was contended on behalf of the respondent that as the ointment contained a dangerous quantity of poisonous vegetable alkaloids, which are expressly included in part 1 of the schedule, and as the penal sections of the Pharmacy Act are not confined to the sale of the scheduled poisons in their simple state or of the preparations of such poisons, but extend to the sale of a mixture or compound containing a scheduled poison (*Pharmaceutical Society* v. *Piper*, 68 L. T. Rep. 490; (1893) 1 Q. B. 686; *Pharmaceutical Society* v. *Armson*, 71 L. T. Rep. 315; (1894) 2 Q. B. 720), the defendant had been proved to be guilty of the offence charged in the information.

It was contended on behalf of the appellant that compounds containing poisonous vegetable alkaloids are not within part 1 of schedule A to the Pharmacy Act 1868; that the words poisonous vegetable alkaloids and their salts in part 1 of that schedule do not include compounds containing a poisonous vegetable alkaloid; and that the cases cited above do not support the contention that a compound containing a poisonous vegetable alkaloid is to be regarded for the purpose of sect. 17 of the Pharmacy Act 1868 as the alkaloid itself, and only to be sold under the restrictions imposed upon the sale of articles included in part 1 of the schedule.

It was further contended on behalf of the appellant that, inasmuch as the resolution of 1869 did not place vermin killers within part 1 of the schedule, it must be taken that "every compound containing any poison within the meaning of the Pharmacy Act 1868 when prepared or sold for the destruction of vermin" is comprised within part 2 of the schedule, and that all the requirements of the Pharmacy Act had been duly complied with.

It was pointed out that certain substances containing poisons within part 1 had been placed by the Legislature in part 2 of the original schedule, and the Sale of Poisons (Ireland) Act 1870 was referred to.

It was contended for the respondent in reply that, if a mixture be sold containing poison in such a form that it retains its dangerous qualities, there is none the less the sale of a poison because it has been mixed with other articles so as to constitute a compound; and, further, that vermin killers containing poisons within part 1 of the schedule were not intended to be withdrawn by the resolution from part 1, even if the Act conferred the power on the council of the Pharmaceutical Society so to withdraw them. It was argued that it was quite consistent with the terms of the resolution to hold that vermin killers containing poisons in part 1 fall within part 1, while vermin killers containing poisons in part 2 fall within part 2. It was also pointed out that at the date of the resolution none of the cases as to the sale of mixtures or compounds had been decided, and that this probably explained the explicit mention of vermin killers; and, further, that, as the court cannot enter into questions arising as to the preparation of the poisonous ingredients (unless the principle of *De minimis non curat lex* applies), one result of upholding the appellant's contention would be that strychnine and other deadly poisons in the form of vermin killers could be obtained by all persons indiscriminately and in any quantity without record or inquiry of any kind.

The magistrate was of opinion that vermin killers containing in dangerous quantities poisons within part 1 of the schedule fell within that part of the schedule, and he therefore convicted the appellant.

Sir *E. Clarke*, K.C., *Bonsey*, and *Glynn Jones* for the appellant.—They referred to

Pharmacy Act 1868 (31 & 32 Vict. c. 121), ss. 1, 2, 17, sched. A, parts 1 and 2.

This was a substance which was not within the first part of sched. A, and was not an addition to that part of the schedule. This substance is specifically included in poisons within the meaning of the Act, but is specifically excluded from the first part of the schedule, and therefore, although it is required that the word "poison" should be placed upon it and the name of the seller, the sale of a substance of this kind is not required by the statute to be accompanied by a knowledge of the purchaser by the seller and the other formalities set out in the latter part of sect. 17. They referred to

Sale of Poisons (Ireland) Act 1870 (33 & 34 Vict c. 26).

In 1869, when the resolution of the Pharmaceutical Society was passed, the various substances were divided into two sets. Four of them were put into the first part of the schedule and the rest into the second part of the schedule. They referred to

Pharmaceutical Society v. *Piper*, 68 L. T. Rep. 490; (1893) 1 Q. B. 686;
Pharmaceutical Society v. *Armson*, 71 L. T. Rep. 315; (1894) 2 Q. B. 720.

Kerly for the respondent.—A scheduled poison within part 1 plus something else is still a scheduled poison. This substance contains a poisonous vegetable alkaloid which comes within part 1. The decision in *Pharmaceutical Society* v. *Piper* shows that part 1 includes all the enumerated poisons and their compounds. [Lord ALVERSTONE, C.J.—I do not think that the two cases cited decided for all purposes that mixture of poison is within the Act. The result of giving the effect contended for to the cases would be to

wipe off all distinction between the two parts of sched. A.] The Pharmaceutical Society by their resolutions cannot put a poison which is already in part 1 of the schedule into part 2.

Sir *E. Clarke*, K.C. in reply.

Lord ALVERSTONE, C.J.—This is an interesting case, but the argument has involved wider considerations than we think are really necessary or material for the purpose of considering this case. For myself I do not question the correctness of the bulk of Mr. Kerly's argument. If he is right in saying we must regard this stuff as containing an ingredient or poison named in the first part of sched. A, I think it would be an offence under sect. 17 to sell that without knowing the vendor or the vendee being introduced by some person known to the seller. In my judgment the fact that the poison named in the first part of the schedule is mixed with another ingredient does not make it the less the sale of a poison. As I put it to Sir E. Clarke in the course of his short reply, he would not contend that if a seller had mixed prussic acid and flour together and sold it as vermin killer he could have sold that without infringing the Act if he did not know the person to whom it was sold, or the vendee was some person introduced by some person known to the seller. Therefore, as I have said, the major portion, on which we heard a very lengthened and forcible argument from Mr. Kerly, in this case seems to me not to touch the real point we have to decide. In my opinion this case depends on whether this order of the Pharmaceutical Society was *ultra vires*, and therefore, as I said, I should hesitate to declare an order to be *ultra vires* unless it appeared to me, notwithstanding it was thirty-five years old, to contravene the clear language of the statute. In my opinion, having regard to the argument I have heard, that cannot be contended in this case. The schedule, so far as this subject is concerned, cannot be said to enumerate veratrine. The part of the schedule which it is said to come under are the words "all poisonous vegetable alkaloids and their salts." I think the general idea of this Act was that the Pharmaceutical Society should have power to say which things ought to be deemed to be poisons within the one part of the schedule or the other. I was at first a little troubled by the suggestion, or the point which arose on the threshold of the case, of whether the Pharmaceutical Society had any power to do more than to say things were poisons under the Act, but I think when you observe that the Act specifies the two parts of the schedule, and says that the several articles named or described shall be deemed to be poisons, and the council may from time to time by resolution declare that any article in such resolution ought to be deemed a poison within the meaning of this Act, that involves the power to put the article which they deem to be a poison in the one part of the schedule or the other, otherwise you cannot carry out the Act. I think, therefore, there is a necessary implication of a power given to the Pharmaceutical Society to say into which part of the schedule the particular thing which is deemed to be poison is brought. That being so, it is properly conceded by Mr. Kerly that, unless he can make out that the poison is named in the first part of the schedule, that order of the Pharmaceutical Society is not invalid. But he contends that, in so far as it must either be read as not including the compound of an article specially named in the first part, or in so far as it did include a compound of an article named in the first part, it would be *ultra vires*. In my opinion, quite apart from the statute, I should come to the conclusion that the society had the power to make the order of 1869. The order follows the actual language of sect. 2, and therefore it cannot be suggested that it was not purported to be made under it. They did declare that certain things ought to be deemed some in the first part and others in the second part, and in the second part they have included two classes of articles which touch this question: "Every compound containing any poison within the meaning of the Pharmacy Act 1868 when prepared or sold for the destruction of vermin," and preparations of prussic acid, preparations of strychnine, and so on. As to those last two, which come within the four articles named, they put them into part 1, and as to the other they put them into part 2. In my judgment it was not *ultra vires* to declare that an article or a preparation which contained some of the poisonous matter, but was not, if I may use the expression, a mere mixture of poisonous matter with something else, was to go into the 2nd schedule. I think it is impossible to overlook the legislation of 1870. There is no reason why in such a matter as the sale of poisons there should be a different restriction or different power with regard to one part of the United Kingdom and another, and when you find in 1869 the Pharmaceutical Society had made this order, in which order they had purported, as I have already pointed out, to put into the 2nd schedule every compound when containing any poison when prepared or sold for the destruction of vermin, and that sched. 2 of the Act of 1870 puts into the 2nd schedule in terms those words, I think it is tantamount to a legislative recognition of the power of the Pharmaceutical Society to make that order, because it is in the area covered. No doubt it does not apply to Scotland. In England the Pharmacy Act was supplemented by the Pharmaceutical Society's order of 1869, and the law in Ireland was the statute which embodied so far as had then gone the wisdom of the Pharmaceutical Society. With regard to the other orders, all I desire to say is that I do not express any doubt upon the suggestion made by Sir E. Clarke that it may turn out that in some of the later orders they had done exactly the same thing; but I do not think any judge of the High Court ought to be deemed to have a knowledge or to know that an article does come within the first part of the schedule, unless it is either admitted or the fact is found for them. I am not saying that there are not other instances. If there were other instances it would show from time to time, as contended by counsel, that this power did rest with the Pharmaceutical Society. The only other word I desire to add is this. We know now, from the statement made, that veratrine is a poisonous vegetable alkaloid, and that there is some portion of this poisonous vegetable alkaloid in this vermin killer. Of course that, with the knowledge we now possess, involves the knowledge of the very fact which the Pharmaceutical Society would know about, and it would show that it was good sense and

wise legislation to make an authority of that kind to declare for the benefit of the public what ought to be deemed to be poisons within one branch or the other. Of course, it must not be supposed that I am suggesting that a sale of a mixture of a named poison with something else would not be a sale under sect. 17. I have said at the beginning of my judgment, and I desire to repeat it, that I do not in any way wish to throw the slightest doubt on that part which is, I think, concluded by the language of the section itself and by the judgments in the Court of Appeal. I come to the conclusion that this order was a perfectly valid order, and that therefore the sale of this article was justified by the Act and the order, and was not a sale of a poison named in part 1 of sched. A. It was a poison, and therefore required to be labelled "poison," and to have the name of the seller upon the box; but it was not a poison in the first part of sched. A, which requires it to be sold only to a person known to the vendor. I think for these reasons that the appeal must be allowed.

Lawrance, J.—I agree.

Ridley, J.—I agree, and have very little to add. I think that the cases quoted show that an unqualified person may be convicted of selling poison contrary to the Act, although the poison be mixed with other substances, and whether that poison be within the first or second part of sched. A. But clearly the question within which part of the schedule each particular poison or preparation of poison may fall is quite independent of these cases. If the Pharmaceutical Society had power to pass the resolution of 1869, I think on the argument addressed to us this ointment falls properly within the words "compound containing any poison within the meaning of the Pharmacy Act 1869 when prepared or sold for the destruction of vermin," and is not within the first part of the schedule. I agree with my Lord that we must hold that the society had power to make the order.

Appeal allowed.

Solicitors, *Neve, Beck,* and *Kirby; Markby, Stewart,* and *Co.*

Wednesday, Dec. 20, 1905.

(Before Lord Alverstone, C.J., Lawrance and Ridley, JJ.)

Hornsey School of Art (apps.) *v.* Edmonton Union (resps.). (*a*)

Poor rate—Exemption—Society instituted for the purposes of fine arts exclusively — Scientific Societies Act 1843 (6 *& 7 Vict. c.* 36), *s.* 1.

The appellants were an institution established for the purposes of the fine arts and of encouraging, advancing, and disseminating the same exclusively. The expenses of maintenance were defrayed by fees paid by the students and grants from the Middlesex County Council and the Board of Education, and a certificate had been given by the Registrar of Friendly Societies that the institution was entitled to the benefit of 6 *& 7 Vict. c.* 36.

Held, that the institution was exempt from poor rates under sect. 1 *of the Scientific Societies Act* 1843.

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

Case stated for the opinion of the court pursuant to the provisions of sect. 11 of 12 & 13 Vict. c. 45.

On the 19th Oct. 1904 the respondents assessed the above-named appellants for the half year ending March 1905 to the rate for the relief of the poor of the parish of Hornsey, in the county of Middlesex, and for other purposes chargeable thereon according to law in respect of the premises and hereditaments hereinafter described. The appellants refused to pay the amount to which they were assessed in the rate or any part thereof.

The Hornsey School of Art is an institution established and carried on for the purposes of the fine arts, and of encouraging, advancing, and disseminating the same exclusively, and it effects these objects by the instruction and examination of art students and by the exhibition of works of art and the award of prizes, medals, certificates of merit, and scholarships to such students as shall have shown themselves on examination proficient in art.

The premises occupied by the school and in respect of which the rate from which exemption is claimed is sought to be imposed were in the year 1893 leased to the committee of the institution for a term of twenty-one years at an annual rent of 150*l.*, and are situated in a road called Crouch End-hill in the parish of Hornsey; they consist of school buildings which by the terms of the lease and by the rules of the institution are required while rented or occupied by the institution to be used solely for the purpose of a school of art for pupils of the age of fifteen years at least, in connection with the Science and Art Department of the Committee of Council on Education, South Kensington, in accordance with the rules and regulations of such department, and for the purpose of teaching drawing, painting, modelling, and designing for architectural manufactures and decorations, but not for music or chemistry, or any other purpose whatsoever, and for the transaction of the business of the institution.

The institution is controlled and conducted by a committee of management, of which committee the majority is appointed by the Middlesex Education Committee. The only members of the institution are those who constitute the committee of management, and by the rules of the institution the services of these members are honorary, no dividend, gift, division, or bonus in money, or any emolument or pecuniary advantage being received or receivable by any of the said members.

The committee of management superintend and control the institution in accordance with and subject to regulations of the Board of Education applicable to schools of art and art classes, and in accordance with and subject to the regulations of the Middlesex Education Committee. The instruction of the students in art is conducted by a teaching staff who are under the directions and superintendence of the committee of management.

Fees for instruction in art at rates approved by the Middlesex Education Committee are paid by the students. By the rules of the institution no profit over and above the expenses of maintenance of the institution as a school of art is sought to be made.

Prior to Nov. 1900 the appellants received in aid of the institution an annual grant from the Middlesex County Council, averaging 88*l.*, in aid of special evening technical classes, and upon condition that these classes—viz., classes for modelling in clay, designing, and wood carving—should be under the control of a joint committee consisting of three members nominated by the said county council and three members of the committee of the appellants' institution. On the 9th Nov. 1900 application was made by the appellants to the said county council for an additional grant for the support of Saturday morning classes in drawing for elementary school teachers and for evening classes. The following is a copy of the application for additional assistance:

Hornsey School of Art, Crouch End-hill, N., 9th Nov. 1900.—To the Technical Education Committee of the Middlesex County Council.—Gentlemen,—The committee of this school of art had the honour of laying before you in their letter of the 6th Oct. statistics relating to the number of students attending the classes, successes which they had gained, and a statement of average income and expenditure. This was accompanied by a proposal which they submitted for the adoption and administration of the school by the technical education committee of the county council. They are given to understand, however, that the proposal as then made did not meet the approval of the majority of the local technical education committee, and therefore, the question of handing over the management of the school to the county council might possibly be postponed. Under these circumstances the committee beg to apply for additional financial assistance to enable them to extend and render more efficient the evening classes carried on by them, and they would submit that such assistance, in addition to the grant as at present received, might be given for the following purposes:—

1. To provide a class in drawing subjects on Saturday mornings for elementary school teachers.—The members of the Hornsey School Board have intimated that they approve of the institution of this class, and, if it is started, to actually co-operate in making it a success. It is proposed that the rate of fees charged should be the same as charged for a similar class by the committee of the Tottenham Polytechnic, and for the remainder of the present session to be as follows: For the term January to May 1901, 6*s.*; for the term May to the 28th July 1901, 6*s.*; for seven months, January to the 28th July 1901, 10*s.* 6*d.*; estimated cost of teaching for the remainder of the session, January to July 1901, 17*l.* 10*s.*

2. To reduce all the fees of evening classes.—The committee desire to point out that expert instruction is now given in upwards of twelve evening classes each week, and they feel that the time has come when this instruction should be brought within the easy reach of all comers by a general reduction in the fees. From the inquiries that have been made it appears that a considerable number of residents in Hornsey attend the evening art classes held in London who would attend the classes at this school if the fees were reduced. Upon an average, 110 students attend the evening classes annually (many of whom are engaged in art trades and manufactures), but the premises will accommodate a much greater number. The committee would be prepared to introduce this change immediately after the Christmas vacation, and request the county council to assist them on the following lines: That at the close of the session in July 1901, upon a statement being presented, the county council grant a sum not exceeding 100*l.* to make up for any loss arising from the reduction in the fees charged at evening classes, and for the provision of additional teachers for duplicating classes as may be required by the larger number of students attracted by the lower fees. (A statement is appended giving details of the proposed alterations in the fees).

Summary.

	£	s.	d.
1. Grant in aid of modelling, designing, and wood carving as heretofore	85	0	0
2. Estimate for Saturday morning class for elementary teachers—teacher 1st Jan. to July	17	10	0
3. For reducing fees of evening classes and additional teachers as may be required and not to exceed the sum of	100	0	0
	£202	10	0

The committee trust that this application will receive the favourable consideration of the committee of the county council.—I am, gentlemen, yours faithfully, G. J. SQUIRES, Hon. Sec.

The county council on the 14th Dec. 1900 consented to make an additional grant on conditions contained in a letter of which the follwing is a copy:—

County Council of Middlesex, Guildhall, Westminster, S.W., 14th Dec. 1900.—Technical Education Hornsey School of Art.—Dear Sir,—Your letter of the 9th ulto. applying for additional financial assistance to your school to enable your committee to extend and render more efficient the classes carried on has now been dealt with by my technical education committee. After giving the matter their careful consideration, I am directed to intimate to you that they will be prepared to make a grant to your school for a period of fifteen months, commencing the 1st Jan. 1901, at the rate of 200*l.* per annum, for the purpose of extending the usefulness of the school by bringing the classes within the reach of a greater number of students, and providing as far as possible for students in industrial occupations in which applied art is of importance. The grant proposed to be made will be subject to the following conditions: (*a*) That the fees are to be reduced on the lines suggested in the scheme of your committee. (*b*) That special Saturday classes be provided for teachers. (*c*) That all teachers be paid fixed salaries and no bonus of any kind to be given. (*d*) That an annual balance-sheet be presented to my technical education committee. (*e*) That the majority of the members of the school committee be appointed by my committee, the remainder being appointed by the present school committee. (*f*) That all fees paid and grants earned by students in the evening classes be the property of the county council. (*g*) That all classes be open for inspection by Mr. Gott, the county council's inspector, to whom notices of all committee meetings must be sent. (*h*) That a scheme of work for the session be submitted to my committee. (*i*) That the whole organisation of the school be taken charge of by the committee appointed under sub-sect. (*e*) and brought under the above conditions.—I am, dear sir, yours faithfully, RICHARD NICHOLSON, Clerk of the County Council.—G. SQUIRES, Esq., Hon. Secretary, Hornsey School of Art, Crouch End-hill, N.

Since that date the county council has continued the additional grant on the conditions, but condition (*f*) has not been enforced, and the fees and grants the subject of the condition have never been claimed from the appellants by the county council. The fees and grants have never at any time approximated to the amount of the additional grant.

The original grant has also been continued, and, as appears from the balance-sheet exhibited to this case, the total grant from the county council for the year ending the 31st July 1904 was 250*l.*

Until the Education Act 1902 came into operation the grant received by the appellants from the Middlesex County Council was made by that council under and by virtue of the Local Taxation (Customs and Excise) Act 1890 and the Technical Instruction Acts 1889 and 1891. Such grant has since been made by the county council under and by virtue of the Education Act 1902. An annual grant has also been received by the appellants in aid of their institution since the year 1883 from the Board of Education. This grant has been hitherto made to them by that board out of moneys voted by Parliament for educational purposes, and has been granted subject to the conditions imposed by the regulations of the board for the year in which the grant was made.

The court is to be at liberty to refer to a King's printer's copy of the regulations of the Educational Board made for the year which commenced the 1st Aug. 1903 and ended the 31st July 1904 under which the grant made to the appellants in aid of their institution in that year was made.

Application for the grants is required to be made annually by the committee of management of the appellants' institution to the Middlesex County Council and to the Board of Education, and the grants may be decreased or determined.

The annual grants made to the appellants' institution by the Middlesex County Council and by the Board of Education have amounted to about 635*l.* per annum, and the same have been and are applied exclusively to the purposes of the institution hereinbefore declared.

The following is a statement of the receipts and expenditure of the institution for the year ending the 31st July 1904:

Hornsey School of Art Balance-sheet, Aug. 1, 1903, to July 31, 1904.

	£	s.	d.
Balance brought forward	80	14	8
Fees	770	1	11
Grants			
Board of Education	385	6	8
County Council of Middlesex	250	0	0
	£1486	3	3

	£	s.	d.
Teachers' salaries fixed	903	14	0
Assistant secretary	15	0	0
Equipment, apparatus, &c.	127	6	2
Rent, rates, taxes, &c.	155	17	10
Heating, lighting, cleaning, &c.	87	13	4
Printing, advertising, postage, prize distribution	69	3	9
Examinations and prizes	21	12	10
Fire insurance	0	9	6
Legal expenses	3	16	0
Repayment of loan	50	0	0
Interest on loan, 5 per cent. on £200 ...	10	0	0
Balance forward	41	9	10
	£1486	3	3

A certificate that the institution is entitled to the benefit of the statute 6 & 7 Vict. c. 36 was given by the Registrar of Friendly Societies and is dated the 17th Oct. 1903, and no alteration in the rules or practice or nature of the institution has been made since that date.

The appellants claimed exemption against the rate for Oct. 1903, and negotiations between the appellants and the respondent assessment committee continued until Jan. 1905, when a definite refusal to allow the appellants' claim for exemption was given.

The appellants thereupon gave notice of appeal against the rate, but, by arrangement with the respondent committee, the rate for Oct. 1904 was substituted as the subject of appeal.

The land and buildings have, however, been assessed to and rated by each of the poor rates made for the parish of Hornsey since the granting of the certificate, and the rates for Oct. 1903 and April 1904 have been paid by the appellants under protest.

The question for the opinion of the court is: Are the appellants exempt under 6 & 7 Vict. c. 36 from being assessed in or rated to and from liability to payment of the said poor rates of the 19th Oct. 1904, and rates for other purposes chargeable thereon in respect of the lands and buildings occupied by them as aforesaid.

The following are the rules referred to above:—

1. The Hornsey School of Art is an institution established for the purposes and encouragement, advancement, and dissemination of the fine arts exclusively. These purposes shall be effected: (1) By instruction and examination of art students; (2) by the exhibition of works of art, and the award of prizes, medals, certificates of merit, and scholarships.

2. The school shall be under the management of a committee, consisting of not less than twelve and not more than fifteen persons, the majority of whom shall be appointed by the Middlesex Education Committee. Of the remainder the Mayor of Hornsey shall be a member *ex officio*, and the others shall be co-opted.

3. The committee shall superintend and carry on the institution in accordance with the regulations of the Board of Education, South Kensington, applicable to schools of art and art classes, and also in accordance with the following regulations of the Middlesex Education Committee: (*a*) That the fees be at such rate as the Middlesex Education Committee approve. (*b*) That all teachers be paid fixed salaries, and no bonus of any kind be given. (*c*) That an annual balance sheet be presented by the committee to the Middlesex Education Committee. (*d*) That all fees paid and grants earned by the evening students be the property of the Middlesex Education Committee. (*e*) That all classes be open to inspection by the Middlesex County Council's inspectors, to whom notice of all committee meetings be sent. (*f*) That the scheme of work be submitted annually to the council.

4. All annual and other voluntary contributions received by the committee for the institution shall be applied for its purposes exclusively.

5. That the institution may not make any dividend, gift, division, or bonus in money unto or between any of its members.

6. That the institution be not carried on with a view to profit over and above the expenses, and that the buildings of, or any buildings, or any part of a building rented or occupied by the institution shall be used exclusively for the transaction of its business and for the purposes of the fine arts, and the encouragement, dissemination, and propagation of the same.

7. That no scholar, student, teacher, or examiner of the institution shall be a member of the institution, the only members thereof being the committee of management as before defined.

The certificate referred to above was as follows:

Register No. 789 Mdx. S. & L.—It is hereby certified that this society is entitled to the benefit of the Act

6 & 7 Vict. c. 36, intituled an Act to exempt from county, borough, parochial, and other local rates, lands and buildings occupied by scientific or literary societies. —This 17th Oct. 1903. — L.S. Registrar of Friendly Societies.— Copy sent to the clerk of the peace.

Danckwerts, K.C. and *Groser* for the appellants. —The institution is within sect. 1 of 6 & 7 Vict. c. 36. In *Royal College of Music* v. *Westminster Vestry* (78 L. T. Rep. 441; (1898) 1 Q. B. 809), sect. 1 was dealt with in the same way as in *Art Union of London* v. *Savoy Overseers* (71 L. T. Rep. 40; (1894) 2 Q. B. 609), and the four conditions with which a society must comply were set out. They are fulfilled by the appellants here. The society is supported by annual voluntary contributions, for the grants that are made, although made under the Education Act 1902, are voluntary. They referred to

Manchester Corporation v. *McAdam*, 75 L. T. Rep. 229; (1896) A. C. 500;
Liverpool Corporation v. *West Derby Union*, 92 L. T. Rep. 467.

Macmorran, K.C., *R. Cunningham Glen*, and *Bethune* for the respondents.—The word "voluntary" does not mean "not compulsory" (*Art Union of London* v. *Savoy Overseers*, *sup.*), and in *Royal College of Music* v. *Westminster Vestry* (*sup.*) there were voluntary subscriptions. Grants of this description are not voluntary annual subscriptions.

Lord Alverstone, C.J.—I confess that if this matter came before me unfettered by authority, I should have thought that such a well-known class of contribution as that which is now suggested is a voluntary contribution would not have fallen within the expression "annual voluntary contributions" in the Scientific Societies Act 1843. Among the cases there are a considerable number in which it was decided that the benefit which was received by the members took the institution out of the class which was intended to be benefited by the Act—namely, institutions for the purpose of science, literature, and the fine arts exclusively. But there also were, in many of these cases, instances of contributions which might have given rise to this question had there not been other grounds for the decision. But this case seems to me to be an illustration of that principle we have constantly acted upon, that a decision ought not to be refined away by nice distinctions. It is perfectly true, as Mr. Macmorran has pointed out, that in *Royal College of Music* v. *Westminster Vestry* (78 L. T. Rep. 441; (1898) 1 Q. B. 809), the case there was a decision on this very point, there were contributions other than the Government grant to the extent of 1132*l*. That would have been sufficient to support the decision, but I cannot take the view that the 500*l*. Government grant—which it is conceded for practical purposes was identical in its incidents with the grant in this case—was not the subject also of the decision of this court. In the *Law Journal* Reports (67 L. J. 80, Q. B.), at p. 84, Hawkins, J. is reported as saying: "It is true that of the 18,780*l*. received in the year ending April 1896 the sum of 1632*l*.—that is, annual subscriptions 1132*l*. and Government grant 500*l*.—only was received from annual subscriptions of a purely voluntary character, but that is a substantial sum." Inasmuch as he was dealing with the 1632*l*. with reference to the 18,780*l*., I do not think I can assume he was proceeding only on the 1132*l*. In the Law Reports, which may or may not be correct, it is true that parenthetical observation showing how the 1632*l*. was made up disappears, but the total given is still 1632*l*. Under these circumstances it seems to me that there is a decision of this court practically on all fours with this case, that a grant of this nature is an annual voluntary contribution within the meaning of sect. 1 of the Scientific Societies Act 1843; and *Art Union of London* v. *Savoy Overseers* (74 L. T. Rep. 497; (1896) A. C. 296), as far as it is an authority at all, is, of course, an authority in the same direction. It is true, as Mr. Macmorran has pointed out, that in that case the actual decision was that people who subscribe money voluntarily and who get a *quid pro quo* are not "voluntary" subscribers within the meaning of the Act. But the reason for the decision, if it be taken as exhaustive, was that "voluntary" means something in respect of which there is no countervailing benefits to the subscriber. I have not overlooked the fact that in the bargain as to the grants from the county council there was a term that the evening fees should belong to the county council, but obviously, however, that would not exhaust the whole of the grants; and it does not apply at all to the Government grant. I think, therefore, that we are bound by the decision in *Royal College of Music* v. *Westminster Vestry*, especially supported or buttressed as it is by the reasoning in *Art Union of London* v. *Savoy Overseers*, and that if a distinction is to be drawn it must be drawn by the Court of Appeal, and cannot be drawn by this court. I think, therefore, that the appeal must be allowed.

Lawrance, J.—I agree.

Ridley, J.—I agree. I should not add anything to what my Lord has said but for the fact that I was a party to the decision in *Liverpool Corporation* v. *West Derby Union* (92 L. T. Rep. 467). I think it is true that in that case this point was raised, but it was raised in a secondary degree. It was not the main point which was argued in the case, and, when it was touched upon, the case of *Royal College of Music* v. *Westminster Vestry*, from which we cannot distinguish the present case, was not cited. I think, speaking for myself, that it would seem from the judgment I gave in the *Liverpool* case that I treated it as turning on whether there was a rateable occupation or not. The second point, indeed, was argued, as I have said, and was dealt with by my brother Kennedy; but the point on which I meant to give a decision was not so much as to the contribution of 250*l*.—although I believe that was also to be accounted for by the fact that the corporation was paying money to themselves—but was more upon this observation, that the library was connected with a newspaper room, and that it was shown, and rightly shown, that the library was not a society which was instituted for the purpose of science, literature, or the fine arts exclusively. Emphasis had been laid upon the fact that there was a reading room in which there were a great number of newspapers, but it will be seen that my brother Kennedy referred to that as a very pleasant mode of acquiring knowledge through the medium of the newspapers as to what is going on from time to

time, but pointed out that you could not say it was for literary, scientific, or artistic purposes. I think that an institution of that kind cannot be said to be for the purpose of science, literature, or the fine arts exclusively. The case was decided upon that point. That is all I have to say about it. Otherwise I think it is very capable of being supported, and I have no reason to differ from what I said then.

Appeal allowed.

Solicitors: *King* and *Burrell*; *F. Shelton*, Tottenham.

Thursday, Jan. 11, 1906.

(Before Lord ALVERSTONE, C.J., RIDLEY and DARLING, JJ.)

COWLING (app.) *v.* TOPPING (resp.). (*a*)

Insurance — Industrial — Policy exceeding 20*l.* — *Jurisdiction of justices—Collecting Societies and Industrial Assurance Companies Act* 1896 (59 *& 60 Vict. c.* 26), *ss.* 1, 7.

The jurisdiction of justices in disputes between an industrial assurance company and any member or person insured or any person claiming through a member or person insured, under sect. 7 *of the Collecting Societies and Industrial Assurance Companies Act* 1896, *is limited to cases where the policy is for a less sum than* 20*l.*

CASE stated on a complaint preferred by the respondent against the appellant whereby the respondent claimed 22*l.* 19*s.*, under the Collecting Societies and Industrial Assurance Companies Act 1896, as executrix of the will of John Topping, deceased, on a policy of insurance.

Upon the hearing of the complaint the following facts were admitted or proved in evidence:—

John Topping, the husband of the respondent, assured his life with the appellants in Oct. 1900 for 22*l.* 19*s.*, and had signed the proposal form to effect that.

He duly made his last will and testament, dated the 6th May 1902, whereby he appointed the respondent his executrix and sole personal representative, which will was not revoked or altered, and he died on the 10th Oct. 1904, and his will was duly proved by the respondent.

One Ellen Rigby or her husband had paid most, if not all, of the premiums which accrued on the policy, there being no evidence as to whether John Topping or the respondent paid any of them.

On the 19th Dec. 1904 Ellen Rigby claimed the sum of 22*l.* 19*s.* assured on the life of John Topping by the policy before a petty sessional court at St. Helens, and the case was dismissed on the ground that Ellen Rigby had no insurable interest in the life of the said John Topping.

The respondent contended that upon the above facts the appellant was liable to pay the sum assured to the respondent, and the dismissal by the justices of the previous case only decided that Ellen Rigby's claim was void, and not that the policy itself was absolutely void as between John Topping and his representative and the appellant, and that the respondent was not thereby prevented from setting up her claim to the moneys assured payable as John Topping's personal representative.

(*a*) Reported by W. DE B. HERBERT, Esq. Barrister-at-Law.

The appellant contended that the respondent's claim was estopped by the previous decision of the petty sessional court of the 19th Dec. 1904, and that he was entitled to prove that the justices in dismissing the previous case had decided, among other things, that the policy was void, and cited *Kinnis* v. *Graves* (78 L. T. Rep. 502); that he was entitled to call the magistrates' clerk to prove what had transpired on the previous hearing, and to produce a note of the evidence taken, and to prove that certain reasons were given by the justices for their decision; that, one of such reasons being that the policy was void, this expression of opinion was binding, and that then the unreported case of *Ex parte Yorkshire Provident Association* (quoted in 58 J. P. 798) applied, and that, the policy being void, there was no longer a dispute between the company and "a person insured"; and that, the claim being for over 20*l.*, the justices had no jurisdiction by virtue of sect. 1 read with sect. 7 of the Collecting Societies and Industrial Assurance Companies Act 1896.

Sect. 1 reads as follows:

This Act shall apply to every such (*a*) friendly society or branch, whether registered or unregistered (in this Act referred to as a collecting society), and (*b*) person or body of persons, whether corporate or incorporate, granting assurances on any one life for a less sum than 20*l.*

Sect. 7 says:

In all disputes between a collecting society or industrial insurance company and any member or person insured claiming through a member or person insured or under the rules, that person or member may, notwithstanding any provisions of the rules of the society or company to the contrary, apply to the County Court or to the court of summary jurisdiction for the place where that member or other person resides, and the court may settle the dispute according to the provisions of the Friendly Societies Act 1896.

The appellant did not raise the point that the policy was void by reason of there being, when the policy was made and issued, another or other policies effected with the appellant on the insured's life, and no evidence was tendered to this effect, and therefore the justices did not consider or decide that point.

The justices were of opinion that the fact of another complainant having failed to substantiate her claim did not prevent the respondent succeeding if she was otherwise able to prove her claim, and that the matter, as far as the respondent was concerned, was not *res judicata* by reason of the previous decision; that the premiums might have been paid on the assured's account, there being no evidence to the contrary; that evidence as to the reasons of the justices in the previous case was inadmissible, and that such reasons did not bind them; that the respondent, as the sole personal representative of the assured, was entitled to the money claimed under the policy of assurance upon his life, any claim of other parties to the moneys assured being a separate matter between them and the respondent executrix when she had received the moneys; and that the words of sub-sect. (*b*) of sect. 1 of the Collecting Societies, &c., Act 1896, "granting assurances on any one life for less than 20*l.*," had the effect of bringing the society which granted such assurances within the denotation of the term "industrial assurance companies," and so made

the procedure in dispute between members and the society subject to sect. 7 of the same Act, and therefore that they had jurisdiction, and that their jurisdiction was not limited to amounts under 20*l.*

They therefore, on the whole case, made an order in favour of the respondent for the amount claimed.

S. T. Evans, K.C. and *F. Dodd* for the appellant.—The justices have no jurisdiction where the policy in dispute is over 20*l.* The mere fact that the company issues policies for less than 20*l.* cannot give jurisdiction where the policy in question exceeds that amount.

Ross Brown for the respondent.—The statute applies to companies granting assurances for less than 20*l.*, and, by sect. 7, jurisdiction is given the justices where a dispute arises between such companies and other persons.

Lord Alverstone, C.J.—I am clearly of opinion that this objection to the jurisdiction must prevail. I wish it to be understood that I express no opinion at all upon the other point—viz., as to the right of the executrix to recover in a proper proceeding. But this Act has conferred a special jurisdiction upon County Courts and courts of summary jurisdiction, and I think it is quite plain, from the long course of legislation of a similar kind, that it was intended to confer jurisdiction in regard to some policies only. The analogy of the other cases shows that there had been limits of amounts and limits of different kinds imposed in cases of such disputes. Now, the language of this statute is this, and it is a curious legislation, but still it seems to be fairly clear when it is read and one wishes to understand it. It says: "This Act shall apply to every such person or body of persons, whether corporate or incorporate, granting assurances on any one life for a less sum than 20*l.*" It is contended by Mr. Ross Brown, and I quite agree it is the only contention open to him, that that means if the society or body of persons chooses to grant assurances on lives for less sums than 20*l.*, the justices have jurisdiction over all their policies for whatever amount. That it is possible to read the language in that way I do not deny, but it seems to me to be contrary to the spirit of the whole of this class of legislation, and would be a strange way of depriving persons of rights which they certainly have according to the ordinary law of the land. I think the only construction that can be properly put upon this section is that it is to give the special jurisdiction in respect of the contracts which are granted by the insurance companies for a less sum than 20*l.* A question may arise some day as to whether or not a society would be outside the Act because it granted insurance for a larger amount, but, at any rate, the limit must be put upon it that the amount which can be made the subject of the special jurisdiction under sect. 7 is a policy for an amount not exceeding 20*l.* I therefore think the magistrate had no jurisdiction to entertain this claim, and that the appeal must succeed.

Ridley, J.—I am of the same opinion.

Darling, J.—I agree.

Appeal allowed.

Solicitors: *Wynne, Baxter*, and *Keeble*; *H. V. Baines*, for *Swift* and *Garner*, St. Helens.

Thursday, Jan. 11, 1906.

(Before Lord Alverstone, C.J., Ridley and Darling, JJ.)

Mayor, &c., of Wandsworth (apps.) *v.* Baines (resp.). (*a*)

Metropolis—Removal of house refuse—Failure to remove without reasonable cause—Notice to place refuse on kerbstone or footpath—Public Health (London) Act 1891 (54 *&* 55 *Vict. c.* 76), *s.* 30.

By a by-law made by the London County Council in pursuance of the Public Health (London) Act 1891, *s.* 16, *sub-s.* 2 (*b*): "*Where a sanitary authority arrange for the daily removal of house refuse in their district or any part thereof, the occupier of any premises in such district or part thereof in which any house refuse may from time to time accumulate shall at such hour of the day as the sanitary authority shall fix and notify by public announcement in their district deposit on the kerbstone or on the outer edge of the footpath immediately in front of the house, or in a conveniently accessible position on the premises as the sanitary authority may prescribe by written notice served upon the occupier, a movable receptacle in which shall be placed, for the purposes of removal by or on behalf of the sanitary authority, the house refuse which has accumulated on such premises since the preceding collection by such authority. . . .*"

The respondent refused to comply with the requirements of the appellants, contained in a notice, to "deposit on the kerbstone or edge of the footpath immediately in front of the house a movable receptacle" in which should be placed the house refuse, and no house refuse was removed by the appellants from the respondent's premises after the 9th Jan. 1905 *until the 20th Jan.* 1905.

On the 16th Jan. 1905 *the respondent gave written notice to the appellants requiring them to remove the house refuse from his premises, but the appellants, in reply, informed the respondent that they would remove his house refuse if the same were placed on the kerbstone or edge of the footpath in accordance with the notice.*

The respondent was always ready and willing to place his house refuse in a proper receptacle in a conveniently accessible position on his premises for removal by the appellants.

Held, that the appellants were rightly convicted under sect. 30 *of the Public Health (London) Act* 1891 *for having failed, without reasonable excuse, to remove the house refuse after written notice requiring this to be done.*

Case stated on an information preferred by the respondent under sect. 30 of the Public Health (London) Act 1891 against the appellant council, for that they, at No. 37, Carlton-road, Putney, in the borough of Wandsworth, did, on the 19th Jan., without reasonable cause, unlawfully fail to comply with a written notice, dated the 16th Jan. 1905, and duly served on the appellants, requiring them to remove house refuse from the above-mentioned premises.

Upon the hearing of the information the following facts were admitted or proved:—

By printed notice dated the 12th Oct. 1904, the appellants gave notice to the respondent and to

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

all other occupiers of houses within a certain defined area of the borough of Wandsworth (hereinafter called the "prescribed area"), that on and after the 1st Jan. 1905 a system of daily removal of house refuse would be substituted for the weekly removal then prevailing, and the notice (which purported to be given in accordance with a by-law made by the London County Council) required the occupiers to deposit on the kerbstone or edge of the footpath immediately in front of their respective houses a movable receptacle in which should be placed for the purpose of removal the house refuse which he had accumulated since the preceding collection.

The appellants also issued to the respondent and the occupiers a printed circular explanatory of the notice.

The by-law made by the London County Council in pursuance of the Public Health (London) Act 1891, s. 16, sub-s. 2 (*b*), was in the following terms:

Where a sanitary authority arrange for the daily removal of house refuse in their district or any part thereof, the occupier of any premises in such district or part thereof in which any house refuse may from time to time accumulate shall at such hour of the day as the sanitary authority shall fix and notify by public announcement in their district deposit on the kerbstone or on the outer edge of the footpath immediately in front of the house, or in a conveniently accessible position on the premises as the sanitary authority may prescribe by written notice served upon the occupier, a movable receptacle in which shall be placed, for the purposes of removal by or on behalf of the sanitary authority, the house refuse which has accumulated on such premises since the preceding collection by such authority. The sanitary authority shall collect such refuse or cause the same to be collected between the hours of the day as they have fixed and notified by public announcement in their district.

On the 9th Dec. 1904 the appellants published in the *Borough News*, a newspaper which circulates in the borough of Wandsworth, a notice in terms similar to those contained in the notice of the 12th Oct. 1904.

On the 2nd Jan. 1905, in accordance with the appellants' notice, the system of daily removal of house refuse and the by-law was put into operation within the prescribed area. The appellants at first commenced sending their carts to remove house refuse pursuant to the notice at 7 o'clock a.m., but afterwards, finding that hour was too early, they began the collection at 7.30 a.m. The carts arrived in the different streets at different times, and the whole collection in the prescribed area was finished by 9.30 a.m.

The respondent is the occupier of a detached house, No. 37, Carlton-road, aforesaid, which is situate at a distance of 40ft. or thereabouts from the highway and is approached by means of a carriage drive from the highway. The respondent refused to comply with the requirements of the appellants, contained in the notices, and no house refuse was removed by the appellants from the respondent's premises after the 9th Jan. 1905 until the 20th Jan. 1905, when it was removed under the circumstances hereinafter mentioned.

On the 16th Jan. 1905 the respondent gave written notice as aforesaid to the appellants requiring them to remove the house refuse from his premises at No. 37, Carlton-road, aforesaid.

The appellants, in reply, informed the respondent that they would remove his house refuse if the same were placed on the kerbstone or edge of the footpath in accordance with the notice of the 12th Oct. 1904.

The respondent was always ready and willing to place his house refuse in a proper receptacle in a conveniently accessible position on his premises for removal by the appellants, but, under protest, placed the house refuse from his premises in movable receptacles upon the kerbstone or edge of the public footpath in front of his premises on the 20th Jan. 1905 and subsequently to that date, and such house refuse was removed by the appellants.

On the 19th Jan. 1905 the respondent preferred the information aforesaid.

By the system of daily removal in pursuance of the notice the time occupied in the removal of house refuse in the prescribed area is much less than under the former system, and in Carlton-road only half an hour is so occupied as against some hours formerly. But it was not proved what length of time it would take to remove the house refuse in that road if all the occupiers placed their dustbins in reasonably accessible positions on the premises as the respondent had offered to do.

The by-law is and has been for some years in operation in other parts of the metropolis, and house refuse is placed in receptacles on the kerb or edge of the footpath, but no facts were before the magistrate as to the circumstances under which the by-law was put into operation in those districts.

Out of a total of 3428 houses in the prescribed area there are 708 houses (including the respondent's house) which stand in their own grounds and which have gardens or forecourts between such houses and the highway; there are 2253 which have not such forecourts or gardens and which are so constructed that the house refuse has to be carried through the building for the purpose of removal, and there are 467 houses which have approaches on back streets or passages. There had been considerable deliberation by the appellants before deciding to put the by-law into operation and before any report was made to them by their surveyor. Their surveyor was never asked for and did not present any report giving details of the number of houses in which there were convenient and accessible positions for placing receptacles for the purpose of the daily removal system. The surveyor's report was confined entirely to defining the area proposed for the operation of the daily removal system, and the appellants selected a representative area containing both poor-class and better-class houses. In one case compliance with the requirements of the appellants' notices involved the carriage of house refuse through the house, which refuse had previously been removed from the back garden or yard without being carried through the house.

The placing of receptacles containing house refuse upon the kerbstone or edge of the footpath immediately in front of the houses caused a physical obstruction to the highway upon which they are placed.

There are some houses in Carlton-road which are provided with immovable dustbins or receptacles, and upon the owners of which no notice

other than as aforesaid has been served to provide the house with movable receptacles such as are required by the appellants' notices or by the 18th by-law of the by-laws made by the London County Council under sect. 39, sub-sect. 1, of the Public Health (London) Act 1891, which by-law is as follows:

Where the sanitary authority have arranged for the daily removal of house refuse in their district or in any part thereof the owner of any premises in such district or any part thereof shall provide an ashpit which shall consist of one or more movable receptacles sufficient to contain the house refuse which may accumulate during any period not exceeding three days which the sanitary authority may determine, and of which the sanitary authority shall give notice by public announcement in their district. Each of such receptacles shall be constructed of metal and provided with one or more suitable handles and cover. The capacity of each such receptacle shall not exceed two cubic feet. Provided always that this by-law shall not apply to the owner of any premises until the expiration of three months after the sanitary authority have publicly notified their intention to adopt a system of daily collection of house refuse in that part of their district which comprises such premises.

The respondent contended: (*a*) That the by-law and notice respectively were *ultra vires* as being repugnant to the law—(1) as involving acts of wilful obstruction and the creation of nuisances; (2) as contrary to sects. 30 and 34 of the Public Health (London) Act 1891; (3) as inconsistent with the by-law No. 18 made by the London County Council under sect. 39, sub-sect. 1, of the same Act. (*b*) That the notice was bad in point of law by reason of its limiting the operation of the by-law as to the time and locality. (*c*) That the by-law was unreasonable by reason of being partial and unequal in its operation. (*d*) That assuming the by-law to be legally valid, the appellants were wrong in applying generally the one alternative and that occupiers of premises upon which conveniently accessible positions could be found for the placing of receptacles containing house refuse should not be compelled to place their refuse outside their premises. (*e*) That on the above grounds the appellants had no reasonable cause for failing to comply with the respondent's written notice.

The appellants contended (*a*) that they had properly and legally fulfilled their duties under sect. 30 of the said Act in regard to the respondent's refuse on the 19th Jan. 1905 and at all times; (*b*) that the by-law and notice respectively were valid in law and neither *ultra vires* nor unreasonable; (*c*) that in operation the new system created no obstruction or nuisance; (*d*) that the respondent's non-compliance with the appellants' notice was reasonable cause within sect. 30, sub-sect. 2, entitling them to a dismissal of the information; (*e*) that assuming the by-law to be *ultra vires* or unreasonable, the appellants were entitled to rely upon a by-law duly made by the London County Council so long as it was in existence and not held to be invalid, and such reliance was reasonable cause entitling them to dismissal of the information.

The magistrate was of opinion that the appellants, under all the circumstances, failed without reasonable cause to perform the duties cast upon them by sect. 30 of the Public Health (London) Act 1891 in that they had failed to remove from the respondent's premises his house refuse; that the notice dated the 12th Oct. 1904 went beyond the by-law to such an extent as to give the occupier permission to cause an obstruction in the street; that the notice amounted to an order to the respondent to place his dustbin on the pavement in front of his premises; and that the respondent was justified in refusing to obey such order, inasmuch as it amounted to an order to do something which entailed the commission of illegal acts. He was further of opinion that for the purposes of his judgment it was not necessary for him to decide (and he did not decide) whether or not the by-law was a valid by-law, because by the course adopted the appellants had put it into operation in an illegal and unreasonable manner, whereas it might have been put into operation in a legal and reasonable manner, since he found as a fact that the respondent had a reasonably accessible position on his premises from which the sanitary authority might have removed his house refuse. He was further of opinion that the by-law contemplated voluntary arrangements being made between occupiers and the sanitary authority as to the removal of house refuse, which was not done, or attempted to be done, in the case before him.

He accordingly convicted the appellants.

Avory, K.C. and *Bernard Campion* for the appellants.

Macmorran, K.C. and *R. Cunningham Glen* for the respondent.

Lord ALVERSTONE, C.J.—This case is certainly one of very considerable importance, but, after the very clear discussion of the case by Mr. Avory, I am of opinion that the decision of the learned magistrate was right, although I do not agree with some of the reasons he has given for it. The summons was a summons against the appellants for not removing the refuse pursuant to sect. 30 of the Act of 1891. That was founded against them on the ground that they failed, without reasonable cause, to comply with the section ordering them to remove the refuse. It must be taken as found by the magistrate as a fact that the respondent had a reasonably accessible position on the premises from which the sanitary authority could have removed the refuse, and was willing to place it there. Therefore this case is only a decision in respect of a complaint against a local authority where the magistrate finds as a fact that the person complaining had put, and was willing to continue to put, the refuse in a convenient position, and that the local authority would not go and remove it from that position, relying, as Mr. Avory has very properly urged, upon the exercise of their discretion that they had the right to have and would have the refuse, as against this particular occupier, placed upon the kerbstone. Now, I desire to point out that the appellants have gone considerably beyond the by-law authorised by the London County Council, if it is to be construed in the way in which Mr. Avory contends. The by-law of the London County Council, sanctioned by the Local Government Board, provides: "Where a sanitary authority arrange for the daily removal of house refuse in their district or in any part thereof, the occupier of any premises in such district or part thereof in which any house refuse may from time to time accumulate shall at such hour of the

day as the sanitary authority shall fix and notify by public announcement in their district deposit on the kerbstone or on the outer edge of the footpath immediately in front of the house, or in a conveniently accessible position on the premises as the sanitary authority may prescribe by written notice served upon the occupier, a movable receptacle in which shall be placed for the purposes of removal by or on behalf of the sanitary authority the house refuse." I think that a question may arise, if a notice has been given under that section with regard to the occupier of a particular house that the refuse should be placed in a given place, whether or not the magistrate can override what may be called the discretion of the sanitary authority in that respect, but this case does not raise that state of facts at all. In this case the local authority have thought fit to give a notice that in a given area everybody in that area, without reference at all to the particular house, shall put their refuse upon the kerbstone, or, in other words, they have not prescribed a conveniently accessible position on the premises, and prescribed that by a written notice served upon anybody. What they have said is that in this district everybody shall put their refuse upon the kerbstone. Mr. Avory says that is the only way in which such power or authority by the local authority can be carried out. I am unable to accede to that argument. Even assuming, although I do not decide it in favour of Mr. Avory, that the local authority may prescribe, with regard to particular premises, where the dust shall be placed, and that the magistrate may not go behind that—I do not decide that in this case, and I do not agree with it—that is not what happened in this case. In this case there has been a notice going beyond what was contemplated by the by-law—viz, a notice that in a given area everybody shall put their refuse upon the kerbstone. I desire to say that I sympathise very strongly with the local authority in their wish that there should be very frequent, and, if possible, a daily, removal of the refuse, and one would be most unwilling to embarrass a local authority in that respect, but we have really to consider what are the duties and rights of persons. The obligation to remove the refuse rests upon the local authority. The occupier and the owner are by statutory provision required to facilitate that removal, and I agree, although the point has not been argued, to that extent the owner and occupier may be called upon to spend money in order to make that removal easy and convenient, as, for instance, by the provision of a movable dustbin and the provision of a receptacle in which refuse can be carried out, and things of that kind. Therefore I quite follow Mr. Avory's argument that in that respect the owner or occupier may be called upon to perform certain statutory duties and undertake certain burdens. The question is, Can the local authority give a notice applying a part of this by-law in such a way as to relieve themselves of their obligation to clear the refuse where the person concerned, whose refuse is to be removed, is willing to do everything which, apart from the particular notice, he can be called upon to do? In this particular case the occupier was willing to put his refuse into a proper movable receptacle, and to put it into a convenient place. The local authority said: "We will not remove it unless you bring it out to the kerb, and we will not remove it because we say that you are bound to bring it out to the kerb, whatever distance it is and whatever the circumstances may be, because you live in a certain area." In my opinion that is not a proper prescription of a conveniently accessible position contemplated by the by-law. If that prescription is intended it must be with reference to the particular premises, and that, if there is no prescription with regard to the particular premises, then the obligation contemplated by the by-law is to put it in a conveniently accessible position on the premises. I do not agree, and I must not be taken as assenting to the view, that the occupier might not have been liable to the penalty if, after such a notice as this in accordance with the by-law, he had declined to put his refuse in a conveniently accessible position so that it might be taken away. It seems to me, therefore, without saying this notice is absolutely invalid, in my opinion the true view of it is, if it is attempted to be put in force in the way in which it has been in this case—viz., that everybody must put their refuse on the kerbstone, however inconvenient it is, whatever distance it is, and although those persons are willing to put the refuse in a convenient place—then that construction of that notice would make it an unreasonable notice. Therefore in that case the magistrate was right in coming to the conclusion that such a construction of the notice would make the notice an unreasonable one. I think in all probability the notice had better be modified and amended, but I do not hold that the notice was invalid. What I do say is in my opinion the magistrate was right in coming to the conclusion that there had been a failure of the local authority to discharge their duty under sect. 30, because they refused to remove this refuse, the occupier being willing to put it in a position which was convenient, and from which they could readily remove it. I think it only necessary to add on this part of the case that there could not possibly be an objection taken to the by-law on the ground that the bins were on the highway. We have not heard Mr. Macmorran, but, had such a point been urged, it seems to me that would have been no objection to the by-law, otherwise unobjectionable, that the receptacles were to stand on the pavement for such length of time as would enable the local authority to collect the refuse. The other point most pressed upon us by Mr. Avory's argument was whether there was a refusal, without reasonable cause, by the sanitary authority, because the respondent could have got the refuse removed if he had chosen to take it down to the kerb. In my opinion that is the same point over again. It seems to me that if the hard-and-fast requisition—all the refuse in all the houses, whatever the circumstances are, shall be brought down to the kerb—was a requisition which, having regard to the by-law itself, the local authority were not entitled to make, then their refusal to remove the dust and refuse from the convenient position offered by the occupier was a refusal without reasonable cause under subsect. 2 of sect. 30. For these reasons I am of opinion that the decision of the magistrate is substantially right, although, as I have indicated, I think many of the objections taken to the notice were not objections to which we could have given effect. Therefore the appeal will be dismissed.

RIDLEY, J.—I agree with my Lord, and I do not think I can usefully add anything to the reasons wh ch he has given.

DARLING, J.—I agree.

Appeal dismissed.

Solicitors: *W. W. Young, Son,* and *Ward; Turner* and *Co.*

Friday, Jan. 12, 1906.

(Before Lord ALVERSTONE, C.J., RIDLEY and DARLING, JJ.)

MANSEL (app.) *v.* OVERSEERS OF ITCHEN (resps.). (*a*)

Rating—Poor rate—Demand of whole rate—Occupier going out of possession during currency of rate—Apportionment of rate—Necessity of fresh demand for apportioned part—Jurisdiction to issue distress warrant without fresh demand—Poor Rate Assessment and Collection Acts 1869 (32 *&* 33 *Vict. c.* 41), *s.* 16, *and* 1882 (45 *&* 46 *Vict. c.* 20), *s.* 3.

Where the whole poor rate at which the rated occupier of premises is assessed has been duly demanded from him and not paid, and he subsequently goes out of possession of the premises during the period for which the rate is made, and thereby becomes entitled to an apportionment of the rate, a fresh demand for his proportion of the rate is not necessary, but, upon a summons for payment of the rate, the justices have jurisdiction to apportion the rate and ascertain the amount for which the occupier is liable, and to issue a distress warrant for that amount, notwithstanding that there has been no fresh demand for the precise amount of the rate so found to be due.

CASE stated by justices of the peace for the county of Southampton.

At a court of summary jurisdiction sitting in the town of Southampton on the 24th March 1905, a complaint was preferred by one of the overseers of the poor of the parish of Itchen, in the county of Southampton, that the appellant (Owen Mansel), being duly rated and assessed to the relief of the poor of the parish in the sum set opposite to his name in the list, had not paid the rate, or any part of it, but had refused so to do.

The rate was dated the 18th Oct. 1904, and the "total sum due" from the appellant was inserted in the column as 6*l.* 5*s.* 8*d.*, and in the column "under rate dated the 18th Oct. 1904," the sum inserted was the same.

The complaint was heard by the justices, when they ordered that a warrant should issue for the recovery of the sum of 3*l.* 10*s.* 3*d.* and 10*s.* 6*d.* costs.

Upon the hearing before the justices the following facts were proved:

The rate was made for the parish on the 18th Oct. 1904, for the half year ending March 1905, the appellant being rated as occupier in a total rate of 9*l.* 7*s.* 3*d.* in respect of house and garden (rate 1*l.* 15*s.*), land (6*l.* 0*s* 9*d.*), and buildings (1*l.* 11*s.* 6*d.*).

The total rate 9*l.* 7*s.* 3*d.* was demanded in Nov. 1904, and was not paid, and no further or other demand in respect of that rate had been made.

There was no dispute with regard to the 1*l.* 15*s.* claimed for the house, it being admitted that the appellant intended to continue the occupation of the house to the 31st March 1905, and that the 6*l.* 5*s.* 8*d.* mentioned in the complaint was the proportion claimed up to the 17th Jan. 1905 of the 9*l.* 7*s.* 3*d.* for the land and buildings to that date and the house and garden to the 31st March 1905.

The actual date when the appellant gave up possession of the land, buildings, and premises was not proved, but he was in actual visible occupation until the 25th Nov. 1904, the date of the sale of the appellant's farm stock, which took place on the premises on that day.

On the part of the appellant it was contended that there was no beneficial occupation after the 29th Sept. 1904; that the tenancy ceased at Michaelmas 1904; that no legal demand of the correct amount of the rate due was made, and also that, inasmuch as the sum of 6*l.* 5*s.* 8*d.* mentioned in the complaint was more than was due, and had never been demanded, and there had been no demand for the rate (if any) due, but that the only demand had been for the sum of 9*l.* 7*s.* 3*d.*, which admittedly was more than was due in respect of the rate, the justices had no alternative but to dismiss the complaint; and that the appellant's tenancy in the premises determined on the 29th Sept. 1904, and that the sale of the stock was by permission of the landlord.

There was no evidence of occupation of the premises by the appellant after the 25th Nov. 1904, and, unless the fact of the sale having so taken place as aforesaid was evidence of such occupation, there was no evidence of such occupation after the 29th Sept. 1904.

On the part of the respondents it was contended that the appellant was in actual and visible occupation during the currency of the rate—namely, of the house up to the 31st March 1905, and the farm buildings and land up to the date of the sale, the 25th Nov. 1904, and retained possession of the latter to a later date, the 17th Jan. 1905 and that the rate as made was demanded in Nov. 1904.

The attention of the justices was called to the following cases: *Reg.* v. *Warwickshire Justices* (24 J. P. 727) and *Manchester Overseers* v. *Headlam* (21 Q. B. Div.) 96.

At the close of the hearing the justices found as a fact, upon the above evidence, that the appellant was in actual and visible occupation of the whole hereditaments in respect of which he was rated up to the 25th Nov. 1904, and of the house to March 1905, and they directed a warrant to issue for the amount due to those dates from the date of the rate (including the undisputed rate for the house and garden, 1*l.* 15*s.*, to March 1905)—namely, 3*l.* 10*s.* 3*d.*, together with costs, 10*s.* 6*d.*

The question for the opinion of the court was whether the justices, being such a court of summary jurisdiction, upon the above statement of facts came to a correct determination or decision in point of law, and, if not, what should be done in the premises.

The Poor Relief Act 1601 (43 Eliz. c 2) provided, in sect. 1, that the churchwardens and

(*a*) Reported by W. W. OBA, Esq., Barrister-at-Law.

overseers of the parish should raise such competent sums of money for the relief of the poor as they should think fit; and by sect. 4 it was provided:

That it shall be lawful, as well for the present as subsequent churchwardens and overseers, or any of them, by warrant from any two such justices of peace, as is aforesaid, to levy as well the said sums of money and all arrearages, of every one that shall refuse to contribute according as they shall be assessed, by distress and sale of the offender's goods, as the sums of money or stock which shall be behind upon any account to be made as aforesaid, rendering to the parties the overplus. . . .

Sect. 12 of the Poor Relief Act 1743 (17 Geo. 2, c. 38) provided:

And whereas persons frequently remove out of parishes and places without paying the rates assessed on them, and other persons do enter and occupy their houses or tenements part of the year, by reason whereof great sums are annually lost to such parishes and places; be it therefore enacted by the authority aforesaid, That where any person or persons shall come into, or occupy any house, land, tenement, or hereditament or other premises, out of or from which any other person assessed shall be removed, or which at the time of making such rate was empty or unoccupied, that then every person so removing from, and every person so coming into or occupying the same, shall be liable to pay to such rate in proportion to the time that such person occupied the same respectively, in the same manner and under the like penalty of distress, as if such person so removing had not removed, or such person so coming in or occupying had been originally rated and assessed in such rate; which said proportion, in case of dispute, shall be ascertained by any two or more of His Majesty's justices of the peace.

Sect. 16 of the Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41) provides:

If the occupier assessed in the rate when made shall cease to occupy before the rate shall have been wholly discharged, or if the hereditament being unoccupied at the time of the making of the rate become occupied during the period for which the rate is made, the overseers shall enter in the rate book the name of the person who succeeds or comes into the occupation, as the case may be, and the date when such occupation commences, so far as the same shall be known to them, and such occupier shall thenceforth be deemed to have been actually rated from the date so entered by the overseer, and shall be liable to pay so much of the rate as shall be proportionate to the time between the commencement of his occupation and the expiration of the period for which the rate was made, in like manner, and with the like remedy of appeal, as if he had been rated when the rate was made; and an outgoing occupier shall remain liable in like manner for so much and no more of the rate as is proportionate to the time of his occupation within the period for which the rate was made; and the twelfth section of the statute 17 Geo. 2, c. 38, shall be repealed.

Sect. 3 of the Poor Rate Assessment and Collection Act 1869 Amendment Act 1882 (45 & 46 Vict. c. 20) provides:

The provisions of the sixteenth section of the Poor Rate Assessment and Collection Act 1869, so far as regards the payment of rates by an outgoing occupier, shall extend and apply to any outgoing occupier assessed in the rate, and such outgoing occupier shall only be liable to pay so much of the rate as shall be proportionate to the time of his occupation within the period for which the rate was made, notwithstanding he may not be succeeded in his occupation by an incoming tenant.

Emanuel for the appellant.—The amount of the rate in the rate book was 9*l.* 7*s.* 3*d.*, and that was the only rate which was demanded. The amount claimed in the summons was 6*l.* 5*s.* 8*d.*, and the amount for which the distress warrant was issued was the smaller sum of 3*l.* 10*s.* 3*d.* The justices had no jurisdiction to issue a warrant for the 3*l.* 10*s.* 3*d.*, inasmuch as that sum had never been demanded. Under the Act of Elizabeth (43 Eliz. c. 2) there was no power to apportion the rate, and the person who was in occupation at the time the rate was made was liable for the whole rate, although he went out of occupation during its currency. To remedy that defect sect. 12 of the Poor Relief Act 1743 (17 Geo. 2, c. 38) was passed, and that section for the first time provided for an apportionment between outgoing and incoming occupiers. That section was repealed by sect. 16 of the Poor Rate Assessment and Collection Act 1869, which makes provision for the apportionment of the rate between successive occupiers. There was no demand for the sum actually due in this case. A demand for the precise sum is necessary before the justices have jurisdiction to issue their distress warrant for the poor rate:

Hurrell v. *Wink*, 8 Taunt. 369.

There the court held that the case was to be distinguished from the case of a distress for rent, "and that the party rated was entitled to a precise demand of the sum actually due for the poor rate previously to the issuing of the warrant of distress." Even if the exact amount of the rate involves the fraction of a farthing, the demand of the whole farthing is an excessive and illegal demand:

Morton v. *Bramner*, 2 L. T. Rep. 600; 8 C. B. N. S. 791.

There must be a refusal to pay the precise amount as well as a demand for that amount, and the mode of proving the refusal is to show that there has been a demand for the exact sum due and that there has been a refusal to pay it. Even if the justices had jurisdiction to make the apportionment there has been no refusal to pay the exact sum so apportioned, and before a distress warrant can be issued for that sum it must be shown in some way or other that there has been a refusal to pay that smaller amount, and unless and until such refusal is proved the justices have no jurisdiction to issue a distress warrant. Here it is not enough to show a refusal to pay the 3*l.*; what was demanded was the 9*l.*, and it was necessary to show not only a refusal to pay the 3*l.*, but that there was a demand for that sum of 3*l.* The refusal to pay the larger sum demanded (the 9*l*) is not a refusal to pay the smaller sum which is found to be actually due. It is the amount assessed and due that must be demanded, not the amount assessed but not due, and the amount must be "legally demanded" (54 Geo. 3, c. 170—the Poor Relief Act 1814—s. 12). In this case the 9*l.* demanded was never due from the appellant, but the sum due was only the 3*l.* In the form of warrant of distress against a rate-payer—form C (1) in the schedule to the Distress for Rates Act 1849 (12 & 13 Vict. c. 14)—it is recited that "the said sum"—that is, the sum for which the warrant is to issue—"hath been duly

demanded of the said A. B., but that he hath not paid, and hath refused and still refuses to pay the same." He also referred to

Ryde on Rating, 2nd edit., pp. 55, 56.

J. A. Simon for the respondents.—There was a sufficient demand of the rate. The rate was made and allowed in Oct. 1904, and it was demanded in Nov. 1904. The appellant was in occupation as to part of the premises up to the 25th Nov. 1904, and as to the remainder up to Lady Day 1905, and the date of the justices' decision was the 24th March 1905. It is found that the whole rate of 9*l.* was duly demanded. Once the rate collector has delivered a proper demand, then, if the rate is not paid, he is entitled to summon the ratepayer for the whole amount of the rate so demanded, and the ratepayer, on being so summoned for the whole rate, is entitled to the advantage of the provision as to apportionment given in sect. 16 of the Act of 1869; and if the ratepayer can show that he was out of possession for part of the period of the currency of the rate, then it is conceded that the magistrate cannot issue a warrant for the whole amount of the rate. Once the proper demand for the rate has been made, then the next step is for the rate collector to summon the ratepayer before the magistrate, and the magistrate, having been satisfied that a proper demand has been made for the proper amount, can give a distress warrant for the sum which he actually finds to be due on apportionment. It is submitted that if the whole is properly demanded, and if the ratepayer has gone out of possession after a short time, then there need not be a second demand for his share. The cases of *Hurrell* v. *Wink* (*ubi sup.*) and *Morton* v. *Bramner* (*ubi sup.*), relied upon for the appellant, are really not in point, as in those cases the question of apportionment was not considered and did not arise. For the origin of the necessity of a demand we have to go back to the Act of Elizabeth. Sect. 4 of the Poor Relief Act 1601 (43 Eliz. c. 2) enabled the overseers to obtain from justices a warrant enabling them to levy the rate by distress "of every one that shall refuse to contribute according as they shall be assessed." The refusal to contribute in that section must necessarily be taken to imply a previous demand, inasmuch as a person cannot be said to "refuse" to pay a rate unless the rate has been demanded from him. The refusal there was a refusal to pay "as they shall be assessed"—that is, as assessed in the rate book, so that the demand there was for the whole amount of the rate. Then came the Acts which enabled an apportionment to be made in case the ratepayer was not in occupation for the whole period, but was succeeded by another occupier; and finally sect. 3 of the Poor Rate Assessment and Collection Act 1882, which extended the principle of apportionment to cases where there was no incoming tenant. In none of these Acts is there anything which says that there must be a separate demand for the amount found due on apportionment, and in fact it is not until the ratepayer is before the court that sect. 3 begins to operate. The effect of these later Acts and the later legislation is simply to give the ratepayer when before the magistrate a right to show that, although the whole rate has been demanded, he is not liable to pay the whole rate, and a right when before the magistrate to claim an apportionment. This is entirely borne out by the form (Form C 1) in the schedule to the Distress for Rates Act 1849. That form says: "And that the said A. B. is therein and thereby assessed at the sum of aforesaid, and that the said sum hath been duly demanded of the said A. B. . . ." The demand there contemplated is the demand of the "said sum"—that is, the sum at which he was assessed in the rate book. That was the form of the distress warrant before the Act of 1869, and there is nothing in that Act or in sect. 3 of the Act of 1882 to alter it, and there is nothing in either of those Acts to show that the rate collector has to perform the impossible task of ascertaining and deciding the exact period of time during which the outgoing tenant was in occupation. Although a demand for a part of a sum is not a demand for the whole sum, a demand for the whole sum is a demand for every part of that sum and is a demand for the smaller sum; so that when the whole rate was demanded, there was a demand for the smaller sum actually found due. The justices cannot issue a distress warrant for more than the sum demanded, but, when the whole has been properly demanded, they can issue their warrant for a less sum. This is borne out by the judgment of Channell, J. in

Davis v. *Woodfield*, 81 L. T. Rep. 782; 64 J. P. 215.

He also referred to

Rex v. *Gillespie*, 90 L. T. Rep. 15; (1904) 1 K. B. 174.

[RIDLEY, J. referred to *Rex* v. *Benn* (6 T. R. 198).]

Emanuel in reply.

Lord ALVERSTONE, C.J.—This question to my mind has presented very great difficulty. It seems to me that in regard to the form in the schedule to the Distress for Rates Act 1849, which was an Act to amend the old Poor Law in enabling overseers of the poor to recover the costs of distraining for rates, Form C (1), being a form of warrant of distress against the ratepayer, is a form which may be used on a summons for nonpayment of the rate when the magistrates have got a case before them in which it is competent for them to decide what was due. It was contended for the appellant that although the magistrates might, upon the summons, decide what was the amount due, they could not give effect to that, but must dismiss the summons, merely stating that, in their opinion, so much was due, or, in other words, must follow the course suggested in Ryde on Rating, 2nd edit., p. 56—namely, that they should dismiss the summons "coupled with an intimation that in the opinion of the justices a smaller sum named appeared to to be due," and then there would have to be a fresh demand and summons. That does not seem to me to be a result we ought to give effect to unless we are forced to do so. I am inclined to think that the root of this question goes back to the time of Elizabeth, and we have to consider what was the original law under the Poor Relief Act of Elizabeth. That statute contemplated a levying of the poor rate by distress if the ratepayer refused to pay. Following that there came a number of decisions, of which *Hurrell* v. *Wink* (*ubi sup.*), was one, to the effect that as there

could be no refusal without a demand, a demand of the rate was essential to the proceedings for a distress warrant. But in that case the effect of the statute 17 Geo. 2, c. 38 (the Poor Relief Act 1743), s. 12, was not considered by the court, and no question appears to have arisen thereunder. The difficulty in the present case arises under the later legislation. In this case the original demand having been for 9*l.* 7*s.* 3*d.*, the occupier went out during the period when the rate was to operate, and therefore he was entitled to some relief under sect. 16 of the Poor Rate Assessment and Collection Act 1869. Under that section, which repealed, but re-enacted in an amended form, sect. 12 of 17 Geo. 2, c. 38, it was provided that if during the period for which the rate was made there was a change of occupation, there was to be an apportionment which the overseers were to make so far as the same should be known to them, and the new occupier was to be liable to pay so much of the rate as should be proportionate to the time between the commencement of his occupation and the expiration of the period for which the rate was made. It was an apportionment in so far as the amount was supposed to be known to them. Further relief was given by sect. 3 of the amending Act of 1882, which extended the provisions of sect. 16 of the Act of 1869 to the case where there was no succeeding occupier in possession. In those circumstances, the original occupier having gone out of possession, and there having been a previous demand for the whole rate, the real question is, what was the authority and jurisdiction of the justices when a person is summoned for nonpayment of a rate upon a summons which was in Form B in the schedule to the Distress for Rates Act 1869. It is quite plain that upon its appearing before the justices that the person was not liable for the whole amount of the rate, the justices could not issue a warrant for the whole amount. That is expressly laid down in the case of *Davis* v. *Woodfield* (*ubi sup.*), where it was held that the justices could make an apportionment and decide the the amount due; and in the case before us of *Rex* v. *Gillespie* (*ubi sup.*), where a ratepayer who had tendered a part of the rate was summoned for the whole of the rate and again tendered a part of the rate in court to the overseer, we decided that the magistrate was not bound to issue a distress warrant for the whole rate, but that he could issue a warrant for the balance. The court decided in *Davis* v. *Woodfield* (*ubi sup.*) that the magistrates could apportion the amount due. That seems the natural and logical result of the legislation which left untouched the jurisdiction of the magistrates under the Act of Elizabeth and the Act of 1849. The occupier had a right to relief from a portion of the rate by reason of his going out of occupation, and, unless there be some technical rule against it, it would seem to me to be in accordance with common sense that a fresh demand should not be required. The overseer can only make a demand of the rate according to what is known to him at the time, and he might not know the exact date when the occupier went out of occupation. The Poor Rate Assessment and Collection Act of 1869 only required that the overseers should make the alteration so far as the facts were known to them. So far there seems to be no difficulty. Therefore upon such a summons the magistrate can adjudicate as to the real amount of the rate due from the occupier up to the date when he went out of possession. But it was contended for the appellant that, although the justices might make an order as to the amount due, they could not issue a distress warrant for the amount. It seems to me, again looking back to the Act of Elizabeth, that that contention goes too far. If the justices have power to assess the amount due from the ratepayer, then it certainly seems to me that they ought also to be able to make an order for the payment of that ascertained amount, as formerly they would have been able to make an order for payment of the whole amount, if there had been no giving up of the occupation. As to the old cases on the subject, they say that a man ought not to have process issued against him unless he knows what is brought against him and a demand has been made upon him, and he has had an opportunity of appearing and defending himself. It seems to me, therefore, that when once we get the fact that the statute gives the power to apportion the amount, and that the justices have power to ascertain the sum actually due, I do not feel compelled to hold that they can only make a declaratory order as to that amount, without following that up by granting a warrant, but that they can make the same order that they could have made if there had been no cesser of the occupation. Therefore the point raised in this appeal fails, and the appeal must be dismissed. I ought to add that in the summons the overseer inserted a less amount than the whole amount of the rate demanded.

RIDLEY, J.—I agree, and I think it advisable to add a few words. It seems to me to be clear that before a distress warrant can be granted there must have been a demand for the amount of the rate due, and according to *Hurrell* v. *Wink* (*ubi sup.*), it must be a demand of the precise amount of the rate due. That may be by virtue of the provision in the section of the Act of Elizabeth, the Poor Relief Act 1601, which says that the overseers are to levy the sums "of everyone that shall refuse to contribute according as they shall be assessed," or it may be from the language of Lord Kenyon, C.J. in *Rex* v. *Benn* (6 T. R. 198), where he said: "On the summons, the party may show a sufficient reason to the magistrates why a warrant of distress should not issue; as, for instance, that he has already paid the assessment to one of the parish officers, who has not accounted for it. But it is an invariable maxim in our law that no man shall be punished before he has had an opportunity of being heard; whereas if a warrant of distress were to be issued without any previous summons, the party would have no opportunity of showing cause why the execution should not issue against him." Here the difficulty arises from the fact that, whereas there was a demand made for the whole rate, there had been an apportionment of the rate made under the Poor Rate Assessment and Collection Acts 1869 and 1882. These Acts were passed in the interest of the ratepayer, but they did not alter the total amount of the rate in the rate book for which a proper demand had been made in this case, and they merely provided that the occupier was to be liable only for the amount which was pro-

portionate to the period of his occupation. They do not provide for any fresh demand being made in respect of the sum so apportioned. In this case I think there was a sufficient demand for the rate when the whole rate was demanded, and I think there is no statute or decision which requires a fresh demand to be made in such a case. The judgment in the case of *Davis* v. *Woodfield* (*ubi sup.*) is in accordance with this view.

Darling, J.—I agree. The case presents itself to my mind in this way. The appellant was the occupier of certain premises, and he was properly rated in respect of the same in the sum of 9*l.* 7*s.* 3*d.*, and this rate was properly demanded of him by a legal notice. His occupation, however, of part of the premises ceased during the period of the rate. Under the old law he might still have been distrained upon for the whole amount of the rate. But the Poor Rate Assessment and Collection Act of 1869 provided for an apportionment of the rate, and sect. 16 of that Act enacted that where a person removed from the premises and another person came into possession of the premises, each should be liable for a proportion of the rate only; and by sect. 3 of the Poor Rate Assessment and Collection Act of 1882 that was extended to include the case of a person going out of occupation without any other person coming into occupation. Now, it appears to me that the rate for which the appellant was liable was properly demanded of him, and at the time it could not be properly demanded from anybody else, because at that time the collector could not possibly know if he would go out or when he would go out of possession, as it was a difficult matter to determine when in fact his occupation ceased. It was therefore practically impossible for the rate collector to have made a demand for the exact sum payable by the appellant. The appellant contends that, as the only demand upon him was for the full amount and as the justices have decided that he is only liable for a part of that amount, therefore there was no demand upon him, and no refusal by him to pay that smaller sum. I do not agree with that. It is true that, by the cases cited, there must be a demand of the precise amount of the rate, but in those cases the question of apportionment was not considered. The strongest argument urged in favour of the appellant's contention was that derived from sect. 12 of the Poor Relief Act 1814 (54 Geo. 3, c. 170), which speaks of the neglect to pay money "legally assessed on and due from him in respect of any rate for the relief of the poor," after the same "shall have been legally demanded of him." That, no doubt, recognises that, for the purposes of that Act, a precise demand was necessary, but it does not bear directly on this case. It seems to me that in this case the overseer gave the only notice of demand which he could give. He demanded the rate—that is, the whole rate—and he could only demand that rate as, at that time, he could not possibly know the exact amount that might afterwards turn out to be due. Therefore, it seems to me that he had sufficiently demanded the rate, and the appellant had the remedy in his own hands. It is said that he received no legal demand, because what was demanded was the 9*l.*, and not the 3*l.*, and that therefore, there was no refusal to pay the 3*l.* In my opinion there was, as he refused to pay the 9*l.* he refused to pay the 3*l.*, and therefore I think there was a sufficient demand and refusal to pay the 3*l.* As to the rest, I agree with the judgment of the Lord Chief Justice.

Appeal dismissed.

Solicitors for the appellant, *Speechly, Mumford,* and *Craig,* for *Lamport, Bassitt,* and *Hiscock,* Southampton.

Solicitor for the respondents, *P. J. Nicholls,* for *Hallett* and *Martin,* Southampton.

Saturday, Jan. 13, 1906.

(Before Lord Alverstone, C.J., Ridley and Darling, JJ.)

Stainland Provision Society Limited (apps.) *v.* Stainland Urban District Council (resps.). (*a*)

Public health—Cleansing of cesspool—Resolution by authority to cleanse privies, closets, and ashpits—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *s.* 42.

The words "earth-closets, privies, ashpits, and cesspools" in sect. 42 *of the Public Health Act* 1875 *are to be read distributively and not conjunctively, and so a local authority may undertake or contract for the cleansing of one or some of these conveniences and are not bound to undertake or contract for the cleansing of all four.*

Case stated on an information preferred by the respondents against the appellants for not cleansing a cesspool, contrary to a by-law made on the 23rd June 1890.

The following facts were proved:—

The appellants were the owners and occupiers of certain premises situate at Stainland, within the district of the Stainland with Old Lindley Urban District Council, to which property there was a cesspool used in connection with it.

The premises consist of a shop and a slaughterhouse and stables at the rear thereof. The cesspool received the drainage from the slaughterhouse and stables, and from the shop also. They were erected some time prior to the year 1890.

The cesspool in question was at the date of the information so full and in such a state that it required emptying and cleansing, and notice had been given by the respondents to the appellants requiring them to cleanse such cesspool, which the appellants had neglected and refused to do, they alleging that it was the duty of the respondents themselves to empty and cleanse the same.

On the 23rd June 1890, by-laws were made under sect. 44 of the Public Health Act 1875 by the local board for the district of Stainland with Old Lindley, who were the predecessors of the Stainland with Old Lindley Urban District Council, with respect to the cleansing of earth-closets, privies, ashpits, and cesspools.

It was admitted that at the time when the by-laws were made the local board had not themselves undertaken or contracted for the cleansing of earth-closets, privies, ashpits, and cesspools.

The minute-book of the local board (now the urban district council) was also produced, showing

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

that on the 6th Sept. 1894 the respondents had, pursuant to sect. 42 of the Public Health Act 1875, passed the following resolutions:

Resolved, on the motion of Mr. Quarmby, seconded by Mr. Briggs, that the scavengering of privies, closets, and ashpits be undertaken by the board at once.

Resolved, on the motion of Mr. Quarmby, seconded by Mr. Stott, that tenders be obtained for emptying and cleansing privies, closets, and ashpits for six months, the tender to be at so much per house, the contractor to dispose of the material, and that dry earth-closets be emptied and cleansed monthly, and privies and ashpits every three months.

Such resolutions were duly confirmed by the council on the 10th Sept. 1894. It was also admitted that from and after the passing of the resolutions the respondents had carried out the work of scavengering privies, closets, and ashpits within their district, but had not at any time cleaned or emptied cesspools.

It was further admitted that the appellants had from time to time at their own expense, both before and after the making of the by-laws, emptied and cleansed the cesspool in question down to the present time, when the question as to whose duty it was to carry out such cleansing and emptying of cesspools was raised by them.

It was also admitted that the respondents had from the passing of the resolutions in Sept. 1894 provided in their estimates of expenditure for each year a sum for the scavengering of their district.

The question for the justices' determination was whether or not, upon the construction of sects. 42 and 44 of the Public Health Act 1875 and the resolutions and facts above stated, it was the duty of the appellants or respondents to cleanse and empty the cesspool in question, the appellants' contention being that the respondents, having undertaken to act under sect. 42 of the Act, were bound to cleanse and empty cesspools in their district, and that the whole of the by-laws made in June 1890 were abrogated or superseded by the resolutions passed by the respondents in Sept. 1894. The respondents, on the other hand, contended that it was competent in their predecessors, the local board, to resolve, as they had done, to undertake only part of the duty of scavengering and cleansing referred to in the second paragraph of sect. 42 of the Public Health Act 1875, and the by-laws Nos. 9 and 10 therefore remained in full force and effect.

The justices decided by a majority that the contention of the respondents was correct in law, and that it was the duty of the appellants to cleanse and empty the cesspool in question.

By the by-laws of 1890 relating to "the cleansing of earth-closets, privies, ashpits, and cesspools belonging to any premises," it is provided:

9. The occupier of any premises shall once at least in every three months cleanse every cesspool belonging to such premises.

A penalty was provided for every offence.

R. Cunningham Glen for the appellants.—The point in this case depends upon the construction of sect. 42 of the Public Health Act 1875. The local authority under that section must undertake the cleansing of earth-closets, privies, ashpits, "and" cesspools. The matters are to be read conjunctively and not disjunctively. If the section meant that they need only take over the cleansing of one or more of these conveniences, the word "or" would have been used and not "and."

Daldy for the respondents.—If the appellants are right, the resolution of 1894 is invalid, and the by-law of 1890 is in force and stands good. The words in sect. 42 must be read disjunctively and not conjunctively.

Lord ALVERSTONE, C.J.—The substantial question in this case is whether the words are to be read distributively or not. If the point as to the validity of the resolution had been taken below, it might have been a difficult one for the appellants. In 1890 the local board for the district of Stainland with Old Lindley made valid by-laws with respect to the cleansing of earth-closets, privies, ashpits, and cesspools, and in 1894 the local board undertook the emptying and cleansing of dry earth-closets, privies, and ashpits, and Mr. Glen says that the result of the resolution taking over that duty was that they took over the cleansing of cesspools as well. Now, I have come to the conclusion that we ought not to construe sect. 44 of the Public Health Act 1875 as making it imperative on the local authority to make by-laws covering all the four things mentioned. It does not seem to be disputed that, if that is the right construction of sect. 44, a like construction ought to be placed on the matters enumerated in sect. 42. Now, the opening words in sect. 42 give the local authority the right, and make the local authority, when required by the Local Government Board, undertake or contract for certain things, and I think it would be a strong thing to suggest that the Local Government Board must order the local authority to undertake the cleansing of all the four conveniences mentioned if they have undertaken to cleanse one of them. Sect. 44 is more strongly in favour of Mr. Daldy's argument, for it allows an urban authority to make by-laws for the prevention of nuisances arising from snow, filth, dust, ashes, and rubbish, and that last clause in a similar sort of section cannot be construed in the way suggested by Mr. Glen, for in some places it may be necessary to have a by-law with regard to one of these matters, while in other places there would be no necessity for such a by-law. If the same burden would be imposed on a local authority in respect of everything in the class mentioned in sect. 42, then all those matters might be taken together, but it may be necessary in many places to separate them. There might be places where a by-law was necessary as to one, but not as to the others. I think by sect. 42 both the Local Government Board and the local authority have an option to order to be done or to do all or some only of the duties mentioned in sect. 42, and the local authority can make by-laws as to all or some only of the matters mentioned in sect. 44.

RIDLEY, J.—I agree.

DARLING, J.—I think this section could be read either conjunctively or distributively, but the section applies equally to the local authority and the Local Government Board, and I think it is difficult to imagine that the Legislature meant to say that the Local Government Board

could only compel the local authority to undertake and contract for the whole of the duties mentioned in sect. 42 and not for any one or some of them. I think there is a wide distinction between a cesspool and the other conveniences mentioned in the section.

Appeal dismissed.

Solicitors: *Helliwell, Harby,* and *Co.*, for *Jubb, Booth,* and *Helliwell,* Halifax; *Robbins, Billing,* and *Co.*, for *Longbotham* and *Sons,* Halifax.

Jan. 12 *and* 13, 1906.

(Before Lord Alverstone, C.J., Ridley and Darling, JJ.)

Rex *v.* Johnstone and others (Justices); *Ex parte* Cobbold. (*a*)

Licensing—Provisional licence—Premises about to be constructed—Licence for seven years from completion of premises and final order of justices—Jurisdiction of justices to grant—Date of commencement of licence—Licensing Act 1874 (37 *&* 38 *Vict. c.* 49), *s.* 22—*Licensing Act* 1904 (4 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 3.

By sect. 22 *of the Licensing Act* 1874 *licensing justices can grant a provisional licence for premises about to be constructed, and such provisional licence is not to "be of any validity until it has been declared to be final by an order of the licensing justices," made upon their being satisfied that the house has been completed in accordance with the plans; and by sect.* 4, *sub-sect.* 3, *of the Licensing Act* 1904 *the justices may, "instead of granting a new on-licence as an annual licence, grant the licence for a term not exceeding seven years."*

Held, that the licensing justices, on granting a provisional licence under sect. 22 *of the Act of* 1874, *have jurisdiction to make it a term of the provisional grant that the licence should be in force for seven years from the date of the declaration by the justices, under sect.* 22, *that the proposed house has been completed in accordance with the deposited plans.*

In such case the licence does not become an effective licence until the final order of the justices has been made, and it may be granted for seven years from that date, and it is no objection to the licence that it may begin to run from or end on a date other than the 5*th April.*

Rule for a *mandamus* to Andrew Johnstone and others, justices of the peace, acting as the county licensing committee for the county of Essex.

The rule called on the respondent justices to proceed to hear and determine an application by one John Cobbold (of the firm of Cobbold and Co., brewers, Ipswich) for the confirmation of a licence granted at the general annual licensing meeting for the Tendring division, in the county of Essex, on the 27th Feb. 1905, authorising him to apply for and hold any of the excise licences that might be held by a publican for the sale by retail of intoxicating liquor to be consumed either on or off the premises, at a house about to be constructed at Parkestone, in the county of Essex, and to be known as the Essex Hotel.

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

The rule was obtained at the instance of Mr. John Cobbold.

The facts were as follows:—

The firm of Cobbold and Co., brewers, of Ipswich, applied to the licensing justices of the Tendring division of the county of Essex on the 13th Feb. 1905, being the adjourned annual licensing meeting for the division, and at the further adjournment on the 27th Feb. for a provisional full on-licence for a hotel and restaurant, which the firm proposed to erect at Parkestone, in that county, in accordance with the provisions of sect. 22 of the Licensing Act 1874 and sect. 4 of the Licensing Act 1904. The application was opposed, and was adjourned to the 27th Feb., it being understood that at the adjourned hearing the plans of the proposed hotel and restaurant should be amended to meet the requirements of the justices.

At the adjourned hearing on the 27th Feb., the amended plans having been put in and approved by the justices, counsel for the applicant's firm applied to the justices to grant either a term licence for seven years or an annual licence, as seemed to them most desirable, and, after consideration, the justices granted a provisional licence for the premises upon certain conditions which were set out in the licence—namely, (1) that the licensee should pay the monopoly value as provided by sect. 4 of the Licensing Act 1904, which monopoly value they assessed at 180*l.* per annum, and (2) that the licensee should acquire a frontage of 120ft. at least on the main road. In accordance with this condition the licensee acquired the prescribed frontage.

The provisional licence contained the following clause:

This licence shall be in force for seven years from the date of the declaration by the justices under the Licensing Act 1874, s. 22, that the proposed house has been completed in accordance with the deposited plans (as amended).

The provisional licence was drawn up by the clerk to the justices, and was submitted to and approved by the solicitors of the applicant and of the opponents; it was duly signed by a majority of the justices present at the hearing, and was then forwarded to the clerk to the confirming authority of the county of Essex.

The applicant applied to the licensing confirming authority of the Essex Quarter Sessions, under sect. 4 of the Licensing Act 1904, for the confirmation of the provisional licence. This application came on for hearing on the 12th April and the 17th May, when counsel on behalf of the applicant's firm of Cobbold and Co. applied for an order confirming the grant.

The confirmation of the provisional order was opposed by counsel on behalf of Messrs. Charrington, Nicholl, and Co., brewers of Colchester, who were the owners of the Garland Hotel at Parkestone, and on behalf of Mr. Burgess, their tenant of the Garland Hotel, upon the ground that the provisional licence was bad upon the face of it, inasmuch as it purported to be for a longer term than the justices had jurisdiction to give under sect. 4, sub-sect. 3, of the Licensing Act 1904.

Upon this objection being taken the committee retired to consider the point, and upon their return into court they stated their opinion that the provisional licence was bad upon the

face of it, and they thereupon declined to continue the hearing of the case upon the merits.

The above rule for a *mandamus* was then obtained, and the applicant submitted that the confirming authority of the Essex Quarter Sessions should be commanded to hear and determine the application on its merits. Notice of the rule was directed to be given to the opposing brewers, Messrs. Charrington, Nicholl, and Co., and to their tenant Mr. Burgess.

Sect. 13 of the Alehouse Act 1828 (9 Geo. 4, c. 61), omitting the words that have been repealed by sect. 33 of the Licensing Act 1902, provides:

Every licence which shall be granted under the authority of this Act . . . shall be in force from the 5th day of April after the granting thereof, for one whole year thence next ensuing, and no longer; and every licence for the purpose aforesaid, which shall be granted at any other time or place . . . than that hereby directed, except as hereinafter excepted, shall not entitle any person to obtain an excise licence for selling excisable liquors by retail, to be drunk or consumed on the premises of the person licensed, and shall be utterly void to all intents and purposes.

Sect. 22 of the Licensing Act 1874 (37 & 38 Vict. c. 49) provides:

Any person interested in any premises about to be constructed or in course of construction for the purpose of being used as a house for the sale of intoxicating liquors to be consumed on the premises may apply to the licensing justices and to the confirming authority for the provisional grant and confirmation of a licence in respect of such premises; and the justices and confirming authority, if satisfied with the plans submitted to them of such house, and that if such premises had been actually constructed in accordance with such plans they would, on application, have granted and confirmed such a licence in respect thereof, may make such provisional grant and order of confirmation accordingly. A provisional grant and order of confirmation shall not be of any validity until it has been declared to be final by an order of the licensing justices made after such notice has been given as may be required by the justices at a general annual licensing meeting or a special sessions held for licensing purposes. Such declaration shall be made if the justices are satisfied that the house has been completed in accordance with such plans as aforesaid, and are also satisfied that no objection can be made to the character of the holder of such provisional licence. A provisional grant and confirmation of a licence shall be subject to the same conditions as to the giving of notices and generally as to procedure to which such grant and confirmation would be subject if they respectively were not provisional, with this exception, that where a notice is required to be put up on a door of a house such notice may be put up in a conspicuous position on any part of the premises. This section shall, with the necessary variations, extend to the provisional removal to any premises of an existing licence under section fifty of the principal Act.

The Licensing Act 1904 (4 Edw. 7, c. 23) provides:

Sect. 4. (1) The power of the county licensing committee to confirm new licences, and any other power of that committee, shall be transferred to quarter sessions. (2) The justices, on the grant of a new on-licence, may attach to the grant of the licence such conditions, both as to the payment to be made and the tenure of the licence and as to any other matters, as they think proper in the interest of the public; subject as follows: (*a*) Such conditions shall in any case be attached as, having regard to proper provision for suitable premises and good management, the justices think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed and the value of the same premises if they were not licensed: . . . (3) The justices may, if they think fit, instead of granting a new on-licence as an annual licence, grant the licence for a term not exceeding seven years, and where a licence is so granted for a term—(*a*) Any application for a re-grant of the licence on the expiration of the term shall be treated as an application for the grant of a new licence, not as an application for the renewal of a licence, and during the continuance of the term the licence shall not require renewal; and (*b*) any transfer of the licence shall, subject to any conditions attached thereto on the grant, have effect for the remainder of the term of the licence and may be granted at a general annual licensing meeting as well as at special sessions, and any reference to special sessions in any enactment relating to transfers or protection orders shall include a reference to the general annual licensing meeting.

Rowsell, for the licensing committee of the quarter sessions, showed cause.—The licensing committee were right in refusing to confirm the provisional licence. The provisional grant of a licence for premises about to be constructed is given under sect. 22 of the Licensing Act 1874, and what is granted under that section is a licence and operates as a licence from the time at which it is granted. It is subject to renewal as a licence, and if the renewal is refused an appeal lies as in ordinary cases:

Reg. v. *London Justices*, 62 L. T. Rep. 458; 24 Q. B. Div. 341.

In this case the provisional licence was bad upon the face of it for two reasons. The first and main point is that it was bad as being a licence for a longer term than seven years, and thereby contravening the provisions of sect. 4, sub-sect. 3, of the Licensing Act 1904, which sub-section enables the justices, instead of granting a new on-licence as an annual licence, to grant a licence for a term not exceeding seven years. In that sub-section the word "licence" should be used in an extended sense, and should be construed as including a provisional licence granted under sect. 22 of the Act of 1874. Under sect. 4, sub-sect. 3, of the Act of 1904, a new licence cannot be granted for a longer term than seven years; and if a provisional licence is a new licence, as it is submitted it is, and if it be granted for a term of seven years plus the time during which the premises are being constructed, then it is granted for a longer term than seven years and contravenes that provision of the sub-section. In the present case the grant was for a period of seven years from the date of the declaration by the justices under sect. 22 of the Act of 1874 that the proposed house has been completed; so that, if the proposed house were not completed for three years, this grant would be a licence for ten years and the house would be withdrawn from the jurisdiction of the justices for that period, and the public would also lose the possible benefit that might accrue to them by reason of the monopoly value of the house. The clear intention of the provision was that the house should not go out of the control of the justices for a longer period than seven years, and that the justices ought not, by granting a provisional licence in this form, to allow the house to go out of their control in regard to securing the monopoly value to the public for a longer term. In the second place, the provi-

sional licence is bad on the face of it for another reason. By sect. 13 of the Alehouse Act 1828, every licence is granted for one year (now it may be granted for seven years) and all these licences are to run from the 5th April, or possibly from the date of confirmation. The grant in the present case contravenes that provision. Suppose in the present case that the applicant, having already got this provisional licence, goes to the justices on the 1st Aug. 1907, and the justices give the final order as from that date. Then the applicant would be entitled to a licence for seven years from that date—the 1st Aug. 1907—and that would carry the licence on to the 1st Aug. 1914, and then the applicant could not get another licence until the next 5th April, so that this provisional licence is not in that respect in conformity with sect. 13 of the Act of 1828.

Bruce Williamson, for the opposing brewers (Charrington, Nicholl, and Co.), also showed cause against the rule.—A provisional licence granted under sect. 22 of the Act of 1874 is simply an ordinary licence such as justices may grant. By sect. 4, sub-sect. 3, of the Act of 1904, the justices may, instead of granting a new on-licence as an annual licence, grant the licence for a term not exceeding seven years; so that what is dealt with in that sub-section and what may be granted for a term not exceeding seven years is a new on-licence. In sect. 32 of the Act of 1874 a "new licence" is defined as "a licence for the sale of any intoxicating liquor granted at a general annual licensing meeting in respect of premises in respect of which a similar licence has not heretofore been granted." This provisional licence comes within that definition of "new licence," and is a new licence. It is a licence for the sale of intoxicating liquor; it was granted at the general annual licensing meeting, and it was granted in respect of premises not before licensed. It still retains its character as a licence, and the provisions of sect. 22, which regulate the granting of it, show that it was a new licence. The procedure to be followed in getting a provisional licence is exactly the same as on getting a new licence; the justices can give or refuse their sanction as in the case of a new grant, plans have to be produced and approved, and the provisional grant has to be confirmed in the same way as in the case of a new licence. It is therefore an ordinary licence, subject to this, that it could not be used until the condition—the completion of the premises—was fulfilled. The recent Act has given the justices no greater right as to granting licences than they had before, subject to this, that whereas before the Act they could only grant a licence for one year, now, under sub-sect. 3 of sect. 4, they can grant a new on-licence for seven years. It is submitted that the provisional licence was a "new on-licence," and that if and when confirmed it would have run from the 5th April following. The justices have no power to grant a licence, whether a provisional licence or otherwise, to run from any other period than from the 5th April (sect. 13 of the Alehouse Act 1828). They could not grant a licence of this kind which, when confirmed, would be for a longer term than seven years from the ensuing 5th April. That provision is contravened in this case, and there is no power to substitute another licence for it. What the licensing justices have done in this case was to grant a new licence for more than seven years, and therefore the confirming authority were right in refusing to confirm it.

Pickford, K.C. (*A. H. Poyser* with him), for the applicant in support of the rule.—The provisional licence is granted under sect. 22 of the Act of 1874, and that section says that "a provisional grant and order of confirmation shall not be of any validity until it has been declared to be final by an order of the licensing justices"; and such declaration is to be made when the justices are satisfied that the house has been completed in accordance with the plans. Therefore, until the provisional licence is declared by the justices to be final, it has no validity at all as a licence, and is nothing at all in the way of a licence, and, coming to sect. 4, sub-sect. 3, of the Act of 1904, there is nothing at all to prevent the justices from making the licence run for seven years from the date of the order confirming the plans, when the provisional licence is declared to be final. The sub-section says that the licence shall not be granted for a longer term than seven years. There is no contravention of that provision in this case, because by the very terms of the section under which the provisional licence is granted that provisional licence is said to have no validity whatever until declared to be final, and in fact it is not a licence at all until that time. With regard to the monopoly value, that begins when the licence begins; but the contention of the respondents would make the monopoly value begin at once, and the licensee would be paying monopoly value for, say, two years before the licence began and before the licensee could sell any liquor at all, and when the premises were earning nothing at all. Then, with regard to sect. 13 of the Alehouse Act 1828, no doubt that section says that the licence is to be granted from the 5th April to the 5th April. That may apply to provisional licences, but the fallacy of the respondents' argument is in assuming that it applies to the seven years' licence granted under the Act of 1904. That that provision cannot apply to the seven years' licence is clear, because sect. 13 says that the licence is to be for one year and no longer, and that cannot apply to the licence for seven years. The sub-section under which the seven years' licence is granted does not say that that licence is to run from the 5th April. The more sensible view to take is to hold that that licence begins to run from the time when the inchoate licence becomes operative—that is, when it is declared to be final—and, unless the court are bound by sect. 13 to hold otherwise, every consideration of justice is in favour of that view. With regard to the difficulty that the licence may expire on a day which is not the 5th April, that may be got over by making an application before the licence has expired, just as in ordinary cases an application for renewal is made before the licence has expired.

Lord Alverstone, C.J.—The point raised in this case is one which has to be carefully considered, but, in my opinion, the confirming authority struck too soon in saying that they would not entertain this application for the confirmation of the provisional licence granted under sect. 22 of the Licensing Act 1874. The main contention

urged by counsel on behalf of the licensing committee, in showing cause against the rule, was that the grant of a provisional licence under sect. 22 of the Act of 1874 for seven years to commence from a future period—namely, from the time when the licence should be declared to be final — contravened the provisions of sect. 4, sub-sect. 3, of the Licensing Act 1904. The argument was that it was held in *Reg.* v. *London Justices* (*ubi sup.*) that a provisional licence granted under sect. 22 of the Act of 1874 is a licence which is subject to many of the incidents of an ordinary licence, being capable of renewal, subject to an appeal as in ordinary cases. Now, if the true view of sect. 22 of the Act of 1874 is that a licence granted under that section is an operative licence as from the time it is granted, then I think there would be a good deal to be said in favour of that argument; but I think, looking at the substance of the thing, that that is not the position of a licence granted under sect. 22. Although, no doubt, it is perfectly true that for some purposes a provisional grant of a licence under sect. 22 may be equivalent to the grant of an ordinary licence, that does not seem to me to dispose of the question whether the powers of sect. 4, sub-sect. 3, of the Act of 1904 can be applied to the grant of a provisional licence made under sect. 22 of the Act of 1874, and whether or not it is *ultra vires* for the licensing justices to say that a licence can be granted under sect. 4, sub-sect. 3, of the Act of 1904 for a period of seven years commencing from the date when the provisional grant of the licence has been declared by the justices under sect. 22 of the Act of 1874 to be final. Looking at the matter from the common-sense point of view, one cannot see why the Legislature should not have intended to confer on the justices the power to grant, under sect. 22, a provisional licence for a term as an ordinary licence. In substance it will be seen that the grant of the provisional licence under sect. 22 is not the grant of a licence *in esse*; it is the grant of a licence to take effect upon the fulfilment of certain conditions—namely, upon the building and completion of the house according to the plans. Therefore, *à priori*, there seems to be no reason why the provisions of sect. 4, sub-sect. 3, of the Act of 1904 should not apply to an application for a provisional licence made under sect. 22 of the Act of 1874. But it was contended that, even admitting that to be so, the grant must be for such a period that it must not exceed seven years from the date of the provisional grant itself. That, however, seems to me to overlook this substantial consideration that the true effect of sect. 22 of the Act of 1874 is not to give an effective licence from the date of the provisional grant, but that the section only gives an effective licence from the date when under the provisions of that section the provisional grant is declared to be final by an order of the licensing justices. In my opinion, it is not *ultra vires* for the justices to say that the licence shall be for seven years from the date of the final order made under sect. 22. That being so, I therefore think that the confirming authority ought to have entertained this application; but as to what they ought to do when the application comes before them I express no opinion. The only point in the case which has caused me any real difficulty arises from the fact that at present all ordinary licences commence on the 5th April, and it may be that our decision in this case may cause some difficulty which has not been foreseen by the Legislature. That, however, does not seem to me to be a sufficient reason for our laying down a different rule under sect. 4, sub-sect. 3, of the Act of 1904. It may be possible to meet that difficulty by making an application to the licensing authority at the general meeting in February before the expiration of the seven years, or by making an application under some other provision of the Licensing Acts, or it may be possible for the confirming authority, if they decide to renew the grant, to say that the licence shall expire on some 5th day of April. However that may be, I am clearly of opinion that it is not *ultra vires* for the justices to make it a term of the provisional grant of the licence granted under sect. 22 of the Act of 1874 that the licence should be for seven years from the date of the declaration by the justices under that section declaring the provisional grant to be final.

RIDLEY, J.—I agree.

DARLING, J.—I agree.

Rule absolute.

Solicitors for the applicant, *Godden, Son,* and *Holme,* for *Ward* and *Hugh-Jones,* Harwich.

Solicitors for Messrs. Charrington, Nicholl, and Co., *Beaumont, Son,* and *Rigden,* for *Beaumont* and *Bright,* Maldon.

Solicitors for the respondent justices, *Patersons, Snow, Bloxam,* and *Kinder,* for *H. W. Gibson,* Chelmsford.

Jan. 16 *and* 17, 1906.

(Before Lord ALVERSTONE, C.J., RIDLEY and DARLING, JJ.)

COMMERCIAL GAS COMPANY (apps.) *v.* POPLAR BOROUGH COUNCIL (resps.). (*a*)

Metropolis—Excavation for gas pipes—Making good and reinstating — Insertion of concrete course — Metropolis Management Act 1855 (18 *&* 19 *Vict. c* 120), *ss.* 111, 114—*Metropolis Management Amendment Act* 1862 (25 *&* 26 *Vict. c.* 102), *s.* 82.

A gas company having opened certain streets for the purpose of laying, altering, and repairing their pipes, the local authority thought it expedient to fill in the ground and make good the surface under sect. 114 *of the Metropolis Management Act* 1855, *instead of permitting the work to be done by the gas company. In order that the surface of the streets should be made as good and remain as good as it was before, the local authority inserted a course of concrete where there was no concrete before, and where there was concrete before put in an extra thickness of concrete. The magistrate found the insertion of such concrete was reasonable and necessary.*

Held, that the local authority could recover from the gas company the cost of such concrete.

CASE stated on a complaint wherein the respondents alleged that the appellants did fail to repay on demand the whole of the expenses of filling in ground and making good the pavement and soil and also of reinstating the pavement surface or soil

(*a*) Reported by W. DE B. HERBERT Esq., Barrister-at-Law.

of parts of certain streets within the borough of Poplar and of the parts contiguous thereto and affected by the work executed to the reasonable satisfaction of the respondents pursuant to the 114th section of the Metropolis Management Act 1855 and the 82nd section of the Metropolis Management Amendment Act 1862.

The appellants under their powers supply gas to consumers in the respondents' borough

Previous to the hearing of the complaint the pavement surface and soil of several streets in the borough had been broken up and opened for the purpose of the appellants laying, altering, or repairing pipes lying beneath the surface of such streets.

In all such cases the respondents had thought it expedient under sect. 114 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120) to fill in the ground and to make good the pavement and surface and soil so broken up and opened and to carry away the rubbish occasioned thereby, instead of permitting such work to be done by the appellants. The respondents also reinstated such contiguous parts for the repair of which the appellants were liable under sect. 82 of the Metropolis Management Act 1862 (25 & 26 Vict. c. 102).

Under the London Government Act 1899 (62 & 63 Vict. c. 14) the respondents are now substituted for the authorities mentioned in the two sections of the Metropolis Management Acts above referred to—viz., the vestry or district board, as the case may be.

It was proved upon the hearing of the complaint that there were three species of roads the surface, &c., of which had been broken up and opened by the appellants. Firstly, where stone setts were placed upon concrete; secondly, where stone setts were placed upon the earth; and, thirdly, where there were no such setts. The appellants for the purpose of dealing with the pipes beneath the surface of the roads excavated trenches. The result was that it was always impossible to replace all the excavated earth in the excavated trench. The proportion of bulk of the loose excavated earth to that of the same earth as it lay consolidated in the trench was as about five to four, and it was impossible, even by dint of the most strenuous pounding, &c., to replace the whole of the earth in the excavation. Such earth, however, as could be placed in the trench would in course of time settle, and, unless precautions were taken, the effect would be a hollow in the road the length of the trench. In the same way where concrete was placed over the excavation the subsidence of the earth which would occur would leave the new concrete at that point without support, and a similar irregularity in the road would appear. The precautions which the borough surveyor took were to make the concrete, where there was concrete already, three inches thicker along the line of excavation and the contiguous parts thereto than it was before. Where there had been no concrete the precaution taken was to place a course of concrete where the excavation, &c., had been.

The appellants refused to pay so much of the respondents' claim as was represented by the cost of the concrete placed where there was no concrete before and the extra thickness of concrete where concrete had been used before, on the ground that such claim was not justified by the Metropolis Management Acts.

The magistrate found as a fact that the whole of the concrete the cost of which the appellants disputed was necessary in order that the surface of the streets should be made as good and should remain as good as it was before the streets were excavated by the appellants, and that this applied as well to the parts contiguous under sect. 82 of the Metropolis Management Act 1862.

It was contended on behalf of the appellants that the respondents could not call upon the appellants to pay for the concrete in dispute, because sect. 111 required only that they should cause the ground to be filled in and the pavement to be reinstated and the surface to be made good in a proper and substantial manner, and that sect. 111 had provided "that no such pavement should be considered to have been reinstated in a proper and substantial manner by any such company or other person unless the same have been reinstated with the same or similar materials of the like quantity and thickness and cemented and bound together in the same or equally substantial manner as those of which it was composed." It was further contended that, as by sect. 10 of the Gasworks Clauses Act 1847 (10 & 11 Vict. c. 15) the appellants were bound to make good subsidences which might take place within the space of twelve months, it was inconsistent that the appellants should be required, by placing extra concrete, to ensure that there should no possibility of a subsidence at any time, and, with reference to the contention that the appellants were bound to pay for the substitution of concrete for the surplus of earth, they drew the magistrate's attention to sect. 110 of the Metropolis Management Act 1855, which contemplates the removal of the surplus soil. The appellants therefore contended that they were right in law in refusing to pay the respondents' demand for the cost of the extra concrete.

It was contended on behalf of the respondents that, the extra concrete being necessary in order that the surface of the streets should be made as good as it was before the appellants' excavations, the appellants were liable for the cost notwithstanding the provision at the end of sect. 111 with regard to the quality and thickness of the materials, &c., that merely meaning that there should be at least such thickness of materials, &c., as before.

The magistrate was of opinion that, in order to comply with the requirements of sect. 111 of the Metropolis Management Act 1855 that the ground should be filled in and the pavement reinstated and the surface to be made good in a proper and substantial manner, it was necessary that the surface of each street where there had been excavations, and the parts contiguous thereto, should be made as good and should remain as good as they were before the appellants had excavated, and he was also of opinion that the respondents' surveyor's refusal to be satisfied under sect. 82 of the Metropolis Management Act 1862 without the use of the disputed concrete was reasonable. He therefore made an order for the cost of the concrete in dispute.

Colam for the appellants.

C. A. Russell, K.C. and *Chester Jones* for the respondents.

Lord ALVERSTONE, C.J.—It is really, I think, unnecessary in the year 1906 to talk of a section

under the Gasworks Clauses Act which gives the gas company power to break up roads and to exercise a privilege against the public as a criminal section. All I can say is that in a great many cases which have been pointed out they are not criminal sections; they are only terms under which the gas company gets a right to break up the roads. I entirely agree with the main principle of Mr. Colam's argument, that all the gas company can be ordered to do is to make good the road and to keep it made good for a certain period under the statute. Of course, it is common knowledge that in those days—1847—there was only one piece of wood pavement in London. Granite setts were the common way of paving where there was a macadam road, and it was also common knowledge that when you fill in a macadam road, as the case finds, if you only put back four-fifths of the earth, when the rain comes there will be subsidence. Upon that Mr. Colam has founded the very ingenious argument that you are intended to make the subsidence and then fill it up. That seems to me to be turning an obligation into a privilege; the obligation is to fill up the road again if it does subside, not to make the subsidence as a part of your privilege in opening the roads. But really this is only a matter of common sense. It is quite true that the gas company are entitled to break up the roads, or have the privilege of breaking up the roads, on the terms that they make good the roads. I quite agree that the surveyor may not order the gas company to do anything which is not necessary in order to make good the road. The surveyor required that there should be an increase of concrete of 3in. where there was concrete before, and that there should be put a layer of concrete under the setts or pavement where there was none. The magistrate has said: "I find as a fact that the whole of the concrete the cost of which the appellants disputed was necessary in order that the surface of the streets should be made as good and should remain as good as it was before the streets were excavated by the appellants." That does not mean for all time, as my brother Ridley pointed out; it means fulfilling their statutory obligation and making the surface good replacing the pavement and making that good, and maintaining, as they are bound to do, this concrete if necessary. I think, as my brother Ridley pointed out when this case began, that the magistrate has stated facts which make it quite impossible for us to say that he has gone wrong as a matter of law. I therefore, with great deference to the forcible argument of Mr. Colam on the matter, think that the appeal must be dismissed.

RIDLEY, J.—I am of the same opinion. I only wish to add that I think that the last clause of sect. 111 has been properly construed by the magistrate when he finds in the case that the provision at the end of sect. 111 with regard to the quality and thickness of the materials, and so forth, merely means that there should be at least such thickness of materials as there was before.

DARLING, J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *C. V. Young* and *Son*; *Chas. G. Bradshaw* and *Waterson*.

Feb. 5, 6, 7, 8, 9, 10, 12, 13, 14, *and* 21, 1906.

(Before BUCKLEY, J., sitting as an additional Judge of the King's Bench Division.)

HOBART *v.* SOUTHEND-ON-SEA CORPORATION. (*a*)

Local government—Sanitary authority—Sewage—Discharge into sea—Pollution—Nuisance—Injunction—Public Health Act 1848 (11 *&* 12 *Vict. c.* 63), *s.* 49—*Public Health Act* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 23, 27—*Sea Fisheries Act* 1868 (31 *&* 32 *Vict. c.* 45), *ss.* 51, 53—*Sea Fisheries Act* 1888 (50 *&* 51 *Vict. c.* 54), *s.* 2—*Southend Local Board Act* 1887 (50 *&* 51 *Vict. c. v.*), *s.* 5.

A local authority, being the sanitary authority for their borough, discharged sewage in a crude state, without any treatment, into the estuary of the Thames.

Under an indenture dated the 1*st May* 1901 *the plaintiff was the lessee in occupation of a certain part of an ancient several fishery, being oyster beds, which he used for depositing oysters and other shellfish till required by him for sale.*

On the 31*st Oct.* 1903 *the Fishmongers' Company forbade the sale in London of oysters coming from the plaintiff's layings because the layings were badly polluted.*

In an action by the plaintiff claiming damages against the local authority for wrongfully and illegally polluting and causing to be polluted with sewage his oyster and shellfish beds, and for an injunction:

Held, that the defendants must keep their noxious matter from trespassing upon their neighbour's land.

Fletcher *v.* Rylands (1866, *L. Rep.* 1 *Ex.* 265; 1868, *L. Rep.* 3 *H. L.* 330) *followed.*

Sect. 23 *of the Public Health Act* 1875, *in reproducing the substance of sect.* 49 *of the Public Health Act* 1848, *omits all provision as to drainage into the sea, while sect.* 27 *provides that, for the purpose of disposing of sewage, the local authority may do certain things, but with this proviso, that no nuisance be created in the exercise of any of those powers.*

Injunction granted.

Tenant *v.* Goldwin (1822, 1 *Salk.* 21; 2 *Ld. Raym.* 1089) *followed.*

Earl of Harrington *v.* Corporation of Derby (92 *L. T. Rep.* 153; (1905) 1 *Ch.* 205) *distinguished.*

WITNESS ACTION.

The plaintiff was a fish merchant and fish salesman in the city of London, and was also lessee in occupation of a certain part of an ancient several fishery, being oyster beds situate in the creek or gut called Hadleigh Ray, in the estuary of the Thames, some three and a half miles above Southend Pier.

The defendants were the Southend Corporation, and as such were the local sanitary authority of the borough of Southend. The defendants discharged the sewage of Southend in a crude state, without any treatment, into the estuary at several outfalls.

This was an action brought by the plaintiff against the defendants claiming (1) damages for wrongfully and illegally polluting and causing to be polluted with sewage the oyster and shellfish beds of the plaintiff situate at Hadleigh Ray, and (2) for an injunction.

(*a*) Reported by W. HUNTER BOND, Esq., Barrister-at-Law.

The Public Health Act 1848 (11 & 12 Vict. c. 63) provides:

Sect. 49. That it shall not be lawful newly to erect any house or to rebuild any house which may have been pulled down to or below the floor commonly called the ground floor, or to occupy any house so newly erected or rebuilt, unless and until a covered drain or drains be constructed of such size and materials, and at such level and with such fall, as upon the report of the surveyor shall appear to be necessary and sufficient for the proper and effectual drainage of the same and its appurtenances; and if the sea or a sewer of the local board of health, or a sewer which they are entitled to use, be within one hundred feet of any part of the site of the house to be built or rebuilt, the drain or drains so to be constructed shall lead from and communicate with such one of those means of drainage.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

Sect. 23. Where any house within the district of a local authority is without a drain sufficient for effectual drainage, the local authority shall by written notice require the owner or occupier of such house within a reasonable time therein specified to make a covered drain or drains, emptying into any sewer which the local authority are entitled to use, and which is not more than one hundred feet from the site of such house, but if no such means of drainage are within that distance, then emptying into such covered cesspool or other place, not being under any house, as the local authority direct. . . .

Sect. 27. For the purposes of receiving, storing, disinfecting, distributing, or otherwise disposing of sewage any local authority may—(1) Construct any works within their district or (subject to the provisions of this Act as to sewage works without the district of the local authority) without their district; and (2) contract for the use of, purchase, or take on lease any land, buildings, engines, materials, or apparatus either within or without their district; and (3) contract to supply for any period not exceeding twenty-five years any person with sewage, and as to the execution and costs of works either within or without their district for the purposes of such supply: Provided that no nuisance be created in the exercise of any of the powers given by this section.

The Sea Fisheries Act 1868 (31 & 32 Vict. c. 45) provides:

Sect. 51. All oysters and mussels being in or on an oyster or mussel bed within the limits of a several oyster and mussel fishery granted by an order under this part of this Act, and all oysters being in or on any private oyster bed which is owned by any person independently of this Act, and is sufficiently marked out or sufficiently known as such, shall be the absolute property of the grantees or of such owner as the case may be, and in all courts of law and equity and elsewhere, and for all purposes, civil, criminal, or other, shall be deemed to be in the actual possession of the grantees and such owner respectively.

Sect. 53. It shall not be lawful for any person other than the grantees, their agents, servants, and workmen, within the limits of any such several fishery, or in any part of the space within the same described in this behalf in the order, or other than the owner of any such private oyster bed, his agents, &c., within the limits of such bed, knowingly to do any of the following things: To deposit any ballast, rubbish, or other substance. To place any instrument, apparatus, or thing prejudicial or likely to be prejudicial to any oyster or mussel bed . . . except for a lawful purpose of navigation or anchorage. To disturb or injure in any manner except as last aforesaid any oyster or mussel bed. . . . And if any person does any act in contravention of this section he shall be liable to the following penalty . . .

The Sea Fisheries Act 1888 (50 & 51 Vict. c. 54) provides:

Sect. 2. A local fisheries committee for a sea fisheries district may from time to time, subject to such regulations as may be made in that behalf by the Board of Trade, make by-laws to be observed within their district for all or any of the following purposes—namely, (e) for prohibiting or regulating the deposit or discharge of any solid or liquid substance detrimental to sea fish or sea fishing.

The facts are more fully set out in the judgment.

Macmorran, K.C., *G. A. Scott*, and *A. Wallace Atkins* for the plaintiff.—The defendants admit the plaintiff's title, and it is also admitted that the *locus in quo* is an ancient several fishery. The year before the plaintiff's business was stopped—1903—there were as many as 4,000,000 oysters laid down on these beds; they were principally oysters laid down for storing until it was necessary to use them. The bed was of great value to the plaintiff, as it was a very good one for oysters and was convenient for the Southend market. In *Earl of Harrington* v. *Corporation of Derby* (92 L. T. Rep. 153; (1905) 1 Ch. 205), where your Lordship went into sects. 21, 24, and 299 of the Public Health Act 1875, an injunction was refused by reason of the fact that, as the people had the right to discharge into the sewers, you could not give an injunction without interfering with the rights of those persons. That question does not arise here. We are not now dealing with any questions of the rights of the inhabitants to drain into the sewers, but with the way in which the defendants themselves deal with the sewage when they have got it cleared into their tanks. The nuisance here arises from their method of sewage disposal. Sect. 27 of the Public Health Act 1875 confers powers on the local authority to provide works for the disposal of sewage, but there is a proviso to the section which says: "Provided always that no nuisance be created in the exercise of any of the powers given by this section." This is the only authority the defendants had for constructing these tanks and outfall works for the disposal of sewage, and I submit by reason of that proviso they are under an obligation so to construct and keep their outfall works that they commit no nuisance either of a public nature or to private persons. Sect. 299 of the Act of 1875 enables complaint to be made to the Local Government Board in certain events, and the courts have held that that section confers a remedy, but we are not complaining here that the local authority has made default in providing sufficient sewers or in maintaining the existing sewers; that is not the complaint here, and I submit that sect. 299 has absolutely no application to this case. [At the conclusion of the plaintiff's argument the defendants abandoned their defence of prescription.]

Montague Lush, K.C. and *C. Herbert Smith* (Sir *Edward Clarke*, K.C. with them) for the corporation.—There are two questions to be considered in this case: one is a question of fact, the other a question of law. Assuming that we are legally liable for the alleged pollution, the plaintiff must prove that the corporation are responsible

for this alleged nuisance, which, of course, means that they have turned oysters which would otherwise be healthy into unhealthy oysters which he cannot sell. Unless he proves that the oyster bed has been turned from a healthy and commercial business and property into that which is uncommercial, of course he cannot succeed, because damage is the gist of his action. The oyster bed was condemned in Oct. 1903 by the Fishmongers' Company, so that there must have been a fouling and polluting of the oysters before that date, and yet the plaintiff claims damages for pollution only since Oct. 1903, and his complaint is that we have done something wrong since the oyster bed was condemned. There is an admission here by implication that it was after the condemnation of his oysters, which must have been preceded by a contamination, that the corporation first contaminated. If that is right, and what the corporation did did not arise till October, there is no cause of action, because the damage was done which led the Fishmongers' Company to condemn his oysters prior to that. The second point is this, unless he can show that the defendant has converted a healthy oyster bed into an unhealthy one he has no cause of action. The oyster beds were contaminated before Oct. 1893, and there is no evidence of disappearance of contamination, which existed before the defendant came upon the scene. In *Foster* v. *Warblington Urban District Council* (1905, 69 J. P. 42) it was held that the only ground of liability is the Sea Fisheries Act 1868. Sect. 53 of that Act provided that it shall be unlawful "knowingly" to place anything prejudicial or likely to be prejudicial to any oyster or mussel fishery. In that case the defendants were held liable because they discharged their sewage right upon the oysters. The defendants in this case have not discharged their sewage on the oysters; they have turned it into the tidal navigable waters, and, if they are responsible for the pollution, it is because the action of the tide and the wind has carried the stuff on to the oyster bed. The basis of the liability is "knowingly," and the plaintiffs cannot say that we "knowingly" disturbed the oyster bed. The Sea Fisheries Act 1888 gives power to the Board of Trade to create sea fishery districts, and the local fisheries committee for that district may make by-laws for the regulation of sea fisheries. Sect. 13 says: "Nothing in this Act shall authorise a local fisheries committee to make any by-law (c) affecting any power of a sanitary or other local authority to discharge sewage in pursuance of any power given by a general or local Act of Parliament." Sect. 5 of the Southend Local Board Act 1887 gives power to the local board to take lands and carry drains under or over the foreshore. [BUCKLEY, J.—Is that a power to discharge sewage into the sea?] I submit it is. The corporation would not have taken powers from Parliament to make drains over the foreshore for any other purpose.

Macmorran, K.C. in reply.—In *Fletcher* v. *Rylands* (1866, L. Rep. 1 Ex. 265, at p. 284) a passage is referred to from *Tenant* v. *Goldwin* (1822, 1 Salk. 21; 2 Ld. Raym. 1089) which says: "It was the defendant's wall and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour, and that it was a trespass on his neighbour as if his beasts should escape, or one should make a great heap on the border of his ground and it should tumble and roll down upon his neighbour's. . . . He must repair the wall of his house of office, for he whose dirt it is must keep it that it may not trespass." That is a concise statement of the common law, and to allow sewage to escape so as to injure a several fishery, which is a property known to the law, gives of itself a right to an action. Sect. 49 of the Public Health Act 1848 is the only section which refers to drainage into the sea, and that section was very strongly relied upon in *Foster* v. *Warblington Urban District Council* (1905, 69 J. P. 42). The Public Health Act 1875 repealed the Act of 1848 and re-enacted sect. 49, but it has carefully omitted any reference to the sea. The Sea Fisheries Regulation Act 1888 enabled the Board of Trade to create fishery districts, and the Kent and Essex Fisheries Committee were given power by sect. 2 to make by-laws. This committee made by-laws which were confirmed by the Board of Trade, and by-law No. 15 is: "The deposit or discharge of any solid or liquid substance detrimental to sea fish or sea fishing is hereby prohibited." Sect. 13 says that nothing in the Act shall authorise the local fisheries committee to make any by-law affecting any power of a sanitary authority to discharge sewage in pursuance of any power given by a general or local Act of Parliament. There is no general Act of Parliament allowing a sanitary authority to discharge sewage into the sea, and there is no local Act giving such power in the present case. He referred to

Lyon v. *Fishmongers' Company* (1876, 35 L. T. Rep. 569; 1 App. Cas. 662.

Cur. adv. vult.

Feb. 21. — BUCKLEY, J. read the following judgment:—The plaintiff is lessee in occupation of a certain part of an ancient several fishery, being oyster beds situate in the creek or gut called Hadleigh Ray, in the estuary of the Thames, some three miles and a half above Southend Pier. His tenure is under an underlease, dated the 1st May 1901, for twenty-one years, at a rental of 80*l*. a year. From the year 1889 the plaintiff or his predecessor in title had held the oyster beds lying both south and north of Hadleigh Ray under a lease from one Foster. That lease determined. The present lease of 1901 includes only the oyster beds on the south side of and extending to the middle line of the Ray, but the plaintiff has, in fact, by agreement continued in occupation of the portion to the north, which had been included in the lease of 1889, and which he had laid down as an oyster bed. The defendants are the corporation of Southend. They discharge the sewage of Southend in a crude state, without any treatment, into the estuary at several outfalls, of which the main outfall lies some 500 or 600 yards east of Southend Pier, and the others lie in various positions principally on the west side. The plaintiff's action is for an injunction to restrain the corporation from so discharging sewage as to create a nuisance to him by the pollution of his oyster beds, and for damages. Upon the pleadings there was raised a defence, based upon alleged prescriptive rights in the inhabitants and in the defendants, the corporation, as their successors (a phrase

which seems to indicate some confusion of thought) to drain into the sea or estuary of the Thames in this manner; but during Mr. Macmorran's opening Sir Edward Clarke abandoned this defence. I will, however, say something about it later. The question which I have to try is the issue of fact, whether the discharge from the defendants' sewers does or does not create a legal nuisance to the plaintiff's oyster beds. The defendants have raised a certain other defence as a matter of law. With that I will deal separately later in this judgment. The evidence adduced in the case has been excessively voluminous. I shall endeavour so far as I can to group my findings of fact under heads, and state as shortly as may be the facts as I find them. That there is pollution at the site of the plaintiff's oyster beds is not denied. The question is as to the source from which that pollution comes. When I say pollution is not denied, the defendant's counsel, upon my invitation, so stated. But nevertheless the defendants' evidence has oscillated between evidence the only purpose of which can have been to show that there is not pollution, and evidence to the effect that there is pollution, but that it comes, not from the defendants' sewers, but from some other source. I pass by so much of the evidence as would seek to show that there is not pollution. There is ample evidence of pollution, including evidence coming from the defendants themselves and they admit pollution. The question is whether it is due to the defendants' sewers. Much evidence has been adduced as to the set of the currents at different stages of the tide in this part of the estuary. I find the facts as to the currents to be as follows: At and above Southend the river flows in a deep channel, on the borders of which, on the Essex side, lie the extensive shallows or flats of Southend and Leigh, constituting a sort of shelf or ledge along the side of the main channel. The ebb in the main channel is, of course, from west to east, but when the tide has ebbed some four hours or thereabouts the course of the falling water over these flats is to a very large extent from north to south, by reason of the water emptying itself off the shelf constituted by the shallows into the deeper water constituted by the main channel. At about two hours before low water there is a visible limit or edge to the main line of flow seawards which is locally called the "streamedge," or, as they pronounce it, the "strimmage." During the last two hours or thereabouts of the ebb the direction of flow on the southern side of the streamedge is seawards, but on the north side of the streamedge there is an eddy tide which runs slowly westward while the main flow is still eastward to the sea. When the tide turns, and the water is flowing, a phenomenon similar in some respects is exhibited in the reverse direction. The flow over the shallows is—for, say, two hours of the flood—largely a flow from south to north. Mr. Strachan, a civil engineer, who was called for the defendants, puts this flow at something like 25ft. per minute in spring tides. The main outlet of the defendants' sewage system lies within—that is to say, to the north of—the streamedge. It results that anything issuing from the main outfall during, say, the last two hours of the ebb has a tendency to flow, and does flow, not rapidly, but steadily, to the westward, towards the Southend Pier, and when the tide turns sewage discharged from the outfall is to be found, often in large quantities, lying about and to the west of the pier. Both parties have carried out an elaborate system of experiments by way of floats, with a view of seeing how the currents in this part of the estuary flow. To my mind the trouble has been to a large extent thrown away. The defendants have satisfied me that to a large extent matter issuing from the main outfall which has not gone seawards, and which is found by the young flood tide lying at and about the main outfall, passes not so much to the west as to the north by reason of the action of the current above described. From the result of these experiments they have sought to deduce the conclusion that no sewage from the main outfall ever reaches the Hadleigh Ray beds, but that such as does not reach the open sea ends its existence on the foreshore lying north, or north with a little west, of the outfall of the sewer. In my judgment the facts which they have proved establish nothing of the kind. It is obvious that experiments with floats prove only what is the direction of motion of the surface water in which the float is floating. They prove nothing as to what is the course of the currents below. It is necessary to trace the course, not only of the sewage which the young flood tide finds at the mouth of the outfall, lying near the surface, but also of that which has travelled a short distance away upon the ebb and which the young flood tide finds lying, say, in the main channel—some, perhaps, at the surface, and other at a depth of a few feet, where these exceptional surface currents do not exist. Without the assistance of evidence I have no difficulty in knowing that in the main channel of the river, as distinguished from the shallow shelf, the flow will not be that which I have described as resulting from the configuration of the ground in the shallows at the side, but that during the flood tide the flow will be up the river—that is to say, from east to west and not from south to north. If there be in that main channel sewage lying which has been discharged from the main outfall but has not been carried far enough to do no further mischief, that will go up with the flowing tide, and there is nothing in the float experiments to show that that, or some of it, will not be found upon the plaintiff's layings in Hadleigh Ray. Probably, some also of that to which the first experiments do apply may find its way to the same place. One of the buoys which are placed near the defendants' outfalls, to mark their position, broke loose some years ago, and was found at low water stranded within fifty yards of the plaintiff's eastern boundary, and Brashier (a witness) found a place about 700ft. to the south of the new pier head, and about three-eighths of a mile to the west of the outfall, from which a float went right up over the oyster beds. In the above I have stated the dominant or principal currents, but any number of eddies and cross currents exist at different periods of the tide over the sandbanks lying in the estuary, which are partially uncovered at and towards low water. The next head with which I propose to deal is that of solid fæcal matter and of solid sewage refuse which can be traced in the relevant parts of this estuary. I find, as a fact, that solid sewage matter is found in large quantities, not in

isolated places at long distances apart, but in substantially large quantities, not necessarily on the surface, but both on the surface and in the lower portions of the current. Mr. Clarke, who was called by the plaintiff, is a surveyor in the service of the Thames Conservancy. He attended on subpœna. He is a person wholly independent of both parties in the controversy, and I see no reason whatever to doubt his evidence. He says that he has seen sewage west of the pier in considerable quantities at an hour and a half after low water; that he has seen at the pier, extending from the outside of the outer head to the inside of the inner head, 450ft. wide, a belt of sewage at half an hour after low water. Mr. Roberts, who is an inspector in the service of the Fishmongers' Company, to whose evidence I give the same credit, says that from the pier you can distinguish the sewage by the glint upon the water, and that you can see plenty of excremental solids, pieces of paper, orange peel, and so on about the outfall. There are some of his reports, which I need not read at length, which, if accurate, disclose a state of filthy pollution of the water. He speaks of abundance of unbroken sewage, of an expanse of crude sewage from the main outfall right over Hadleigh Ray, and of the water up Hadleigh Ray and near the plaintiff's beds as studded with solid—that is to say, fæcal—matter, and a greasy dull liquid. He has not the slightest doubt that it came from Southend. Mr. Arnold, a yachtsman, who is much about the estuary, has seen a lot of floating sewage matter. He has no doubt that it is sewage, and in tacking he has sailed into and out of it and back into it again. I do not go on to detail what many other witnesses have said, substantially to the same effect. Mr. Petch saw excreta and sewage scum when bathing, and gave up bathing in consequence. This was up near the Crow Stone. There are also witnesses who prove that they have, when trawling from the pier westwards towards Hadleigh Ray, had their nets clogged with solid sewage. [Referring to the evidence of some of these other witnesses, his Lordship continued:] I make all proper allowance for some exaggeration which may be expected from this class of witness, but their evidence is, in fact, supported by that of a witness, Little, called by the defendants, who says the same thing. To these I will add two other witnesses called by the defendants, James Myall and Charles Myall, who say that they have seen solid sewage and seen plenty of it. James Myall says that he saw it every day he was out. To mention in detail other witnesses called even by the defendants, who give similar evidence, would be prolix. I content myself by saying that Dr. Thresh has seen solid matter, and says that if nets were clogged with sewage, as the above witnesses state, he can point to no source from which it can come other than the Southend outfall. In the face of evidence of this kind, I am not convinced in the least by evidence such as that of the bathing-machine proprietor and the piermaster, that they have never seen anything of the kind, or that of the owner of the floating baths, who says that he sees a brown stuff in large quantities at certain times of the year, and that it is fish spawn. This witness stands alone in saying that the discoloured matter in the water is fish spawn. Beyond this class of evidence there is that of persons who have seen a sewage scum—meaning not solid sewage, but plain indications of diluted sewage. I refrain from detailing the plaintiff's evidence as to this, and content myself with some of the evidence given by the defendants. Dr. Nash has seen sewage scum in Hadleigh Ray. Professor Klein has seen a floating scum on the surface, and I understand him to say that it extended a mile across, and he says that it looked like sewage scum. Upon this Dr. Thresh, who had been in the box before, was subsequently recalled by the defendants to contradict the defendants' previous witness, and to say that it was not sewage scum. There is a conflict of evidence as to the origin of this sewage scum. I find as a fact that, to a large extent at any rate, it comes from Southend outfalls. From all these heads of evidence the conclusion of fact at which I arrive is, that in this estuary, at the main outfall and at the west of the pier, and in the main current westward of the end of the pier, and up to and extending to Hadleigh Ray, there are to be found solid sewage in very substantial quantities, and diluted sewage and sewage scum. It remains to say from whence these come. I will take, first, the case of solid sewage. The defendants suggest as sources of pollution, first, places lying further up the river than Southend—namely, Barking and Cross Ness downwards to places called Leigh and Benfleet, on the north of the estuary, some three or four miles above the plaintiff's beds; secondly, boats of various kinds, such as fishing smacks, yachts, P. and O. boats, and other vessels lying from time to time in the vicinity, as well as the Belle steamers, the general passing traffic, and the like. These, they say, or some of them, do or may send solid sewage into the water. I may reject all of these as possible origins of solid sewage except Leigh (to the small extent which I will mention), Benfleet, and the boats. No one can maintain that Barking or Cross Ness, twenty-five miles away, can account for solid fæces found floating in the water. The same is true of Gravesend and other like places up the river. The sewage of Leigh is treated in beds from which sewage effluent, containing no solid sewage, is discharged. Leigh, therefore, is out of the question, except to the extent of a very few houses, say, twenty, which, it may be, have not been connected with the sewage system. Benfleet is a little place, to which I will give credit for thirty houses as possibly sending solid sewage into the water. The fishing boats and some other boats no doubt contribute some solid sewage. But what are the proportions? Leigh and Benfleet, together, say, fifty houses. Southend (so Dr. Nash suggests) 6000 houses, but the population is 45,000, and probably 9000 would be nearer the figure than 6000. Yachts, it is proved by the defendants themselves, are cleanly in their habits, and do not discharge solid sewage into the river. The men on the fishing boats come from their homes, go away to sea, return again, and go home. Nevertheless, they do, I dare say, to some small extent contribute something. The Belle steamers, I should think, certainly do not. Making, however, every allowance for the fact that some solid sewage probably comes from these sources, it is utterly inadequate to account, even to a small extent, for the quantity of solid matter which, upon the evidence, is to be found here. Whence does it come? It

is proved, as matter of estimate, that 1000 people produce one hundredweight and a half of solid matter per diem. The 45,000 permanent population of Southend thus produce something between three and four tons of solid matter per diem. The summer population is increased by visitors staying in the place, or coming for the day, to a very much larger figure. The solid matter in the summer might be fairly put at half as much again or more. The fifty houses of Leigh and Benfleet, taking five to a house, will give, say, 250 people. If you add as many more for the boats, and then even double it, you will get a figure which is trifling compared to the discharge from Southend. As regards solid matter found floating in the water, it is to Southend that one must look as substantially the source of origin of the floating solid sewage which is found. Apart from solid sewage, and as regards sewage pollution generally, it is said, and I dare say truly, that, bacteriologically, the sewage effluent from Leigh and the comparatively trifling volume of sewage from Benfleet, falling, however, as it does, into a comparatively small volume of water, and presented thus at the plaintiff's layings, in a less dilute form, may well have some substantial effect. The defendants seek to add from the bacteriological point of view a pollution originating from the metropolitan sewage discharged at Barking and Cross Ness. Upon the evidence such a thing is impossible. Of the bacteria (and I have no doubt there are plenty of them) which are to be found in the effluent at Barking and Cross Ness very few, if any, will still exist when the water reaches Hadleigh Ray. It is proved that in clean sea water bacteria *coli communis* will substantially disappear in forty-eight hours. In that time 22,000 bacteria will become reduced in number to about 400. The water between Barking and Southend is, of course, not clean sea water. It is brackish and it is not clean. The destruction of the bacteria will be correspondingly slow. But the distance is twenty-five miles, and the period of flow over that distance in the flux and reflux of the tide must be very considerable. Bacterial pollution which existed at Barking will, for every substantial purpose, have ceased long before Hadleigh Ray. The same is true, to a diminishing extent, of the places intermediate between Barking and Hadleigh Ray, which discharge into the river. The result of the evidence, to my mind, is that the pollution at Hadleigh Ray does not come down the river. To some extent I have no doubt there is pollution to be traced bacteriologically from Leigh and Benfleet, but the volume of sewage from these places is, as I have said, a mere nothing compared to the enormous number of gallons of sewage discharged daily from Southend. The main outfall is capable of discharging 3,699,000 gallons a day. To this, upon the evidence, I have no doubt that the pollution at Hadleigh Ray is to be attributed—not perhaps wholly, but to such an extent as to constitute a legal nuisance. Another head of evidence is that which deals with the condition of the mud at different parts of the estuary. It is no matter for surprise that at Leigh and Benfleet, at the immediate outfall of such crude sewage as they discharge, diluted as it is with a small volume of water in a confined place, the mud is found to be very fœtid. It is necessary, however, to take a broader view to find the real bearing of this kind of evidence. If it be found, as Professor Hehner finds, that, taking Southend as a centre, the foulness of the mud in the estuary generally diminishes as the distance increases, he is, I think, justified in drawing the deduction that Southend is the sender which discharges the organic matter which causes the blackening of the mud. According to Mr. Mansergh's report of 1892 the sewage would, he thought, find its way clear out to sea if the discharge were stopped two hours before low tide. There is evidence that it is not so stopped. By this I mean that persons have been called who have seen the discharge coming out during the last two hours, and even until dead low water, and even during the flood tide, and there is the fact that the sewage does get up to the west side of the pier at about the last two hours of the ebb, being carried there by the eddy tide which I have described. As against this the defendants have called the men who controlled the valves at the tanks. Records have been produced, but they are, to my mind, not to be depended upon. The sheet upon which the entries used to be made until an automatic record was established is so prepared as to show the hours of high and low water, and there is a column headed "Time of closing outlet valve, two hours before low water." That is what the man ought to have done according to his instructions. The records show that, without exception, or substantially without exception, that exact thing he did to the minute on every day throughout the record. It is not in human nature to open and close a valve to the minute four times a day over a long period of months and years. That record, I think, shows not the time at which the act was done, but the time at which, according to his instructions, the man ought to have done it. I place no reliance upon sheets which purport to record that which it is incredible can be accurately and truly the fact. After a time an automatic record by clockwork was kept. That system automatically indicated upon a sheet of paper the times at which a float on the surface of the tank was rising, falling, or stationary. From that sheet the inference is sought to be drawn that when the float ceases to fall and commences to rise the valve must have been closed. In many cases that may be true. It does not follow that it is always true. The inlet pipe is of much larger bore than the outlet pipe, and at times unquestionably the outflow is overpowered by the inflow, and the float may begin to rise, not because the valve is closed, but because the inflow is of greater volume than the outflow. Subject to these observations, I agree that the automatic indicator deserves attention, but I am not by it convinced that the evidence which the plaintiff has given of discharge after four hours of ebb and down to and even after low water is other than accurate. In the foregoing I have not referred, and I do not think it necessary to refer at length, to discharges which from time to time have certainly taken place from the storm outfalls and other outfalls other than the main. They have added something, and during the dislocation of the pipes from the western tank, after the landslip in Feb. 1904, I dare say that outfall A contributed materially. It is sufficient that I should say that I am satisfied that from the defendants' outfalls there has resulted pollu-

tion to the plaintiff's layings. The defendants, however, in case the facts were found (as I have found them) against them, have argued that, as a matter of law, they are entitled to discharge their sewage as they do, whether nuisance arises to the plaintiff or not. They say, first, that they have a common law right to do it; and, secondly, that, if that be not so, they have a statutory right to do it. In my opinion, neither proposition is well founded. First, is there such a right at law? The plaintiff is entitled to the enjoyment of a several fishery; he has the right to enjoy the land for the purpose of laying oysters there. That right of his in the land is interfered with by nuisance caused by the discharge by the defendants from their pipes of offensive matter in such a way as that it reaches the plaintiff's land. Upon the principle of *Fletcher* v. *Rylands* (1866, L. Rep. 1 Ex. 265; 1868, L. Rep. 3 H. L. 330), and the decisions upon which that case was founded, the defendants must keep their noxious matter from trespassing upon their neighbour's land. *Tenant* v. *Goldwin* (1822, 1 Salk. 21, 360; 2 Ld. Raym. 1089) is an express authority upon this point. The passage from Salkeld which was read seems to me entirely applicable. It runs thus: "It was the defendant's wall and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour, and it was a trespass on his neighbour as if his beasts should escape, or one should make a great heap on the border of his ground and it should tumble and roll down upon his neighbour's." The defendants have, I think, no common law right. But, if there be no right at law, there is a right, say the defendants, by statute. For that purpose they refer to sect. 49 of 11 & 12 Vict. c. 63 (the Public Health Act 1848), and argue that, inasmuch as if the sea be within 100ft. of the site of a house the owner might under that Act have been called upon to construct a drain into the sea, there must be a right to drain into the sea. The Act of 1848, however, was repealed by the Public Health Act of 1875, and sect. 23 of the latter Act, in reproducing the substance of sect. 49 of the former, omits all provision as to draining into the sea, while sect. 27 of the Act of 1875 provides that, for the purpose of disposing of the sewage, the local authority may do certain things, but with this proviso, that no nuisance be created in the exercise of any of those powers. Any argument based upon the repealed Act of 1848 seems to me, therefore, to be displaced. But the matter does not rest there. By the Sea Fisheries Act 1868 (31 & 32 Vict. c. 45) the property in oysters and mussels is, by sect. 51, in the owner of the fishery, and by sect. 53 it is not lawful for any person, other than the grantee, within the limits of a fishery knowingly to disturb or injure in any manner any oyster bed, and a penalty is imposed for doing the forbidden act. The defendants point to the word "knowingly," and it may be that until this present trial the corporation might be successful in saying that they did not "knowingly" injure the bed by discharging their sewage as they did. But after this trial they would be doing it "knowingly." Further, by the Sea Fisheries Act 1888 (50 & 51 Vict. c. 54) provision is made for the creation by the Board of Trade of sea fishery districts, and for local fishery committees for the regulation of sea fisheries carried on within the district. It is provided by sect. 2 that a local fisheries committee may, with the confirmation of the Board of Trade, make by-laws, amongst other things prohibiting or regulating the deposit or discharge of any solid or liquid substance detrimental to sea fish or sea fishing. The by-laws may, under sect. 3, impose penalties. Further, sect. 6 provides that for the purpose of enforcing the by-laws fishery officers may stop and search vessels and so on, and that for the enforcement of the provisions of the by-laws the officer shall be deemed a constable. By sect 7 a justice of the peace may by warrant authorise a fishery officer to enter and search premises, and so on. I refer to these provisions for the purpose of showing that the by-laws which are made are enforceable under the Act of Parliament in such a manner as to show that an act in breach of the by-laws is an illegal act. The plaintiff's fishery lies in the Kent and Essex Sea Fisheries District, and within the jurisdiction of the Kent and Essex Sea Fisheries Committee, being a district and a committee constituted under that Act of Parliament. They have made by-laws which have been properly confirmed by the Board of Trade, and by-law 15 provides as follows: "The deposit or discharge of any solid or liquid substance detrimental to sea fish or sea fishing is hereby prohibited." Not only, therefore, have the defendants no common law or statutory right to discharge the sewage so as to cause a nuisance—they are, in my opinion, forbidden to do so by a by-law properly made under a statute. This by-law is binding upon the defendants, for they are not within sect. 13 (c) of the Sea Fisheries Act 1888. They have no power to discharge sewage given them by a general or local Act of Parliament or by a provisional order confirmed by Parliament. The local Act which was referred to—namely, the Southend Local Board Act 1887, s. 5—has no bearing upon the matter. The defence raised upon the point of law fails. In *Earl of Harrington* v. *Corporation of Derby* (92 L. T. Rep. 153; (1905) 1 Ch. 205) I refused to grant an injunction upon grounds which are there stated at length. Of these the ground which might have been pertinent to the present case is that arising upon prescriptive rights in the householders to discharge their sewage into the existing sewers. I have already said that Sir Edward Clarke abandoned prescription during the opening of this case. The question, therefore, does not arise. At the same time, if I thought anything turned upon it, and if a real point had been abandoned by inadvertence, I should have been less strict in refusing to entertain at a late stage of the case an endeavour which was made to reintroduce it. I desire, therefore, to add the reason why in this case I think it right—whether a prescriptive right in the householders exists or not—to grant the injunction which in Lord Harrington's case I refused. If prescription had not been abandoned, and prescriptive rights enjoyed by the householders had been shown to exist, it does not appear that in the facts of this case an injunction to restrain the defendants from committing a nuisance by pollution of the plaintiff's beds will result in any interference with the rights, if any, of the householders. The defendants have not shown that, if proper control is maintained as regards the times at which the sewage is dis-

charged, they cannot, without any interruption of the householders' right of drainage, so discharge the sewage as not to commit a nuisance. In my judgment the plaintiff has proved a nuisance against which he is entitled to an injunction, and I grant an injunction to restrain the defendants as asked in the claim, limiting it in point of time to the duration of the plaintiff's lease. The plaintiff also claims damages. On the 31st Oct. 1903 the Fishmongers' Company forbade the sale in London of Portuguese and French oysters coming from the plaintiff's layings at Hadleigh Ray. The layings were badly polluted. Since that date the plaintiff has collected some winkles from the beds, and has, under permission from the Fishmongers' Company, collected and sold some mussels, with a warning that they must be boiled for a certain time. These shellfish being sterilised by cooking, the question of pollution did not affect them, at any rate vitally. But except to that limited extent, and except that he has sold a few oysters for cooking, the plaintiff has, from the 31st Oct. 1903, by reason, as I find, of nuisance committed by the defendants, suffered loss by being unable to use his oyster beds for the purpose of laying oysters. Under his lease he is, nevertheless, liable to pay the rents and to do the acts necessary to comply with the covenants of the lease, and for that purpose he has had to keep a certain number of men and pay wages. The annual cost for rent, rates, wages, and incidental expenses is proved to be 294*l.* 9*s.* per annum. Further, he had upon the beds when they were stopped a certain stock of oysters, and, thirdly, he has not only to pay his rent and outgoings and gain no return except so far as he got something from the winkles and mussels and something for the few oysters which he sold for cooking, but he has also lost the benefit which would have accrued to him by the employment of the beds for the purposes of his trade. I have to take into account, on the other hand, that if it had been possible to obtain other layings elsewhere he might have saved his stock or some part of it, although by so doing he might have lost his local market in Southend. And I have to regard the fact that after the oyster scare occasioned by the Winchester banquet the oyster trade was to a large extent affected. I have, looking at all the facts, to measure as best I can the damage sustained. The materials, as is commonly the case, are not such as to lead to any exact figure. I know what amount he has spent out of pocket for the enjoyment of an oyster bed which, except to the limited extent I have stated, has been valueless to him, and I have some materials to guide me as to the value of his stock in 1903 and as to the nature and volume of the business for which these beds were of value to him. From these materials I have to assess the damages to the best of my ability. I assess them at 1500*l.* I give judgment, therefore, for 1500*l.* damages, an injunction in the terms I have stated, and for the costs of the action.

Solicitor for the plaintiff, *W. E. M. Buchanan.*

Solicitors for the corporation, *Sharpe, Parker, Pritchards, Barham,* and *Lawford,* agents for *W. H. Snow,* Town Clerk, Southend-on-Sea.

CROWN CASES RESERVED.

Thursday, Nov. 9, 1905.

(Before Lord Alverstone, C.J., Wills, Darling, Walton, and Jelf, JJ.)

Rex *v.* Barraclough. (*a*)

Practice—Indictment — Particulars — Deposit of particulars with indictment—Criminal law—Libel—Obscene libel—Defamatory libel—Unlawful publication of obscene matter—Sufficient averment—Averment of intention to debauch public morals—Law of Libel Amendment Act 1888 (51 *& 52 Vict. c.* 64), *s.* 7.

It is not necessary to aver in an indictment for obscene libel that the publication tended to debauch public morals if it is averred that the matter is obscene and was published unlawfully.

The Law of Libel Amendment Act 1888, *s.* 7, *provides that it shall not be necessary to set out in any indictment or other judicial proceeding instituted against the publisher of any obscene libel the obscene passages, but it shall be sufficient to deposit the book, newspaper, or other documents containing the alleged libel with the indictment or other judicial proceeding, together with particulars showing precisely, by reference to pages, columns, and lines, in what part of the book, newspaper, or other document it is to be found.*

B. was indicted on an indictment which charged a defamatory libel on a woman, E. W. The matter alleged to be libellous was obscene, and the indictment contained counts alleging that B. had unlawfully published obscene matter relating to E. W. The writings containing the obscene matter had been put in evidence at the hearing before the justices when B. was committed for trial, and were attached to the depositions. Before the trial the prosecution deposited with the bill of indictment an abstract of the indictment referring to the counts as charging a defamatory libel on E. W. with a paper headed "Particulars of Obscene Libel—51 & 52 Vict. c. 64, *s.* 7." *At the trial the judge held that the indictment was bad as charging a defamatory libel on E. W. because the alleged libel was not set out in the indictment, but held that the indictment did support a charge of publishing an obscene libel.*

Held, that, inasmuch as the indictment charged the unlawful publication of obscene matter, it was a good indictment for publishing an obscene libel.

That the deposit of the paper referring to the document already attached to the depositions, and therefore in the custody of the law, was a sufficient compliance with sect. 7 *of the Law of Libel Amendment Act* 1888 *requiring the deposit of particulars of the matter relied on by the prosecution as supporting a charge of obscene libel.*

Semble: *A count charging the publication of an obscene libel should aver not only that the publication was unlawful, but that it tended to corrupt public morals.*

Case stated by Jelf, J.

William Barraclough was arraigned before me at the Leeds Assizes on the 3rd Aug. 1905 and

(*a*) Reported by A. A. Bethune, Esq., Barrister-at-Law.

called upon to plead to the following indictment:—

Yorkshire, West Riding, to wit.—The jurors for our Lord the King upon their oath present that William Barraclough, contriving and unlawfully and maliciously intending to injure, vilify, and prejudice one E. W. (the prosecutrix) and to deprive her of her good name, fame, credit, and reputation and to cause her to be esteemed as a person of depraved and incontinent behaviour and to bring her into public contempt, scandal, infamy, and disgrace, on the 3rd day of November, A.D. 1904, unlawfully and maliciously did write, print, and publish, and cause and procure to be written, printed, and published, to one Edward Harry Mond a false, scandalous, malicious, and defamatory libel in the form of a type-written document purporting to be extracts from a diary kept by the said William Barraclough, which said document was entitled "Extracted from the Diary of the Rejected One" and contains divers lewd, wicked, scandalous, obscene, false, malicious, and defamatory matters and things of and concerning the same E. W. and of and concerning certain wicked, unchaste, and immoral practices of which he the said William Barraclough alleged the said E. W. had been guilty with him to the great damage, scandal, and disgrace of the said E. W., to the evil example of all others in the like case offending, and against the peace of our Lord the King, his Crown and dignity.

Second Count.—And the jurors aforesaid upon their oath aforesaid do further present that the said William Barraclough, contriving and intending as aforesaid, on the said 3rd day of November, A.D. 1904, unlawfully, wickedly, and maliciously did write, print, and publish, and cause and procure to be written, printed, and published, to the said Edward Harry Mond a false, scandalous, and defamatory libel in the form aforesaid containing the defamatory matters aforesaid of and concerning the said E. W. and of and concerning certain wicked, unchaste, and immoral practices of which he the said William Barraclough alleged the said E. W. had been guilty with him, he the said William Barraclough then well knowing the said defamatory libel to be false, contrary to the statute in that case made and provided, and to the great damage, scandal, and disgrace of the said E. W., to the evil example of all others in the like case offending, and against the peace of our Lord the King, his Crown and dignity.

Third Count.—And the jurors aforesaid upon their oath aforesaid do further present that the said William Barraclough, contriving and intending as aforesaid, on the 21st day of December 1904 unlawfully, wickedly, and maliciously did write, print, and publish, and cause and procure to be written, printed, and published, to one Hedley Nichols Fowler a false, scandalous, malicious, and defamatory libel in the form and containing the obscene matters aforesaid concerning the said E. W. and of and concerning her alleged immoral practices aforesaid to the great damage, scandal, and disgrace of the said E. W., to the evil example of all others in the like case offending, and against the peace of our Lord the King, his Crown and dignity.

Fourth Count.—And the jurors aforesaid upon their oath aforesaid do further present that the said William Barraclough, contriving and intending as aforesaid, on the said 21st day of December, A.D. 1904, unlawfully, wickedly, and maliciously did write, print, and publish, and cause and procure to be written, printed, and published, to the said Hedley Nichols Fowler a false, scandalous, malicious, and defamatory libel in the form aforesaid containing the defamatory matters aforesaid of and concerning the said E. W. and of and concerning certain wicked, unchaste, and immoral practices of which the said William Barraclough alleged the said E. W. had been guilty with him, he the said William Barraclough then well knowing the said defamatory libel to be false, contrary to the statute in that case made and provided, and to the great damage, scandal, and disgrace of the said E. W., to the evil example of all others in the like case offending, and against the peace of our Lord the King, his Crown and dignity.

Before the defendant pleaded, his counsel objected that the whole indictment was bad and ought to be quashed upon some one or more of the following grounds:

First objection: That the defendant was committed for trial only on a charge of publishing a defamatory libel, and that under the Vexatious Indictments Act no indictment or count could be preferred or added against him for publishing an obscene libel without the previous leave of the court, which had not been obtained.—Answer: I overruled this objection on the ground that, in my opinion, the depositions disclosed a case of obscene libel, and therefore no previous leave was required: (see 30 & 31 Vict. c 35, s. 1).

Second objection: That, so far as the indictment purported to charge the publication of a defamatory libel, it was bad for not setting out the words of the alleged libel: (see *Reg.* v. *Bradlaugh*, 38 L. T. Rep. 118; 14 Cox C. C. 68; 3 Q. B. Div. 607).—Answer: I upheld this objection, and held that as a charge of defamatory libel the indictment failed.

Third objection: That the manifest intention of the framer of the indictment was to charge the publication of a defamatory libel and not of an obscene libel (as to which latter, subject to certain conditions to be mentioned presently, the obscene passages need not be set out since the Law of Libel Amendment Act 1888. 51 & 52 Vict. c. 64, s. 7), and, as the defamatory libel failed, the indictment failed altogether and could not be construed as a charge of obscene libel, the words relating to obscene matter being merely descriptive of the defamatory libel, and that the indictment was also bad for duplicity.—Answer: I overruled this objection as to the first and third counts on the ground that the words apparently relating to a defamatory libel, but abortive for the purpose, under the second objection could be treated as surplusage, and could and should, if necessary, be struck out, and that the residue of each of the first and third counts, by alleging the publication of a libel containing obscene matter, sufficiently alleged the common law offence of publishing an obscene libel. I ordered the second and fourth counts, which contained no reference to obscene matter, to be struck out.

Fourth objection: That, if any count of the indictment could be construed as alleging an obscene libel, it was bad by reason of the omission of the words "to the manifest corruption of the morals of His Majesty's subjects," which was the gist of the offence.—Answer: I overruled this objection, holding that an obscene libel *ex vi terminorum* connotes that it is to the manifest corruption of morals.

Fifth objection: That the conditions of the Act of 1888 (51 & 52 Vict. c. 64, s. 7), allowing on certain conditions the omissions of the obscene passages of an obscene libel had not been complied with, and therefore that *Reg.* v. *Bradlaugh* applied and the indictment was bad. As to this objection, the facts, so far as they appeared before the court, were as follows: The depositions together with the original exhibits, including the documents referred to in the first and third

counts of the indictment, entitled "Extracted from the Diary of the Rejected One," were sent as usual some time before the assizes by the clerk to the justices to the clerk of assize, and were by him forwarded some days before the assizes to me as judge and remained in my hands up to the time of the defendant being arraigned and were in court before me at that time, and could and would have been handed to the defendant or his counsel on his or their request. These documents are of too filthy and voluminous a nature to be set out in this case or in a schedule thereto. but they are in the custody of the court, initialled by me and marked A and B, and can be seen by any member of the court or by the defendant or his counsel if required. The indictment itself was drawn by counsel, and was handed on the morning of the first business day of the assizes by the solicitor for the prosecution to the clerk of assizes, engrossed and ready to go before the grand jury, but without any intimation that any other document had to be attached to it. At the same time there was handed as usual by the solicitor to the clerk of assize an abstract of the indictment for the judge's use, to which was pinned a paper containing the following particulars:

Rex v. *William Barraclough.*

Particulars of Obscene Libels.

51 & 52 Vict. c. 64, s. 7.

Count 1 of indictment.—The entire publication.
Count 2 of indictment.—The entire publication.
Count 3 of indictment.—The entire publication.
Count 4 of indictment.—The entire publication.

These particulars as well as the indictment and exhibits were all before me in court at the time when the defendant was arraigned and when the objections were taken, and all three could and would have been produced to the defendant or his counsel on request. The indictment had been sent up in the usual way. Nothing had occurred to call the attention of the clerk of assize or of the court to the necessity or desirability of dealing with the indictment in any special manner till this objection was taken in court.—Answer: I overruled this objection also and held for the purposes of the day that there had been a sufficient deposit with the indictment of the documents containing the alleged obscene libel together with the particulars to satisfy sect. 7 of the Act of 1888 (51 & 52 Vict. c. 64).

No separate point was taken that the particulars were in themselves insufficient; but I had considered this question and was prepared to hold, and, if the point is open to the defendant under the fifth objection, must be taken to have held, that, inasmuch as every passage in the documents containing the libel was a repetition of the obscene matter, the particulars were sufficient.

While overruling all the above objections I promised to state a case for the opinion of the Court for the Consideration of Crown Cases Reserved, and I state this case accordingly.

The defendant thereupon pleaded "Not guilty" to the remaining (first and third) counts of the indictment.

Counsel for the defendant then formally repeated the objections which had been so overruled, and I again overruled them on the same grounds as before.

The trial then proceeded, and it was proved that the defendant, who was an assistant overseer and held other public offices at Farnley, had published to the men mentioned in the first and third counts of the indictment, who were courting or intending to court the girl mentioned in the indictment, to whom he had been for some years engaged to be married, and to herself copies of the alleged "Diary of the Rejected One" as well as the following printed postcards addressed to her and them and others: "The Barraclough-Woodhead Diary," "The most up-to-date Arabian Nights Entertainment extant at the Reception by John Bull and Co," and that this was done by him in pursuance of a threat that if she did not marry him he would make her a whore.

Counsel for the defendant watched the case to the end, but did not cross-examine any of the witnesses or raise any defence on the merits.

I left the case to the jury to say whether the defendant had published an obscene libel, explaining to them the meaning thereof.

The jury found the defendant guilty, and I sentenced him to a year's imprisonment, but respited the sentence till after the decision of this case, admitting him to bail in the meanwhile.

I desire the opinion of the court whether I was right in refusing to quash the first and third counts of the indictment on any of the grounds above mentioned.

If so, the conviction is to stand; if not, it is to be quashed.

Tindal Atkinson, K.C. and *F. Palmer* for the prisoner.—The indictment is bad. Publishing a defamatory libel is an offence quite distinct from publishing an obscene libel. The publication of a defamatory libel is criminal only because it tends to a breach of the peace, while the publication of an obscene libel is an offence against the morals of the public. These two offences cannot be confused. In a criminal prosecution for defamatory libel there is no question of private injury; in a prosecution for publishing an obscene libel the defendant cannot justify. And the punishment for the offences is different. In this indictment, count 1 is clearly a count for a defamatory libel; there are no words sufficient to charge an obscene libel. The test of obscenity is stated by Cockburn, J. in *Reg.* v. *Hicklin* (L. Rep. 3 Q. B., at p. 371; as *Reg.* v. *Recorder of Wolverhampton*, 18 L. T. Rep. 395; 11 Cox C. C. 19), and the indictment must contain averments which will satisfy this test. That is the form of indictment in Archbold's Criminal Pleading, 23rd edit., p. 1192. It is essential that it should be averred of the libel that its publication tends to debauch public morals. It is not sufficient merely to allege the publication of obscene matter; it must also be alleged that its publication tends to corrupt morals. Intention is not material, and evidence of intention is inadmissible. The publication of obscene matter does not necessarily imply an intention to corrupt morals, for obscene matter may be lawfully published—*e.g.*, in a medical treatise. Then, assuming that this indictment is capable of being construed as an indictment for obscene libel, the procedure prescribed by the Law of Libel Amendment Act 1888 (51 & 52 Vict. c. 64, s. 7) has not been followed. The incriminated writings and particulars should have been deposited with the

indictment; it is not sufficient to refer to documents which are attached to the depositions. If the document is attached, as it should be, to the indictment, it goes before the grand jury, whereas it does not if only attached to the depositions.

Waugh, K.C. and *Compston* for the prosecution. —The indictment is sufficient; it alleges the unlawful publication of obscene matter. Publication of obscene matter may be lawful or unlawful; if unlawful it is criminal. The whole point is, therefore, whether the publication was lawful or unlawful, and unlawful publication is averred in the indictment as the charge which the prisoner has to meet.

Lord ALVERSTONE, C.J.—I have no doubt in this case but that Jelf, J. was placed in a difficulty by the form of the indictment. It would, I think, be far better that an indictment for obscene libel should contain an averment that the libel tends to corrupt morals. But what we have to do is to consider whether the indictment which is now before us is sufficient to support a conviction for the publication of an obscene libel—was there sufficient to permit the counts therein being treated as averring an obscene libel? Counts 2 and 4 were withdrawn, and Jelf, J., after a full argument, held, and in my opinion held rightly, that sufficient was alleged to support a charge of obscene libel. The passages which support Jelf, J. are those which allege that the prisoner "unlawfully and maliciously" published a "wicked, scandalous, false" statement with great damage—and so on. Now, though, as I have already said, it would have been better to have followed the old precedents in drawing the indictment, yet, in my opinion, the indictment as drawn was sufficient. It was argued that Jelf, J. must quash the indictment on the ground that it could only be treated as a defamatory libel. There was a distinct allegation of the unlawful publication of obscene matter, and it was not necessary for the prosecution to negative defences. The defendant had the opportunity of showing that the publication was not unlawful and was not obscene. I think the question may be tested thus: Assuming that the obscene words had been set out with an allegation that the publication was unlawful, could the judge have withdrawn the case from the jury on the ground that there was no averment that the publication tended to corrupt morals? I am of opinion that, though the count was embarrassing in one sense, the judge could not have stopped the case. On the other point I have no doubt. The object of the Law of Libel Amendment Act is to avoid the necessity of setting out the matter alleged to be libellous by making it sufficient to deliver as particulars attached to the indictment the matter which is alleged to be an obscene libel. It is well to remember what is the practice in criminal cases. Documents which are necessary for the case are annexed to the depositions, and are in the custody, first of all, of the clerk to the justices and then of the clerk of assize, and are at the disposal of the grand jury. In this case the documents must have remained with the clerk of assize. The bill of indictment is also deposited with the clerk of assize, and so are the particulars which are delivered in compliance with the Law of Libel Amendment Act, both documents being actually in the custody of the clerk of assize; the statute does not say how the particulars are to be annexed when the documents which are the subject of a criminal prosecution are in the custody of the law. I think that sect. 7 of the statute is complied with.

WILLS, J.—I am of the same opinion.

DARLING, J.—I merely add that it seems to me that, if a thing is properly called obscene and is published, it follows that all things necessary to be pleaded are included in the averment that the thing is published unlawfully. The intent is a necessary implication, and it need not be set out in detail. It would, however, be better to set out all the matters in order to give the prisoner notice of the charge he has to meet, and, as the intention of the publication may be material, the intention should be averred. In *Reg.* v. *Thompson* (64 J. P. 456) the learned Common Serjeant said that the question of the intention with which the book in that case was published was part of the indictment, and he admitted evidence showing the intention. I agree that it is well to draw the indictment in the usual form.

WALTON, J.—I had some doubts during the argument as to the sufficiency of the indictment. The crime involves two propositions: first, that the matter published is obscene; secondly, that the publication was unlawful. In this indictment the words relied on as establishing the offence are "lewd, wicked, scandalous, obscene, false, malicious, and defamatory matters." That alleges that the matter was obscene. It also alleges that the publication was unlawful and malicious. The defendant could under a plea of "Not guilty" set up either that the matter was not obscene, or that the publication was not unlawful.

JELF, J.—I agree with the rest of the court.

Solicitors for the prosecution, *Vincent* and *Vincent*, for *Peckover* and *Scriven*, Leeds.

Solicitors for the prisoner, *Scott*, *Lawson*, and *Palmer*, for *Arthur Willen*, Leeds.

Saturday, Dec. 9, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE, CHANNELL, WALTON, and SUTTON, JJ.)

REX *v.* PAYNE. (*a*)

Criminal law—Felony—Practice—Misdemeanour —Indictment—Receiving stolen goods—Receiver —Goods stolen by married woman—Necessary averment — Larceny Act 1861 — *Married Woman's Property Act* 1882—24 *&* 25 *Vict. c.* 96, *s.* 91; 45 *&* 56 *Vict. c.* 75, *ss.* 12, 16.

Receiving goods stolen by a married woman from her husband is a misdemeanour at common law. Receiving stolen goods is made felony by the Larceny Act 1861 (24 *&* 25 *Vict. c.* 96), *s.* 91, *only when the stealing amounts to a felony either at common law or under that Act. Stealing by a married woman from her husband, being larceny only because of the provision in the Married Women's Property Act* 1882 (45 *&* 46 *Vict. c.* 75), *ss.* 12 *and* 16, *is not a stealing which makes the receiver indictable for felony under the Larceny Act* 1861. *An indictment which charges receiving*

(*a*) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

goods stolen by a married women from her husband as a misdemeanour is therefore good.

Semble, *an indictment charging this offence should aver that the goods were stolen by a married woman from her husband.*

CASE stated by the Common Serjeant of the City of London as follows:—

William Payne was tried before me at the November session of the Central Criminal Court on an indictment of which the following is a copy:

Central Criminal Court to wit.

The jurors for our Lord the King upon their oath present that William Payne, on the sixth day of August, in the year of our Lord one thousand nine hundred and five, at the parish of All Saints, Poplar, in the county of London and within the jurisdiction of the said court, certain money, to wit, 86*l.* of the moneys of John William Price before them feloniously stolen taken and carried away, unlawfully did receive and have he the said William Payne then well knowing the said moneys to have been feloniously stolen, taken, and carried away against the peace of our Lord the King, his crown and dignity.

It was proved that the money was stolen by Caroline Price, and that she was the wife of John William Price. There was evidence that William Payne received the money so stolen knowing both that Caroline Price was the wife of John William Price and that she had stolen the money from him.

Before the trial of William Payne, Caroline Price pleaded guilty to stealing the money from her husband.

It was contended by counsel for the prisoner (1) that the indictment was bad in law as alleging the receipt of money stolen by a common law larceny, which is by statute a felony, and charging such receiving as a misdemeanour; (2) that the facts proved did not support the indictment, as it did not state that the goods were stolen by a wife from her husband; (3) that the receipt of goods with knowledge that they were stolen by a wife from her husband was not a misdemeanour.

The prisoner was found guilty. I postponed sentence, reserving the following questions for the consideration of the Court for Crown Cases Reserved: (1) Is the indictment bad after verdict? (2) Do the facts proved support the indictment? (3) Is the receipt of goods with knowledge that they have been stolen by a wife from her husband a misdemeanour?

The prisoner was committed to prison pending the decision of the court.

Huntley Jenkins for the prisoner.—The indictment is bad because it indicts the prisoner for a misdemeanour. Receiving stolen goods is made felony by the Larceny Act 1881 when the stealing is a felony. The effect of the Married Women's Property Act 1882 (45 & 46 Vict. c. 75), ss. 12-16, is to make a married woman who steals her husband's goods guilty of larceny, which is felony. The receiving such goods is, therefore, felony because of the provision in sect. 91 of the Larceny Act 1881. *Reg.* v. *Streeter* (83 L. T. Rep. 288; 19 Cox C. C. 570; (1900) 2 Q. B. 601) was wrongly decided. The indictment is also bad, assuming that the receiving is misdemeanour, because it does not aver that the goods were stolen by a married woman from her husband. He referred also to

R. v. *Cross*, 1 Ld. Raym. 711;
Foster's Crown Law, p. 373.

The Crown was not represented.

Lord ALVERSTONE, C.J.—In our judgment this conviction must be affirmed. Mr. Jenkins has contended that the offence amounted to felony, and that, the indictment being for misdemeanour, the prisoner could not be convicted of felony. If he could show that the offence was felony, his contention would be good. But it seems to me that we cannot so hold in the face of the decisions of *Reg.* v. *Smith* (22 L. T. Rep. 554; 11 Cox C. C. 511; L. Rep. 1 C. C. R. 266) and *Reg.* v. *Streeter* (83 L. T. Rep. 288; 19 Cox C. C. 570; (1900) 2 Q. B. 601). In *Reg.* v. *Smith* it was held that a person could not be convicted of receiving stolen goods where the original misappropriation of the goods did not amount to larceny either at common law or the Larceny Act. That case having been decided in 1870, the point was again considered in *Reg.* v. *Streeter*, the principle of which is correctly stated in the headnote. In his judgment Mathew, J. refers to *Reg.* v. *Smith* and to sect. 91 of the Larceny Act, and says that the judgment of the court must be the same as in the case of *Reg.* v. *Smith*. Wright, J. is reported as saying: "But in future cases it seems that there might be an indictment for receiving at common law." The learned judge must have meant an indictment for misdemeanour. Now, Mr. Jenkins has not been able to show that any other indictment for felony could be brought against the prisoner, and we cannot give effect to this argument without overruling *Reg.* v. *Smith* and *Reg.* v. *Streeter*. But, if he had succeeded in so doing, the principle of *Rex* v. *Cross* (1 Ld. Raym. 711) would have applied. Then, as to the second point, that is the same in principle. *Rex* v. *James* (86 L. T. Rep. 202; 20 Cox C. C. 156) is an authority against Mr. Jenkins' contention that, in order to support an indictment for larceny against a married woman, there should be averments in the indictment showing that the stealing was not an offence at common law or under the Larceny Act. On both points, therefore, I think that the conviction must be affirmed.

LAWRANCE, J.—I agree.

CHANNELL, J.—I think that there is some doubt as to the second point, but I think that *Rex* v. *James* does cover it. I only suggest that in drawing indictments in the future the point should be kept in mind.

WALTON and SUTTON, JJ. concurred.

Conviction affirmed.

Solicitor: *Cyril Renton.*

Supreme Court of Judicature

COURT OF APPEAL.

Tuesday, Feb. 27, 1906.

(Before ROMER and COZENS-HARDY, L.JJ.)

LAW *v.* LLEWELLYN. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Slander—Magistrate—Words uttered at judicial proceedings, but after withdrawal of case—Defamatory statement — Privilege—Cause of action.

A magistrate is a judge within the meaning of the rule that the defamatory observations made by a judge in the course of his judicial duties are not actionable, even though made without reasonable or probable cause and maliciously.

Munster *v.* Lamb (49 *L. T. Rep.* 252; 11 *Q. B. Div.* 588) *and* Hodson *v.* Pare (80 *L. T. Rep.* 13; (1899) 1 *Q. B.* 455) *considered and applied.*

Allardice *v.* Robertson (1 *Dow. & Cl.* 495) *distinguished.*

Where, therefore, a magistrate, in acceding to the application of a prosecutor to be permitted to withdraw a criminal charge, made certain defamatory observations concerning him, it was held that the observations were privileged, and that it made no difference whether they were spoken before or after leave to withdraw was given.

Decision of Channell, J. affirmed.

On the 30th Jan. 1905 two persons obtained from the plaintiff a sum of 10*l.* by way of loan (on a promissory note to pay 12*l.* 10*s.* in three months) on the faith of certain statements which the plaintiff alleged were subsequently found to be false.

The loan not having been repaid, the plaintiff took proceedings against the debtors in the County Court.

In the course of these proceedings the plaintiff, as he alleged, discovered that the loan had been obtained from him fraudulently.

The plaintiff thereupon swore an information at the county police-court, and caused summonses to be issued against the debtors to answer a charge of obtaining the loan by false pretences.

Before the hearing of the summonses took place the amount of the plaintiff's claim in the County Court proceedings was satisfied.

Thereupon the plaintiff, being advised that in the absence of certain witnesses it would be impossible to obtain a conviction against the debtors, decided that he would not proceed further with the prosecution of them, and at the adjourned hearing of the summonses he instructed counsel to ask the magistrates that the charge might be withdrawn upon certain terms as to costs.

The matter was accordingly mentioned to the court by the plaintiff's counsel, and leave was given for the charge to be withdrawn.

After such leave had been given, however, the defendant, a justice of the peace, who was sitting as chairman of the justices, said that in their opinion this criminal charge had been a "gross attempt to blackmail"; that "it would have been well if the matter had come before the public prosecutor"; and that from what they had heard of the plaintiff "he had been in the habit of trying to extort money from persons by illegal means."

The plaintiff then commenced an action in the King's Bench Division against the defendant, alleging by his statement of claim that the defendant meant, and intended to mean, that the plaintiff was a blackmailer, and had brought an unfounded criminal charge against the debtors; and that he had been and was guilty of having committed some criminal offence or offences; and he further alleged that by reason of the same defamatory matter he had been and was greatly injured in his character and reputation and had suffered damage; and he claimed damages accordingly.

The defendant applied to have the statement of claim struck out on the ground that it disclosed no reasonable cause of action, the point taken before the master being that the defendant, sitting as a magistrate, was absolutely privileged, and that, therefore, no action would lie against him: (*Munster* v. *Lamb*, 49 L. T. Rep. 252; 11 Q. B. Div. 588.)

The master was of opinion that there was a question to be tried as to whether the defendant could set up the plea of privilege under all the circumstances, and therefore made no order, but without prejudice to the right of the defendant to set up the point of law in his defence.

The defendant then appealed to the judge in chambers (Channell, J.), who was of opinion that no action would lie, but gave the plaintiff leave to appeal.

The plaintiff accordingly now appealed to the Court of Appeal.

S. T. Evans, K.C. and *Montague Lush*, K.C. (with them *Lewis Thomas* and *Harold Stowe*), for the appellant, contended that the respondent could not claim privilege for the defamatory statement which he had made concerning the appellant, first, because the same was not relevant or pertinent to the question before the justices; and, secondly, because there was no matter before the justices, no facts relating to the case having been mentioned to them, and the mere application to the justices for leave to withdraw the prosecution would not constitute the case being "before the court"; that therefore the respondent could have formed no opinion on the matter to justify him in making the observations he did; and, further, that permission had already been given for the charge to be withdrawn before the words complained of were uttered. They relied upon

Allardice v. *Robertson*, 1 Dow. & Cl. 495.

They referred also to

Seaman v. *Netherclift*, 35 L. T. Rep. 784; 2 C. P. Div. 53;

Scott v. *Stansfield*, 18 L. T. Rep. 572; L. Rep. 3 Ex. 220;

Hodgson v. *Scarlett*, 1 B & Ald. 232;

Munster v. *Lamb*, 49 L. T. Rep. 252; 11 Q. B. Div. 588;

Hodson v. *Pare*, 80 L. T. Rep. 13; (1899) 1 Q. B. 455.

Eldon Bankes, K.C. and *Hugh Fraser*, for the respondent, were not called upon to argue.

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law

ROMER, L.J.—In my opinion this appeal fails. In opening the appeal Mr. S. T. Evans said—and in my opinion said rightly—that it was hopeless to contend at the present day that a justice of the peace sitting in petty sessions to dispose of a criminal case which came before him was not acting judicially; and that, consequently, a defamatory statement made in the course of the proceedings before him could not be actionable as against that justice. That was, to my mind, clearly settled beyond controversy at the present day by the two cases of *Munster* v. *Lamb* (49 L. T. Rep. 252; 11 Q. B. Div. 588) and *Hodson* v. *Pare* (80 L. T. Rep. 13; (1899) 1 Q. B. 455). They are both to the same effect, and show that a magistrate is a judge within the meaning of the rule, that observations made by a judge in the course of his judicial duties when sitting as a judge are not actionable, even though it is alleged or suggested that the observations were made without reasonable or probable cause and maliciously. Mr. S. T. Evans' junior (Mr. Montague Lush) boldly attempted to reargue that question, and he did so by reference to a decision of *Allardice* v. *Robertson* (1 Dow. & Cl. 495). With reference to that case, all I need say is this: Whether it be law in Scotland at the present time or not, I cannot say; but certainly it is a case dealing with Scotch law, and is not binding upon this court, and is no authority for the proposition for the purpose of which Mr. Lush cited it. It is not an authority against the law as I have stated it, and as illustrated by the cases to which I at first referred. It is said that the case of *Allardice* v. *Robertson* (*ubi sup.*) was referred to without disapproval by Lord Cockburn, C.J. in the case of *Seaman* v. *Netherclift* (35 L. T. Rep. 784; 2 C. P. Div. 53). All I need say with regard to that is, that, if reference is made to that case, it will be observed that the Lord Chief Justice was not referring to that case for the purpose of approving it, or anything of the sort. It was a case that had been cited to him, and what he said with reference to that case was that it was not an authority precisely for the case which he had to decide then. And that clearly was so. Of course, it formed in nowise a recognition by the Lord Chief Justice that *Allardice* v. *Robertson* (*ubi sup.*) was an authority in the English courts for the point of law which it purports to decide. That being so, so far as the law is concerned it is clear that this action against the defendant will not lie, if it be that the observations which are said to have been made by the defendant, and which are said to have been slanderous and malicious, were uttered by him in the course of his duty as magistrate. To my mind, they clearly were uttered under such circumstances as made them privileged. The circumstances are stated in the statement of claim, and shortly they amount to this: The plaintiff had brought a criminal charge against two persons, and when that charge came before the defendant, sitting, as he did, as a justice of the peace in sessions, the plaintiff then stated that he had withdrawn the charge and agreed to pay the costs of the solicitors of the persons against whom the charge had been made, upon their undertaking to bring no action against the plaintiff in respect of the proceedings, which he had instituted. Being a criminal charge, it could not have been withdrawn as a matter of course. Under the circumstances it was clearly impossible for the magistrates to insist upon the charge not being withdrawn—it would have done no good, especially as the magistrates were of opinion that there was no real crime committed by the persons in respect of whom the charge had been made. Under those circumstances he had to state why, in his opinion, nothing could be done except to allow the charge to be withdrawn, and it was upon that he made the observations which are said to be libellous. In my opinion it was clearly within his jurisdiction at that time to have made observations with regard to an impending summons. They were observations made, therefore, in the course of his judicial duty, and consequently are not actionable. In those circumstances it seems to me that this action is clearly frivolous and vexatious. As I have stated, the law is clear, and the statements in the statement of claim are clear, and, that being so, it appears to me that the learned judge below rightly discharged his duty in striking out the statement of claim as being frivolous and vexatious. I am of opinion that his decision was right, and that the appeal should be dismissed with costs.

COZENS-HARDY, L.J.—I agree.

S. T. Evans, K.C.—Your Lordships have dealt with this case upon the assumption, which must, of course, be taken from the statement of claim, that it was in the course of the proceedings that the words complained of were uttered. Putting, however, this supposititious state of facts: Supposing the magistrate had said, "We will allow this case to be withdrawn," and then went on and added the defamatory words, then, I submit, the words would not have been spoken "in the course of the proceedings"; and that, at any rate, that is a matter which ought to be determined. I ask, therefore, this court to allow the plaintiff to have leave to amend, so that he need not go back to the master or the judge in chambers for that purpose.

COZENS-HARDY, L.J.—It makes no difference whether the magistrate said at first, "We will allow this case to be withdrawn" and then uttered the words complained of, or whether he said, "In our opinion the facts are so-and-so, and therefore the charge should be withdrawn."

ROMER, L.J.—It makes no difference whatever. The observations are made in the course of one transaction. We refuse leave to amend, and we dismiss the appeal with costs.

Appeal dismissed.

Solicitor for the appellant, *Herbert G. Rastall*, agent for *A. Jestyn Jeffreys*, Neath.

Solicitors for the respondent, *Bell, Brodrick*, and *Gray*, agents for *T. J. Hughes* and *Lewis*, Bridgend.

HIGH COURT OF JUSTICE

CHANCERY DIVISION.

Jan. 29, 30, 31, *and Feb.* 7, 1906.

(Before BUCKLEY, J.)

DENMAN AND CO. LIMITED *v.* WESTMINSTER CORPORATION.

CORDING AND CO. LIMITED *v.* SAME. (*a*)

*Metropolis—Street widening—Compulsory powers—House—Adjudication to take whole—Part to be thrown into street—Prior agreement to sell surplus land subject to rights of pre-emption—*Bona fides—*Michael Angelo Taylor's Act* 1817 (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 96.

The London County Council, being desirous of widening P. and having no compulsory powers for that purpose, entered into certain agreements whereby it was agreed that the local authority should (if necessary) put in force their compulsory powers under Michael Angelo Taylor's Act, and that an hotel company should pay all compensation, costs, and expenses consequent upon the exercise of those powers in return for the assignment to them by the London County Council of the surplus back lands.

The London County Council sent a formal resolution to the local authority which they desired to have passed, and the local authority passed that resolution in exactly the form submitted.

The plaintiffs were lessees and sub-lessees respectively of a house in P., and were served with notices to treat for the whole of their interests in the premises.

In an action by the plaintiffs asking for an injunction to restrain the defendants from proceeding under the notices to treat, it was alleged that the notice to treat was in fact given at the request of the London County Council; that a certain portion only of the premises was required for the widening; and that it was intended to assign the residue to a company for the purposes of building an hotel thereon.

The plaintiffs also alleged that the reduced depth would allow of premises suitable for their business, and that they desired to retain it and the portion of the building that would be left after the front had been thrown into the roadway.

Held, having regard to the fact that the owner desired and was willing to do what was necessary to make that which remained an effectual house, that the local authority were not entitled to take more than was wanted for the widening of the street, and that the 30ft. depth which would remain after the widening was a building which ought to be left as a house.

Teuliere *v.* St. Mary Abbotts, Kensington (1885, 53 *L. T. Rep.* 422; 30 *Ch. Div.* 642) *and* Aldis *v.* London Corporation (80 *L. T. Rep.* 683; (1899) 2 *Ch.* 169) *followed.*

Held, also, that the defendants did not bonâ fide *adjudicate upon the matter, and that their adjudication was not binding.*

Gard *v.* Commissioners of Sewers of the City of London (1885, 52 *L. T. Rep.* 827; 28 *Ch. Div.* 486) *and* Lynch *v.* Commissioners of Sewers of the City of London (1886, 54 *L. T. Rep.* 699; 32 *Ch. Div.* 72) *followed.*

Pescod *v.* Westminster Corporation (93 *L. T. Rep.* 160; (1905) 2 *Ch.* 475) *distinguished.*

(*a*) Reported by W. HUNTER BOND, Esq., Barrister-at-Law.

WITNESS ACTION.

These were two actions brought by different plaintiffs occupying the same house against the Westminster Corporation for an injunction to restrain the defendants from proceeding under notices to treat under Michael Angelo Taylor's Act.

The plaintiffs in the first action, Denman and Co. Limited, were wine merchants carrying on business in Piccadilly, and were the Crown lessees of Denman House, Nos. 19 and 20, Piccadilly, and No 3, Air-street, under a lease, dated the 9th Nov. 1903, for a term of seventy-nine years, at a rent of 950*l.* per annum.

The plaintiffs in the second action, Cording and Co. Limited, were sub-lessees of Denman and Co., and carried on the business of waterproof manufacturers in part of Denman House.

The premises consisted of (1) a basement, which was occupied as to the western part by Denman and Co., and as to the eastern part by Cording and Co.; (2) two shops on the ground floor, the western shop being occupied by Denman and Co, and the eastern shop by Cording and Co.; (3) a mezzanine floor, the whole of which was occupied by Cording and Co.

The remainder of the house was either in the possession of Denman and Co. or under their control.

In 1903 the London County Council were desirous of widening Piccadilly, but, as they had no compulsory powers for this purpose, the following agreements were entered into:

By an agreement dated the 26th Oct. 1903, and made between the King of the first part, the Commissioners of Woods in charge of the land revenue of the Crown in London of the second part, and the London County Council of the third part, reciting that the London County Council proposed to widen Piccadilly, and for that purpose desired to acquire (*inter alia*) a strip of land, the property of the King, on the north side of Piccadilly, lying between Piccadilly-place and Air-street, it was agreed that:

(1) The London County Council should pay the King 80,000*l.* for that strip. (2) As and when the commissioner should obtain vacant possession of the strip he should give notice to the London County Council stating that the agreement could be carried out *quoad* the strip. (3) In any case in which in the commissioner's opinion it should be necessary or desirable the London County Council would co-operate in the compulsory acquisition of any interests that it might be found necessary or expedient to acquire by the exercise of compulsory powers, and for that purpose would, if required by the commissioner, arrange with the Westminster Corporation to put in force the powers of Michael Angelo Taylor's Act, on the funds necessary for the compulsory acquisition of such interests, including costs, being first deposited with the London County Council or secured to their satisfaction. (6) On payment of the consideration, and on possession being given, the London County Council would add the strip to Piccadilly, but the strip would not be conveyed to them, but should remain vested in the King.

By an agreement dated the 4th March 1904, and made between the King of the first part, the commissioner of the second part, and the P. and R. Syndicate Limited of the third part, it

was agreed that: (1) The syndicate should determine, cause, and procure certain Crown leases then vested in the syndicate to be surrendered to the King as from the 10th Oct. 1903 free from underleases and under-tenancies, and, as regards the lease of Nos. 19 and 20, Piccadilly, should before the 1st Oct. 1904 provide the purchase money, compensation, and costs for the compulsory acquisition by the London County Council or the Westminster Corporation of that portion of the site of Nos. 19 and 20, Piccadilly, coloured light red on the plan (the strip required for the widening), and forthwith procure the surrender of so much of the lease as related to such portion; but if the syndicate acquired the latter Crown lease by agreement they would cause and procure its entire surrender as aforesaid. (2) On the completion of the surrenders of the Crown leases or so much thereof as related to the strip as provided in clause 1, and the removal of the buildings from (*inter alia*) the strip as thereinafter provided, the commissioner would carry out the arrangement already made between him and the London County Council for adding the strip to Piccadilly, and the syndicate would make no claim in respect of their interest therein. (11) The syndicate should pull down certain buildings on the strip and on the land in the rear thereof. (12) The syndicate should erect a high-class hotel, with shops on the ground floor, on the land in the rear of the strip, and as and when they should obtain possession of the premises Nos. 19 and 20, Piccadilly, and No. 3, Air-street, coloured dark red on the plan (the portion of the plaintiffs' premises not required for the widening), should immediately pull down the building then existing and build upon it new buildings to be incorporated and used as part of the hotel. (18) As soon as the new buildings were erected the commissioner would grant the syndicate a ninety years' lease thereof from the 10th Oct. 1903, subject to but with the benefit of the leases of Nos. 19 and 20, Piccadilly, and No. 3, Air-street, if such leases were then in existence.

By an agreement dated the 1st June 1904, and made between the syndicate of the one part and the London County Council of the other part, reciting the agreements of the 26th Oct. 1903 and the 4th March 1904, and reciting that the syndicate had acquired all the Crown leases and other interests in the strip and the rear thereof, except certain unacquired Crown leases and interests, including Nos. 19 and 20, Piccadilly, and No. 3, Air-street, and reciting that the London County Council had entered into the agreement of the 26th Oct. 1903 with a view to widening Piccadilly after negotiations and arrangements with the syndicate, and upon the faith that the syndicate would enter into the present agreement, it was agreed that: (1) The syndicate would surrender their leasehold interests in the strip to the commissioner so as to merge them, and would use their best endeavours to acquire, either by agreement or in manner provided by clause 2, before a certain date the unacquired interests, and would surrender the unacquired interests to the commissioner, so as to merge them, in order that possession of the strip might be given to the London County Council pursuant to the agreement of the 26th Oct. 1903. (2) If the syndicate were unable to acquire the unacquired interests by agreement the London County Council would at their request arrange with the Westminster Corporation to enforce their compulsory powers, the syndicate first depositing 70,000*l.* with the London County Council or securing it to their satisfaction. (3) The London County Council would procure the surrender to the commissioner of the unacquired interests in the strip when acquired; and, in the event of the London County Council or the Westminster Corporation acquiring any unacquired interests beyond the strip, they would assign the same to the syndicate, subject to the owner's right of pre-emption under sect. 96 of Michael Angelo Taylor's Act. Moneys payable by the owner on pre-emption should belong to the syndicate. (4) So soon as all the unacquired interests were acquired by the syndicate or the London County Council or the Westminster Corporation, the syndicate would within twelve calendar months demolish and clear away all the existing buildings upon the strip down to the level of the pavement in front thereof (possession of so much of the strip as should have been acquired by the London County Council or the Westminster Corporation being given to the syndicate for that purpose), in order that the Crown might give the London County Council possession of the strip free from buildings. (5) The syndicate would pay all purchase money, compensation, or costs payable by the London County Council or the Westminster Corporation in consequence of the exercise of the compulsory powers, and all costs and expenses thereby occasioned, and would indemnify the London County Council and the Westminster Corporation against all claims, demands, actions, suits, proceedings, liability, costs, damages, and expenses arising from the exercise or attempted exercise of their compulsory powers.

By an agreement dated the 11th July 1904, and made between the London County Council of the one part and the Westminster Corporation of the other part, reciting that both parties were desirous of widening Piccadilly and of acquiring a sufficient easement over the strip for this purpose, and reciting the agreements of the 26th Oct. 1903 and the 1st June 1904, it was agreed that: (1) The Westminster Corporation would repay to the London County Council (*inter alia*) one-fifth of the 80,000*l.* purchase money for the easement over the strip. (2) The Westminster Corporation would, at the request of the London County Council, co-operate in the compulsory acquisition of any interest that it might be found necessary or expedient to acquire in the strip. (3) The Westminster Corporation would, at the like request, put in force their compulsory powers for the acquisition of the unacquired interests of the syndicate, or any such interests, or any part thereof, and would deal with them in accordance with the agreement of the 1st June 1904. (4) The London County Council would pay all purchase moneys, compensation, or costs payable by the Westminster Corporation in consequence of the exercise of the compulsory powers, and the costs and expenses thereby occasioned, and would indemnify the Westminster Corporation against all claims, demands, actions, suits, proceedings, liability, costs, damages, and expenses arising from the exercise or attempted exercise of their compulsory powers.

By an agreement dated the 6th June 1905, and made between the Piccadilly Hotel Limited (thereinafter called the hotel company) of the one part and the London County Council of the other part, being supplemental to the agreement of the 1st June 1904, after reciting that the agreement of the 1st June 1904 and the leasehold interests of the syndicate had been assigned to the hotel company, who had requested the London County Council to arrange with the Westminster Corporation to put in force such powers as they possessed under Michael Angelo Taylor's Act for the acquisition (*inter alia*) of the unacquired interest in Nos. 19 and 20, Piccadilly, or any part thereof, it was agreed that, subject to the hotel company depositing or securing 70,000*l.* in accordance with the agreement of the 1st June 1904, that agreement should be binding on the London County Council and the hotel company in the same way as if the hotel company had been party thereto instead of the syndicate, and these presents should constitute an agreement between the hotel company and the London County Council on the terms of that agreement, and, in addition to the obligations imposed by clause 5 thereof, the hotel company would provide all purchase money and compensation to be paid or to be lodged in court in respect of interests to be acquired, and the words "and expenses" in clause 5 should include (*inter alia*) all costs and expenses incurred by the London County Council or the Westminster Corporation incident to the settling and serving notices to treat, negotiations (whether abortive or not) following thereon, payments into court, applications for investment or payment out, surveyors' charges, references to arbitration for determining purchase money and compensation, investigation of title, conveyances, and deeds to which either the London County Council or the Westminster Corporation was a party, and all costs, charges, and expenses which either of them had to pay any owner, occupier, or other person consequent upon any notice to treat, or in connection with the acquisition of the unacquired interests.

Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.) provides:

Sect. 80. It shall and may be lawful to and for the commissioners or trustees or other persons having the control of the pavements of any parochial or other district from time to time and at all times hereafter to . . . widen any of the streets . . . within any parochial or other district; . . . and if any houses, walls, buildings, lands, tenements, and hereditaments, or any part thereof, shall be adjudged by the said commissioners or trustees or other persons as aforesaid to project into, obstruct, or prevent them from so . . . widening the said streets . . . and that the possession, occupation, and purchase of such houses, walls, buildings, lands, and hereditaments . . . for the purposes aforesaid, and to pay for the same such sum or sums of money as shall be agreed upon by the said commissioners, &c., and the owner or owners, occupier or occupiers thereof . . . and to pull down, use, sell, or dispose of such houses, walls, and buildings and the materials thereof, and buy the sites thereof, and also all such other lands, tenements, or hereditaments, or so much thereof as the said commissioners or, &c., shall think proper into the said streets.

Sect. 96. It shall and may be lawful to and for the said commissioners or trustees or other persons as aforesaid from time to time absolutely to sell and dispose of all or any of the freehold or leasehold estates, land, houses, hereditaments, and premises which shall hereafter be conveyed to them in pursuance of this Act or otherwise; provided the said freehold or leasehold estates, &c., so purchased are first offered for sale to the respective person or persons of or from whom the premises respectively were purchased by or on behalf of the said commissioners, &c.; and if such person or persons respectively shall not then and thereupon agree . . . or shall refuse . . . to purchase the same respectively, an affidavit shall be made and sworn . . . by some person or persons uninterested in the said freehold or leasehold estates, &c., stating that such offer was made by or on behalf of the said commissioners, &c., and that such offer was not then and thereupon agreed to or was refused . . . and that such affidavit shall in all courts whatsoever be sufficient evidence and proof that such offer was made and was not agreed to . . . and in case such person or persons shall be desirous of repurchasing the same, and he, she, or they and the said commissioners, &c., shall differ and not agree with respect to the price thereof then the price or prices thereof shall be ascertained by a jury . . . ; and the money to arise by the sale or sales which may be made by the said commissioners, &c., of such freehold or leasehold estates, &c, shall be applied by the said commissioners, &c., to the purposes of the local Act or Acts of Parliament relating to the parochial or other division over the pavements whereof they shall possess a control, or to the purposes of this Act.

The further facts are fully set out in the judgment.

Sir *Robert Finlay*, K.C. and *R. J. Parker* for Denman and Co. Limited.—There are three grounds for attacking the notice to treat. First, there is nothing to show that the land mentioned in the notice is necessary for the widening of Piccadilly; secondly, the notice to treat is bad because the 27ft. that is wanted for the widening would not interfere with the house as a house; and thirdly, the notice to treat is also bad because the London County Council got the city council to put in force their powers under Michael Angelo Taylor's Act, and the Act was invoked for a purpose for which it was not intended. By the agreement of the 1st June 1904 it is provided that, if the city council exercise their powers under Michael Angelo Taylor's Act, the syndicate, and not the London County Council, shall provide the compensation payable in consequence of the exercise of these powers, and the London County Council shall hand over the land thus acquired, and which is not required for the widening, to the syndicate for the purposes of their hotel. The adjudication was sent to the city council and passed by them in exactly the form submitted by the London County Council and was not a proper adjudication, and, with regard to the back part of the plaintiffs' premises, was for an ulterior motive, and not for the purpose of the widening. In *Thomas* v. *Daw* (1866, 15 L. T. Rep. 200; L. Rep. 2 Ch. 1) Lord Chelmsford, affirming the decision of Kindersley, V.C., held that the commissioners were not entitled without the plaintiff's consent to take the whole of his land. The city council have no power to adjudicate that the possession of the whole piece of land is necessary for the purpose of the improvement when they only intend to use a small part of it for that purpose:

Gard v. *Commissioners of Sewers of the City of London*, 1885, 52 L. T. Rep. 827; 28 Ch. Div. 486;

Lynch v. *Commissioners of Sewers of the City of London*, 1886, 54 L. T. Rep. 699; 32 Ch. Div. 72.

If the landowner desires to retain part of his house, the local authority cannot insist on taking the whole unless the remainder would be useless to him:

Teuliere v. *Vestry of St. Mary Abbotts, Kensington*, 1885, 53 L. T. Rep. 422; 30 Ch. Div. 642.

This is so even though the removal of the part actually required would destroy the identity of the house as a house:

Aldis v. *London Corporation*, 80 L. T. Rep. 683; (1899) 2 Ch. 169.

Sects. 80 and 82 of the Act give the local authority power to purchase and take compulsorily part only of a house or building where the facts establish that such a taking will not involve a substantial alteration in the character and condition thereof, but they may be compelled by the owner to take the whole if what remains can no longer be occupied as the kind of building it was before:

Gordon v. *Vestry of St. Mary Abbotts, Kensington*, 71 L. T. Rep. 196; (1894) 2 Q. B. 742;
Gibbon v. *Vestry of the Parish of Paddington*, 83 L. T. Rep. 136; (1900) 2 Ch. 794.

The evidence shows that there is no architectural difficulty in taking down the south side of the house, and that what remains will be quite sufficient for the plaintiff to carry on his business. They also referred to

Parry v. *Metropolitan Borough of Hammersmith*, 1904, 21 Times L. Rep. 56.

Buckmaster, K.C. and *T. T. Methold* for the defendants.—The building which would be left, after the portion which is required for the widening was taken off, would not be a house and would not be suitable for any trade. Where it is necessary under Michael Angelo Taylor's Act to take more land than is actually wanted for the improvement, the local authority is authorised to make agreements as regards the disposal of surplus lands:

Pescod v. *Westminster Corporation*, 93 L. T. Rep. 160; (1905) 2 Ch. 475.

I submit that there can be no distinction between the powers of the London County Council or the city council in the case where the owner wants to sell part only and where he wants to sell the whole:

Teuliere v. *Vestry of St. Mary Abbotts, Kensington*, 1885, 53 L. T. Rep. 422; 30 Ch. Div. 642;
Thomas v. *Daw*, 1866, 15 L. T. Rep. 200; L. Rep. 2 Ch. 1.

The question of what the owner is willing to do cannot affect the Act. There would be no finality if you left it in the hands of the person on whom you serve the notice to treat to say whether you are to take the whole or only part. All the tenants must be served with a notice to treat, and in this case you might have two or three different opinions as to how much ought to be taken. As a matter of dictum it was laid down in *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (71 L. T. Rep. 196; (1894) 2 Q. B. 742) that a house is *primâ facie* a unit incapable of division, and that the vestry could take part of the house only when that part was separable from the house so that it could be removed without destroying the house as a house. I submit it is impossible in this case to make the improvement without taking the whole of the house. They also referred to

Thompson v. *Hammersmith Corporation*, 94 L. T. Rep. 135; (1906) 1 Ch. 299.

Sir *Robert Finlay*, K.C. in reply.—In this case there was no proper adjudication. The city council never did adjudicate; the London County Council sent them the form of adjudication and the city council passed it. I submit that that was not an adjudication. The question as to the agreements and the adjudication was not argued in *Pescod* v. *Westminster Corporation* (93 L. T. Rep. 160; (1905) 2 Ch. 475), and there is only a slight reference to them in the judgment.

BUCKLEY, J.—I will take the case of *Cording and Co. Limited* v. *Westminster Corporation* now, and will give judgment in both actions at the same time.

Gore-Browne, K.C. and *Ashton Cross* for Cording and Co. Limited.—I adopt the argument of the plaintiffs in the last case. As to the adjudication, it was bad because one of the body who sat on the improvement committee and adjudicated was a party interested, and the presence of a person having a bias is sufficient to vitiate the proceedings:

Reg. v. *London County Council*, 66 L. T. Rep. 168; (1892) 1 Q. B. 190.

In a case where the building was occupied by two or three different persons, and the freeholder said take the whole and the leaseholders wanted to retain part, I submit there would be no difficulty, as the local authority would become the freeholder in reversion subject to the lease.

Buckmaster, K.C. and *T. T. Methold* for the defendants.—The fee simple here is in the Crown, and we cannot serve the Crown with a notice to treat. If the plaintiffs' contention is right, that will prevent me getting any interest in the house, and from carrying out my improvements. [BUCKLEY, J.—Could they purchase the interest of some and not of others, and then leave the house standing?] I submit not, because they can only acquire the house for the purpose of widening.

Gore-Browne, K.C. in reply.

T. H. Attwater held a watching brief for the hotel company.

Cur. adv. vult.

Feb. 7.—BUCKLEY, J. read the following judgment:—On the north side of Piccadilly, a short distance west of Piccadilly-circus, is a block of land bounded by Piccadilly, Air-street, Regent-street, and Piccadilly-place. The freehold is in the Crown. The plaintiffs in the first action, Denman and Co. Limited, are the Crown lessees of Denman House, Nos. 19 and 20, Piccadilly, which stands at the south-east corner of this block, with a frontage of 44ft. 6in. to Piccadilly and a depth of about 57ft. up to Air-street. Denman House is an important building, which was erected by the plaintiffs, Denman and Co., two or three years ago under a building agreement with the Crown at a cost of 25,000*l.* The lease is dated the 9th Nov. 1903, at a rent of 950*l.* a year, and their term extends to the 10th Oct. 1982. Denman and Co. occupy the shop in the western half of Denman House and some other part of the premises. The plaintiffs

in the second action, Cording and Co. Limited are under-lessees of Denman, and occupy the shop in the eastern half of the house and some portion of the basement and the whole of the mezzanine floor. They pay a rent of 1200*l.* a year. Their tenure is for seventy-nine years less one day from the 10th Oct. 1903 as to the principal part, and for twenty-one years from the 10th Oct. 1903 as to the rest of their portion of the premises. Both plaintiffs have carried on business upon this site for many years past—Denman for more than fifty years and Cording for more than thirty years. The premises are of great importance to them by reason of the fact that the site is for their purposes one of the best in London, and that they have long carried on business there. The London County Council and the defendants, the city of Westminster, have in contemplation a public improvement—namely, the widening of Piccadilly, by throwing into the street a strip which, at the eastern end of Denman House, will be of a width not exceeding (as near as may be) 27ft., and which may be not more than 25ft., diminishing towards the western end of the house. There is no question but that the defendants are entitled to use their powers under Michael Angelo Taylor's Act for the purpose of acquiring such land as is necessary for this purpose. On the 10th June 1905 the defendants served upon Denman and Co. and on the 26th June on Cording ane Co. notices to treat for their interests in the whols of Denman House. The question in these actione is whether these notices are valid. Thesa are also sub-lessees under Denman and Co. of some other portions of Denman House. No notice to treat has yet been served upon them. They hold for short terms, and Denman and Co. state that they are in a position to control them all. The St. James' Hall and Restaurant occupied a large part of the block in question. By their demolition and the demolition of the bulk of the surrounding buildings an opportunity has been afforded of erecting a large block of new property. The ground is now in process of being cleared. A syndicate was formed, and their successors, the Piccadilly Hotel Company Limited, are desirous of erecting upon the whole block of land a large hotel, and they hold an agreement from the Crown for a lease of the whole block, but subject, as regards Denman House, to Denman's existing lease of the 9th Nov. 1903. The hotel company are desirous of obtaining possession of Denman House, pulling it down, and extending their hotel over so much of its site as is not thrown into the widening of Piccadilly. The plaintiffs in the actions, on the other hand, are desirous of retaining so much of the property comprised in Denman's lease as is not required for the widening of the street. The persons other than the lessees and sub-lessees of Denman House interested in the matter are four in number—viz., the Crown, the London County Council, the city of Westminster, and the syndicate, including in the latter their successors in title, the Piccadilly Hotel Company Limited. These parties have entered into agreements, the short effect of which I proceed to state. The Crown has entered into two agreements—the one with the London County Council and the other with the syndicate, dated respectively the 26th Oct. 1903 and the 4th March 1904. These effect two arrangements—viz., first, an arrangement for the use of the statutory powers of Michael Angelo Taylor's Act for the acquisition of the strip of land which is required to be thrown into Piccadilly and the grant by the Crown to the London County Council of an easement over that strip for the purpose of the proposed widening of the thoroughfare; and, secondly, an agreement for a grant by the Crown to the syndicate of a lease of the rest of the block (that is to say, the whole block, less the strip which is to be thrown into the street), but, as regards Denman House, subject to Denman's lease, and there is an obligation in the syndicate to erect upon the block a high-class hotel at a cost of 200,000*l.* As regards Nos. 19 and 20, Piccadilly, the following provisions are material. The land to be thrown into the street is coloured light red. The rest of the site of Nos. 19 and 20, Piccadilly, is coloured dark red. It is then provided that the syndicate shall pull down the buildings standing on the land coloured light red, other than Nos. 19 and 20, Piccadilly, or so much of Nos. 19 and 20, Piccadilly, the leases of which shall not for the time being have been acquired or surrendered, and shall erect upon the said premises, other than the sites of Nos. 19 and 20, Piccadilly (or so much of the dark red the leases of which shall not for the time being have been surrendered), new buildings, and shall, upon the expiration or sooner determination of Denman's lease of Nos. 19 and 20, Piccadilly, pull down Denman House "upon so much of the site thereof of which they shall have obtained possession," and shall build upon it new buildings to be incorporated with the hotel. I call pointed attention to the fact that arts. 1, 12, and 18 of this agreement of the 4th March 1904 discriminate between the portions of Denman House which are respectively coloured light red (being part of the strip) and dark red (being back land lying beyond the limits of the widened thoroughfare), and, in fact, contemplate that, so far as compulsory powers are concerned, some part of Denman House may be within and other part without those powers. The syndicate have acquired the ground leases of a large part of the premises upon the block. They contract to surrender to the Crown these leases and any further like leases which they may acquire. The Crown is not a party to any arrangement by which any part of Denman's leasehold property is to be acquired otherwise than by agreement, except so far as it is to be acquired for the purpose of the strip. On the contrary, art. 4 of the agreement of the 26th Oct. 1903 contemplates that any back land—by which I mean any land lying beyond the limits of the widened street—will be retained by the Crown, and the Crown are to have facilities for carrying out building operations upon it, and are to be provided with temporary bridges or ways for the purpose of access to it while the widening is in progress. As between the London County Council, the city of Westminster, and the hotel company, the contractual rights are determined by three further agreements, dated respectively the 1st June 1904, the 11th July 1904, and the 6th June 1905. The short effect of these is as follows: First, as regards the strip, the syndicate are to acquire the leasehold interests in it and surrender them, and thus enable the Crown to grant the easement which is required for widening the street. The powers of Michael Angelo

Taylor's Act are to be used as a means towards that end. Secondly, the syndicate are to acquire, either by agreement or in default of agreement before a certain date then by use of the powers under Michael Angelo Taylor's Act, what are called the "unacquired interests." Of these the interest material for the present purpose is Denman's term of years in Nos. 19 and 20, Piccadilly. The London County Council contract that they will, at the request of the syndicate, arrange with the city of Westminster to put in force the powers which that city may possess for the acquisition of the unacquired interests. These interests when acquired are to be assigned to the syndicate subject to the rights of pre-emption which the Act creates. Thirdly, when all the unacquired interests have been acquired, the syndicate are to demolish the buildings, including Denman House. Fourthly, the city council of Westminster contract, and pointedly by two separate articles as regards the strip and the back land respectively, that they will at the request of the council—(*a*) use their statutory powers to acquire the land the subject of the required easement, and (*b*) use their statutory powers to acquire the unacquired interests, including Denman's leasehold, and, when they have acquired that property, will deal with it by assignment to the syndicate in manner above mentioned. Fifthly, the London County Council are to indemnify the city of Westminster, and the syndicate are to indemnify the London County Council against all purchase money, costs, and so on, incurred in using the powers under Michael Angelo Taylor's Act. In the schedule to each of these three agreements Denman's lease is specifically mentioned as a property which is to be acquired, and the last of the three, that of the 6th June 1905, recites, as the fact was, that the hotel company had requested the London County Council to use their statutory powers to acquire (*inter alia*) that property. The land to be acquired for widening and the land to be acquired at the request of the syndicate are pointedly discriminated in art. 3 of the agreement of the 1st June 1904, and in arts. 2 and 3 of the agreement of the 11th July 1904. At this point I pause to ask what was the purpose of providing that any powers of Michael Angelo Taylor's Act should be put in force at the request of the syndicate. For the public purpose of widening the thoroughfare, the defendants owed the public duty of doing what was necessary to acquire all such land as was necessary for this purpose. There was no room for any request to be made by the syndicate or the hotel company as a preliminary to the local authority acquiring what was necessary for that purpose. But if the provisions as to request were addressed to the case of land which was not wanted for the purpose of the widening, they become intelligible. In any other case they are surplusage. Land necessary to be acquired for the purpose of the widening would include not only that which was actually to be thrown into the street, but that which, having regard to the circumstances of the case, it was necessary to acquire in addition, and which would be surplus land to be dealt with as provided by the Act. No request by the syndicate could be wanted or admissible to move the local authority to acquire all such land. These agreements, I think, intend a contract by the local authority that they will, at the request of the syndicate, use their statutory authority for the purpose of acquiring other and additional land for the purpose of throwing it into that which, under the bargain with the syndicate, was to be the subject of a new Crown lease in their favour for the purposes of the hotel. These contracts having been executed, Messrs. Ashurst and Co., acting for the hotel company, wrote on the 9th March 1905 to the London County Council, referring them to the agreement of the 1st June 1904, and stating that the hotel company desired to have the powers of the Act to acquire the interests in (*inter alia*) Denman House put into force at the earliest possible moment. Accordingly, on the 31st March 1905 the London County Council wrote to the defendants, asking them to put in force, on behalf and at the cost of the London County Council, their compulsory powers in respect of (*inter alia*) Nos. 19 and 20, Piccadilly, and suggesting that the council's solicitor and the council's valuer, Mr. Andrew Young, should be appointed to act for the defendants in the matter. They inclosed with their letter copies of the formal resolution which they desired to have passed. On the 6th April 1905 the Westminster City Council passed the resolution in exactly the form submitted by the London County Council. They were invited to pass that resolution because they had contracted to pass it. In my opinion they passed it because they had contracted to pass it. I find no evidence that they exercised any independent judgment of their own in the matter. There has been called for the defendants no one who represented either the defendants or the London County Council in the matter to say that the defendants had exercised any such judgment. Mr. Andrew Young, who was called, disclaimed responsibility. He actually said that he did not think it singular that the local authority should agree by the exercise of the powers of Michael Angelo Taylor's Act to get this land for the syndicate; it is, he said, a common thing to do. I am startled and shocked at this statement. The local authority are intrusted with statutory powers, to be used *bonâ fide* for the statutory purpose, and for none other. They have no right to seek to reduce the expense to the ratepayers by straining their powers in the interest of persons who desire to acquire the adjacent land from those who are the owners of it. The language of sect. 80 of the Act is that, if any houses, walls, buildings, &c., or any part thereof shall be "adjudged" and so on. The defendants were in this matter exercising a power in its nature judicial. They were bound to form an honest judgment, after consideration of all the facts of the case such as I shall have to detail presently, whether the whole of Denman House or any part thereof was, or was not, necessary to be acquired *bonâ fide* for the purpose of widening Piccadilly. Their duty was to arrive at an honest decision in the matter, in the sense that, after considering the facts, they ought to have said whether they *bonâ fide* believed that the entirety or any and what part of the property was wanted—not necessarily for the purpose of throwing it into the thoroughfare, but *bonâ fide* for the purpose of carrying out the widening of the thoroughfare. If they have not accepted the responsibility of such a decision, and in that sense arrived at an honest adjudication, their decision

is not binding. That was decided in *Gard* v. *Commissioners of Sewers of the City of London* (1885, 52 L. T. Rep. 827; 28 Ch. Div. 486) and *Lynch* v. *Commissioners of Sewers of the City of London* (1886, 54 L. T. Rep. 699; 32 Ch. Div. 72). In my opinion the defendants did not so consider and adjudicate upon the matter, and their adjudication is not binding. I go on to consider whether, upon the facts of the case, this house was such as that the defendants, who unquestionably were entitled to take part of it, were entitled to take the whole. The building, as I have said, was of a depth of 57ft. The strip will take off something less than an average of 27ft. in the front, leaving a depth of 30ft. The plaintiffs say that this reduced depth will allow of premises suitable for their businesses, and that they desire to retain that 30ft. and the building upon it, and not to be dispossessed of the site which is to them of so great value. As matter of construction, the building may be said to consist of two moieties, the line of division between which is, strangely enough, almost coincident with the line of the proposed new frontage in Piccadilly. The building and its floors are carried upon steel girders and steel joists. In the centre of the back moiety of the building is what is practically a tower of brickwork, composed of four walls inclosing the staircase and lift. The southern wall of this tower falls just north of the proposed new line of frontage. From this central tower there run steel joists, east and west from the tower to the external walls, and on the eastern part of the back moiety some steel joists run north and south from the first-mentioned steel joists to the north wall. This system of joists is self-contained in the back moiety of the house. The front moiety, which would be the part to be demolished, has a central pillar near the front wall which supports a long girder running east and west right across the building. The system of joists in this front moiety of the house runs north and south from the south wall to this girder and from this girder to the girders first above described, which run east and west from the central tower to the outer walls. The existence of the central tower in the back moiety of the house gives that moiety such a stability as that there is no practical difficulty in demolishing the front part of the house, leaving the back half standing. The building is built in cement, which gives it large additional strength. The defendants' plans for widening the street include a canting off of the south-east angle of the building. This will create some difficulty. One stanchion in particular, in Air-street, being one of a series which support a long girder running at the level of the floor of the mezzanine story through the length of the building from north to south, will have to be removed. To allow of the removal of this stanchion it will be necessary to replace it by another stanchion lying rather more to the north. Further, the construction of the building, as regards some of the short joists at this point, and as regards an arch which is turned over the windows above the mezzanine floor, will require some readjustment, and it will, of course, be necessary to put a new front or south wall to the reduced building. The line of that wall would be substantially the line of the southern wall of the staircase tower, but really a little south of it. The short result of the facts is that upon the 30ft. of depth which are not wanted for the widening there is no difficulty in preserving, with a certain amount of reconstruction, so much of the building as stands on that 30ft. I may add that there is an existing entrance in Air-street, at the north-east corner, which would be available to give access during the alterations. In *Teuliere* v. *St. Mary Abbotts, Kensington* (1885, 53 L. T. Rep. 422; 30 Ch. Div. 642) and *Aldis* v. *London Corporation* (80 L. T. Rep. 683; (1899) 2 Ch. 169) there is authority for saying that, where the landowner desires to retain part, the local authority cannot insist on taking the whole unless the remainder will be useless. There is, however, great difficulty in saying that the power of the local authority is to be determined by ascertaining *ex post facto* what the landowner desires, and the more so if the owner who expresses the wish is a limited owner. One limited owner might take one view and another another view. The freeholder might wish the whole to be taken; the leaseholder might wish to keep part. Upon this part of the case I do not rest my decision upon any principle to be deduced from those cases, to the effect that the power of the local authority is measured by the wish of the owner. But I think that the attitude which the owner takes up is not to be disregarded. The question to be decided is whether that which will be left will be a house. If the owner whose estate is in possession is desirous of doing upon his own land such work, by way of shoring and reconstruction, as that that which will be left will be a house, I think regard ought to be had to that fact. Under such circumstances the local authority in demolishing part will be leaving that which, having regard to the acts which the owner desires to do, will be a house available for him as a house. In every case where part of a house is demolished (say a porch or a cellar) some reconstruction will be required. The question cannot, therefore, I think, be answered by saying that the thing left will require some reconstruction before it will be complete as a house. The question is one of degree. Will there be so much left as that a house will be left? In answering that question regard is, I think, to be given to the fact that the owner is willing to do what is necessary to make that which remains an effectual house. To my mind the question in these cases is one of fact, and largely one of degree. If the projected widening were such as to take 18in. off the frontage of a house 60ft. deep, it would, I think, be fallacious to argue that, inasmuch as it would be necessary to pull down the front wall, that which was left would not be a house, even when the owner whose estate is in possession is minded to erect a new front wall. Upon the facts of this case I arrive at the conclusion that the local authority are not here entitled to take more than is wanted for the widening of the street, and that the 30ft. depth which will remain after the widening is not wanted, but is a building which can be and ought to be left as a house which the plaintiffs, who are its owners, desire to retain, and from which the defendants have no right to dispossess them for the purpose of putting the hotel company into possession. As regards *Pescod* v. *Westminster Corporation* (93 L. T. Rep. 160; (1905) 2 Ch. 475), the relevant facts were different, and consequently the decision was different. I

find it unnecessary to express an opinion upon the argument which Mr. Gore-Browne addressed to me upon the question whether the local authority can, under this Act, acquire some only of the several interests in the premises which go to make up the fee simple. It is, I think, a question of difficulty, and I keep my mind open upon it until it shall be necessary to decide it. I think the plaintiffs are entitled to injunctions to restrain the defendants from proceeding upon the notices to treat. I grant those injunctions and order the defendants to pay the costs of the actions. There will, of course, be a separate judgment in each action.

Solicitors for Denman and Co. Limited, *Hollams, Sons, Coward,* and *Hawksley.*

Solicitors for Cording and Co. Limited, *Vallance* and *Vallance.*

Solicitor for the defendants, *W. A. Blaxland.*

Solicitors for the hotel company, *Ashurst, Morris, Crisp,* and *Co.*

KING'S BENCH DIVISION.

Monday, Dec. 11, 1905.

(Before Lord Alverstone, C.J., Lawrance and Ridley, JJ.)

Whitehaven Harbour Commissioners (apps.) *v.* Whitehaven Union (resps.). (*a*)

Rating—Special exemption—Education rate—Liability to pay.

In 1894 *an urban district with certain portions of a rural district was created by charter a municipal borough. By a scheme made in the same year under the Municipal Corporations Act* 1882 *it was provided that the portions of harbour property which were situated in the rural district "shall not in the future pay to the borough, or be assessable for any rates or charges (not being the water rate hereinafter mentioned) at a higher rate of assessment in the pound than at present—that is to say,* 3*d. in the pound per annum (exclusive of the rate for the relief of the poor and the other charges at present collected with the poor rate within the urban district)—so long as the said harbour shall out of its own revenues pay, as at present, for its own lighting, cleansing, and repairing of public roads, ways, and places in the said harbour." Before the grant of the charter the harbour property in the rural district contributed through the poor rate to the expenses of the school attendance committee, and since the charter they continued to be assessed to rates for the relief of the poor, but the amount claimed for the poor rate did not include anything for expenses incurred in respect of elementary education in the borough.*

Held, that these portions of the harbour property were not exempt from paying a rate for the expenses of the Education Act 1902 *levied by the corporation of Whitehaven as local education authority, although such rate was* 5*d. in the pound.*

Case stated by quarter sessions on an appeal by the appellants against a rate or assessment made by the overseers of the poor of the parish of Whitehaven.

In a rate made for the relief of the poor by the overseers of the parish of Whitehaven, in the Whitehaven Union, on the 4th June 1903, the appellants were rated as occupiers of certain hereditaments situate in the municipal borough of Whitehaven (hereinafter called the "borough").

The Nos. 2789 and 2790 in the poor rate include that portion of the harbour property which was outside the urban area of the town of Whitehaven prior to incorporation, and was brought within that area on incorporation.

The poor rate of the 4th June 1903 was levied in respect of the above numbers on the rateable values shown in the schedule hereto at 2*s.* 8*d.* in the pound.

This 2*s.* 8*d.* comprised (*inter alia*) the borough rate, which included the following:

For free library	1*d.*
For education	5*d.*
For joint burial committee	4½*d.*
For other purposes	2½*d.*
	1*s.* 1*d.*

The overseers demanded the rate in full, but, by arrangement between the harbour commissioners and the overseers, the following allowances were made—viz.: 1*d.* for free library rate and 1½*d.*, part of the 2½*d.* levied for other purposes; ¾*d.* being the cost of collection of the poor rate by the overseers.

The total rate of that portion of the harbour property included in No. 2789 amounted to	£43	6	8
The agreed allowances of 1*d.* and 1½*d.* amounted to	£3	7	8
Making the amount claimed	£39	19	0
The harbour commissioners refused to pay the 5*d.* in respect of education, amounting to	£6	15	5
And have paid instead of the £39 19*s.* the sum of	£33	3	7
The total rate of that portion of the harbour property included in No. 2790 =	£384	0	0
The agreed allowances of 1*d.* and 1½*d.* amounted to	£30	0	0
Making the amount claimed	£354	0	0
The harbour commissioners refused to pay the 5*d.* in respect of education, amounting to	£60	0	0
And have paid instead of £354 the sum of	£294	0	0

The overseers contend that the harbour commissioners are liable for the new education rate, and were not entitled to deduct the 6*l.* 15*s.* 5*d.* and 60*l.*

The harbour commissioners contend that they are not liable for the new education rate, and were therefore entitled to make the deduction.

The assessment No. 1275 in the schedule includes a portion of the harbour commissioners' property which is adjacent to or forms part of the harbour, but was within the urban area of the town of Whitehaven prior to incorporation, and there is no dispute as to the rating of this portion of the harbour, the demands for which have been paid in full.

The limits of the borough comprise the area of the Parliamentary borough of Whitehaven as defined in sched. O of the Parliamentary

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

Boundaries Act 1832 (2 & 3 Will. 4, c. 14), including the foreshore adjoining that area and the whole of the harbour of Whitehaven as defined by the Acts relating to the harbour, all in the county of Cumberland, and also two small triangular pieces of land, one being on the extreme north and another on the extreme south of the Parliamentary borough.

These two pieces of land were added to the borough by the Whitehaven Corporation Act 1899 (s. 24, sched. 2, to the Act).

By sect. 4 of the Whitehaven Town and Harbour (Incorporation) Act 1885 the expression "the harbour" in that Act, unless there be something in the subject or context repugnant to such construction, means the port and harbour of Whitehaven, and all docks, quays, piers, walls, buildings, lands, property, houses, offices, sheds, tramways, railways, buoys, and moorings connected therewith; and also the railways Nos. 1 and 2 authorised by the Whitehaven Dock and Harbour Act 1871, together with all stations, sidings, signals, signal stations and boxes connected with such railways, and also any additions to and improvements in the harbour from time to time made by the trustees.

The borough was created a municipal borough by virtue of a charter of incorporation granted on the 11th July 1894, and the Municipal Corporations Acts were extended to the municipal borough so created, subject as regards the port and harbour of Whitehaven and its railways and other appurtenances (hereinafter referred to as "the harbour") and also subject as regards other matters to the special provisions relative to the harbour and such matters as are contained in the scheme settled by the Committee of the Privy Council under and pursuant to the Municipal Corporations Act 1882, and entitled "The Borough and Harbour of Whitehaven Scheme 1894," which scheme is hereinafter referred to as "the scheme."

Prior to the grant of the charter of incorporation a small portion of the harbour of Whitehaven was within the Whitehaven Urban District, the remainder of the harbour being within the Whitehaven Rural District.

The town and harbour of Whitehaven were under and by virtue of the local and other Acts of Parliament (particulars of which are set forth in the third schedule to the scheme, and are hereinafter referred to as "The Whitehaven Town and Harbour Acts") governed, both for municipal and for certain sanitary purposes, by a body of trustees incorporated under the name of "The Trustees of the Town and Harbour of Whitehaven" under and by virtue of the Whitehaven Town and Harbour (Incorporation) Act 1885, and the town and the harbour were both administered by such trustees as one board.

Prior to the grant of the charter the trustees were assessed in respect of so much of their harbour property as was situated in the Whitehaven Urban District by the overseers of the poor of the township of Whitehaven and by the overseers of the poor of the township of Preston Quarter to the poor rates levied in such townships respectively by the respective overseers. They were also assessed in respect of such property to the general district rates made by themselves as the urban sanitary authority of the Whitehaven Urban District. Prior to the grant of the charter the trustees were also assessed in respect of so much of their harbour property as was situated in that portion of the township of Whitehaven which was within the Whitehaven Rural District to rates levied for the relief of the poor and for sanitary purposes by the overseers of such township, and were assessed in respect of so much of their harbour property as was situated in that portion of the township of Preston Quarter which was within the rural district to rates levied for the relief of the poor and for sanitary purposes by the overseers of the last-mentioned township.

There has never been a school board elected under the Elementary Education Acts for either of the townships of Whitehaven and Preston Quarter, although prior to the grant of the charter of incorporation a poll was demanded and taken on the question of a school board for the town of Whitehaven, and the ratepayers declined to have one, the proposal having been beaten by a large majority. Prior to the grant of the charter of incorporation the guardians of the Whitehaven Union (within which the townships were included) appointed annually a school attendance committee under sect. 7 of the Elementary Education Act 1876, and the school attendance committee employed a clerk and attendance officer for the purposes of carrying out a portion of the then Elementary Education Acts in connection with the townships of Whitehaven and Preston Quarter, amongst other townships and parishes. The expenses incurred by the school attendance committee were from time to time, pursuant to sect. 31 of the Elementary Education Act 1876, paid out of a fund raised out of the poor rate of the townships or parishes in which the committee acted for the purposes of the Act according to the rateable value of each parish or township. So much of the expenses of the committee as was chargeable on the townships of Whitehaven and Preston Quarter respectively was paid out of the poor rates levied by the overseers of the said townships respectively. The trustees of the town and harbour of Whitehaven, in respect of so much of their property as was within the townships of Whitehaven and Preston Quarter respectively, were from time to time down to the grant of the charter of incorporation rated by the overseers of the townships respectively, and paid or contributed to the expenses of the school attendance committee as part of the poor rates levied within the townships respectively. The average amount so paid for the two years prior to the grant of the charter of incorporation was about one-fifth of a 1*d.* in the pound, whereas the new education rate appealed against is 5*d.* in the pound.

Subsequently to the grant of the charter and down to the year 1896 the appellants have been assessed in respect of their harbour property to rates made for the relief of the poor in Whitehaven by the overseers of such township, and since the year 1896, when the township of Whitehaven was extended by the inclusion therein of part of the township of Preston Quarter and then became the parish of Whitehaven, the appellants have been assessed in respect of their harbour property to rates made for the relief of the poor in the parish of Whitehaven by the overseers of such parish, and since the grant of the charter the appellants have been assessed in respect of their harbour property to general district rates

made by the corporation of the borough of Whitehaven subject to the limitations prescribed by art. 27 of the scheme.

By art. 3 of the scheme it is provided that the borough shall be placed for all sanitary purposes (except as in the scheme mentioned) within the jurisdiction of the mayor, aldermen, and burgesses of the borough of Whitehaven (hereinafter called "the corporation"), acting by the council of the borough, and shall constitute the district of such sanitary authority acting as such. Provided always that the corporation shall not have any jurisdiction with regard to the making, construction, management, and control of roads and ways, and the lighting thereof in and over the harbour.

By art. 4 the trustees, from and after the commencement of the scheme, were as a corporate body abolished and dissolved and their district thenceforth ceased to exist. And by art. 5 of the aforesaid scheme the harbour and the adjacent portion of the Parliamentary borough of Whitehaven ceased to form part of and were wholly withdrawn from the jurisdiction of the rural sanitary district of the Whitehaven Union, and the guardians of the Whitehaven Union, acting as the Whitehaven rural sanitary authority, ceased to be the sanitary authority for the harbour and for the adjacent portion of the Parliamentary borough, or for either of them, or for any part thereof.

By art. 6 it is provided that

From and after the commencement of the scheme there shall for all the purposes of the Whitehaven Town and Harbour Acts and of this scheme affecting or relating to the said harbour be a body corporate under the name of "The Whitehaven Harbour Commissioners" [hereinbefore and hereinafter referred to as "the appellants"], who by that name shall have perpetual succession and a common seal (distinctive from that of the corporation), with power to sue and be sued in their corporate name, and to purchase, take, hold, and dispose of lands and other property.

By art. 14 it is (*inter alia*) provided that

All property now vested in the trustees as such corporate body as aforesaid for harbour purposes, together with the jurisdiction, powers, and duties of the trustees relative to the said harbour, shall vest in the said harbour commissioners and be held, applied, and exercised for the purposes of the said harbour.

The property which under this clause is vested, or intended to be vested, in the harbour commissioners includes the hereditaments in respect of which the appellants are rated and assessed in and by the rate of the 4th June 1903.

By art. 19 it is provided that

With respect to such of the Whitehaven Town and Harbour Acts and such parts thereof as relate to the said harbour, the said harbour commissioners shall (save in the particulars next hereinafter mentioned) be substituted for the trustees a such corporate body as aforesaid, and shall (subject to the other provisions of this scheme and save as aforesaid) have and exercise and be subject to all the rights, property, powers, authorities, privileges, duties, and liabilities vested in, devolving upon, or exercisable by or enforceable against the trustees in respect of any acts, matters, and things which by the said Acts lastly before referred to, or such parts of them as aforesaid, are appointed or required to be done relative to the said harbour or otherwise relative to the said harbour, but as regards the sanitary jurisdiction over the said harbour the corporation (save as in this scheme otherwise provided) shall alone have and exercise exclusively of the said harbour commissioners and also exclusively of the rural sanitary authority the rights, powers, duties, and authorities which under the Public Health Acts and any Act amending or extending the same are ordinarily exercisable by a municipal corporation acting as the urban sanitary authority.

By sect. 22 it is provided that

All the rights, interests, powers, property, obligations, and liabilities whatsoever of the trustees acting as the urban sanitary authority of the town of Whitehaven and of the Whitehaven rural sanitary authority in respect of the said adjacent portions of the said Parliamentary borough and in respect of the said harbour under or by virtue of the following Acts, viz., the Public Health Acts and any Act amending or extending the same and any of the Whitehaven Town and Harbour Acts or any (if any) other local or general Act for sanitary purposes the same or similar to those of the aforesaid Acts, except as hereinafter mentioned, shall be transferred to, vested in, devolve upon, and be exercisable by, and enforceable against the corporation acting by the council as the sanitary authority of the borough.

By art. 23 it is provided that

Nothing in this scheme shall take away, limit, or prejudice the powers, rights, and duties of the said harbour commissioners under the Whitehaven Town and Harbour Acts with respect to the lighting, watching, and repairing of the said harbour, or of the roads, ways, wharves, and railways within and belonging to the same.

By art. 27 it is provided (*inter alia*) that

In making, assessing, and levying general district rates and other sanitary rates within and for the borough, such district rate and other rates upon tithes, lands, and other property in the said adjacent portion of the said Parliamentary borough which under the Public Health Acts and the Acts amending or extending the same are directed to be assessed in the proportion of one-fourth only of their net annual value shall be and continue to be assessed in the proportion of one-fourth only of their net annual value, and the said harbour or the premises therein shall not in the future pay to the borough or be assessable for any rates or charges (not being the water rate hereinafter mentioned) at a higher rate of assessment in the pound than at present—that is to say, 3*d.* in the pound per annum (exclusive of the rate for the relief of the poor and the other charges at present collected with the poor rate within the urban district)—so long as the said harbour shall out of its own revenues pay, as at present, for its own lighting, cleansing, and repairing of public roads, ways, and places in the said harbour, but the said adjacent portion of the said Parliamentary borough (excluding the said harbour) shall (except in respect of the said principal and interest of the loans referred to in clause 26 hereof) be assessable in the future for all borough rates to the full extent and pay the full rates to the borough, and all dwelling-houses and other property as defined and made rateable by sect. 20 of the Whitehaven Waterworks Act 1849 and sect. 17 of the Whitehaven Waterworks Act 1864 which are situated within the limits of the said harbour and the said adjacent portion of the said Parliamentary borough and the premises in or belonging thereto respectively shall in the future pay the full water rate to be leviable by the corporation without prejudice always to the provisions contained in the said clause.

Subsequently to the grant of the charter of incorporation and down to the commencement of the operation of the Education Act 1902 the corporation appointed a school attendance committee under sect. 7 of the Elementary Education Act 1876, and the expenses of the

committee and their officers were charged upon the borough fund or borough rate under sect. 31 of the Elementary Education Act 1876. Precepts to levy the amounts required for the borough rate were from time to time issued by the corporation to the overseers of the township of Whitehaven and Preston Quarter respectively or, after the extension of the township of Whitehaven so as to include the whole of the borough of Whitehaven, to the overseers of Whitehaven, and the amounts specified in the precepts (which averaged in the years subsequent to the grant of the charter of incorporation down to the commencement of the Elementary Education Act 1902 about halfpenny in the pound) were raised by the overseers to whom they were addressed as part of the poor rates made by them from time to time. In collecting the poor rates from the appellants the overseers charged them the full rate in respect of so much of their property as was within the area of the urban sanitary authority of Whitehaven prior to the grant of incorporation, but, in respect of so much of it as was outside the area of the urban sanitary authority of Whitehaven prior to the grant of incorporation and was brought in by such grant, the overseers made the agreed deductions set out above, and the amount claimed by the overseers for poor rate did not include anything for expenses incurred in respect of elementary education in the borough of Whitehaven.

The respondents contend that it was a mistake and erroneous in point of law not to include in the poor rate the amount which the harbour commissioners should have contributed towards the expenses of elementary education in the borough.

The appellants have since the creation of the borough continued to pay and at the date of the rate, the 4th June 1903, paid and were liable to pay out of their revenues for the lighting, cleansing, and repairing immediately prior to the commencement of the scheme. That is to say, the appellants for that portion of their property which was in the area of the rural district council before the grant of incorporation, but was included in the urban area of the borough of Whitehaven by that grant, pay to the borough of Whitehaven for sanitary and general district rates a sum of 3*d.* in the pound on the assessable value, and, in addition, they pay to the overseers of the poor the poor rate minus the amount charged for elementary educational purposes, for the free library rate, and for other purposes, except the cost of collection of the poor rate, and in respect of their property which was in the urban area of Whitehaven prior to the grant of incorporation they pay all the rates paid by occupiers; that is, to the corporation they pay sanitary and general district rates, including the expenses of lighting and paving, and to the overseers the poor rate and all payments collected therewith. The expenses of the appellants for lighting, cleansing, and repairing the public roads, ways, and places in the harbour during the year which ended the 31st March 1903 amounted to 808*l.* 6*s.* 3*d.* During the year prior to the creation of the borough the expenses of the trustees of the town and harbour of Whitehaven in lighting, cleansing, and repairing public roads, ways, and places within the harbour amounted to 646*l.* 4*s.*

The borough of Whitehaven has a population of over 10,000, and the corporation is therefore the local educational authority in the borough for the purposes of Part 3 of the Education Act 1902. By sect. 18, sub-sect. 1, of the Education Act the expenses of the corporation under that Act shall, so far as not otherwise provided for, be paid out of the borough fund or rate, and the rate of the 4th June 1903 includes an amount of 5*d.* in the pound which the overseers of the poor of the parish of Whitehaven have levied in order to satisfy a precept served upon them by the corporation, acting as the local educational authority of the borough, in respect of expenses incurred or to be incurred by the corporation under the Education Act 1902.

The appellants contend that they are by reason of such inclusion assessed in respect of their hereditaments at a higher rate of assessment than that of 3*d.* in the pound per annum (exclusive of the rate levied for the relief of the poor in the borough of Whitehaven, and of the other charges which at the date of the commencement of the aforesaid scheme were collected with the poor rate within the Whitehaven Urban District).

On behalf of the appellants it was contended that, having regard to the provisions of art. 27 of the scheme, they were not liable to pay in respect of their harbour property so much of the rate of the 4th June 1903 as is levied or made to satisfy the precept of the corporation acting as the local education authority of the borough; that no charges under the Education Act 1902 were collected with the poor rate at the date of the scheme; that the expenses of the school attendance committee referred to in this case were not charges collected with the poor rate within the Whitehaven Urban District at the date of the scheme; that the appellants were not liable to pay to the borough and were not assessable for any rates or charges (not being the water rate mentioned in art. 27 of the scheme) at a higher rate of assessment in the pound than that of 3*d.* in the pound per annum upon the value of their rateable property (exclusive of the rate for the relief of the poor, and the other charges at the date of the scheme collected with the poor rate within the Whitehaven Urban District).

On behalf of the respondents it was contended: (*a*) That at the date of the scheme made when the charter of incorporation was granted the expenses under the Elementary Education Acts were included among the charges then collected with the poor rate within the urban district within the meaning of art. 27 of the scheme; (*b*) that the expenses under the Elementary Education Acts are now, by virtue of the Education Act 1902, raised in the borough of Whitehaven by the corporation of the borough by means of a borough rate levied with or as part of the poor rate; (*c*) that the limitation to a rate of assessment at 3*d.* in the pound imposed by art. 27 of the scheme does not apply to the rate for expenses of elementary education made under the Education Act 1902, because those expenses formed part of the charges collected with the poor rate within the urban district at the date of the scheme; (*d*) that the limitation to a rate of assessment of 3*d.* in the pound applies only to the general district rate or to other sanitary

rates; (*e*) that the limitation cannot apply to a rate made under an Act passed after the date of the scheme.

The question for the opinion of the court is: Are the appellants liable to pay to the borough such portion of any rates assessed upon their hereditaments at a higher rate of assessment than 3*d.* in the pound per annum as are in excess of such rate of 3*d.* in the pound if such excess is levied to meet expenses incurred by the corporation under the Education Act 1902?

R. Cunningham Glen for the appellants.

Ryde for the respondents.

Lord ALVERSTONE, C.J.—This case is certainly one of difficulty, and one can never be sure that one has arrived at a right conclusion when it depends on the construction of a sentence somewhat obscure as to its meaning, and people dealing with such a clause may very likely take different opinions as to what it means, and give equally good reasons for taking the one view or the other. But I think, as a guide to this clause, one must look at the whole scope of this order. Certain portions of the harbour which were outside the borough were about to be incorporated. Their condition at that time has been very clearly stated by Mr. Glen and Mr. Ryde. They were part of a rural district. They contributed to such rates as the rural authorities would be able to levy. They might become liable to pay rates in respect of education. I use a general term. If there was no school board there would be such rates as were necessary to defray the expenses of a school attendance committee, and they would pay these rates through the medium of the poor rate, either as a part of the poor rate or collected with the poor rate. That was the state of things before those portions of the borough were incorporated. They were going to be incorporated, and they had, in addition, up to that time been maintaining public roads in their own area. They desired, not unnaturally, to retain the power of cleansing, lighting, and repairing the public roads, ways, and places which were within the harbour, and that would, of course, make it unjust that there should be imposed upon them the other liability which they might have had as a constituent part of a rural district—viz., to pay a highway rate, or something in lieu of a highway rate. They therefore come to the borough and they make a bargain. Parts of the bargain are clear; one part is obscure, having regard to the clauses we have to construe, and the arguments which have been addressed to us show that there is a great deal to be said on both sides. With regard to the roads, they are to be exempt from a payment which I will refer to directly—from further payment beyond a certain sum so long as the harbour shall out of its own revenue pay, as at present, for its own lighting, cleansing, and repairing of public roads, ways, and places in the harbour. That is one indication on the face of this clause that they intend to maintain the *status quo*. Then, coming into the borough, they would under ordinary circumstances be liable to general district rates, which would include sanitary rates, sewage rates, police rates, and a number of other things of that kind. The scheme, therefore, provides: "And the harbour shall not in future pay to the borough or be assessable for any rates or charges (not being the water rate hereinafter mentioned)"—that was excluded because I gather the corporation had become the water authority—"at a higher rate of assessment in the pound than at present—that is to say, 3*d.* in the pound per annum." I think, therefore, on the face of the clause, 3*d.* was to represent a payment in respect of the classes of rates which would correspond with what they were paying to the rural authority. Whatever sanitary rates there might be or whatever other rates there might be, the 3*d.* was to take their place. Now, it is not disputed that the *primâ facie* analogous rate would be the general district rate. Then, in addition to that, there is this excluded from the operation of this 3*d.* bargain: "Exclusive of the rate for the relief of the poor and the other charges at present collected with the poor rate within the urban district." Now, the state of things in regard to education at that time was that neither outside nor inside the borough had there been any school board. There had been a school attendance committee, and there had been a payment by means of the poor rate, or collected with the poor rate, in respect of the school attendance committee expenses. It is first contended by Mr. Ryde that the education rate under the Act of 1902 has become, by virtue of the sections by which it is raised and under which it is raised, a part of the rate for the relief of the poor. My present view is that, if it is necessary to go so far, it is right to say that the education rate is, for the purpose of this clause, part of the rate for the relief of the poor. The next part is, "and the other charges at present collected with the poor rate within the urban district." The difficulty of that clause, of course, depends upon the introduction of the words "at present," Mr. Glen contending, first, that it is not part of the poor rate, and then that there was no other present charge collected with the poor rate which would correspond to the present rate in respect of education. I think for myself that under this clause the rate which was levied in respect of the school attendance committee was undoubtedly a charge then presently at that time collected with the poor rate, and, without saying that the education rate as at present levied takes the place of it, because I think that this is going too far, it is, at any rate, of the same character and in the same category, and I think that this clause was meant to say that the 3*d.* shall cover all the chargeability in respect of the purposes for which that which corresponds to the sanitary rate and the general district rate would be levied, but that is not to exclude you from the liability to pay the poor rate and charges which properly come upon the poor rate at the present time within the borough. If, for instance, you could imagine such a thing as a part of the expenses borne by the general district rate being put upon the poor rate, then I think that the harbour might properly turn round and say, "Our bargain says that we are only to pay the 3*d.* plus what is now poor rate, or a charge at present collected with the poor rate." It indicates, in my opinion, an intention to keep clear and to keep alive the liability of the harbour to pay poor rate—to pay things which are properly part of the poor rate, or are levied with the poor rate. In that sense the analogy, and the

analogy only, of the Scarborough case, *Ash* v. *Nicholl* (91 L. T. Rep. 803; (1905) 1 K. B. 139) applies. I think it is a clear indication that the harbour was still to continue liable to such rates as were at that time levied or leviable with the poor rate, including, of course, the school attendance rate or the expenses of the school attendance committee which at that time existed. I at one time thought that this view might create a difficulty in Mr. Ryde's way, because, when you look at the Education Act, the rate is *primâ facie* payable out of the borough rate, but I think that difficulty disappears when you follow it out and see that the borough rate is only a collection for this purpose of the sums which have been contributed to it out of the poor rate, so that the mere fact that it has become part of the borough rate does not bring it within the class of liability, or does not bring the purpose within one of those in respect of which the 3*d.* rate was levied. I think, therefore, that the view to be taken on this special case is that the harbour authorities, under the bargain of this clause 27, are liable to pay rates in respect of the education rate now being levied within the borough.

LAWRANCE, J.—I am entirely of the same opinion. I have felt the same difficulty to which my Lord has already alluded, but it seems to me the only thing one can do is to give effect as far as possible to the words of this 27th clause of this agreement between the parties. My Lord has already dealt with that. That was a bargain made by the harbour authorities that they were to pay no more than 3*d.* in the pound to the borough rate so long as they took upon themselves the lighting and the maintaining of the roads in the harbour. Then comes the exception, the words "exclusive of the rates for relief of the poor and the other charges at present collected with the poor rate within the urban district." The difficulty Mr. Glen appears to me to be in is this: First, he says that this part of the rate, assuming it not to be a poor rate, is not *ejusdem generis* with the school attendance committee rate, and then he is driven therefore to this dilemma, if it is not so, that it is a new rate altogether and entirely outside this agreement between the parties. I agree with my Lord upon that, but I think it is fair to go one step further than he has, and to hold that this is a rate for the poor relief, absolutely a rate for relief of the poor. That being so, I come to the conclusion that this is the only way in which one can find any method by which these words contained in this clause can be accounted for in any way. Therefore I come to the same conclusion as my Lord has, that the appeal should be dismissed.

RIDLEY, J.—I agree with the decision of the court. I only wish to add that I have felt a great difficulty in arriving at the proper meaning of the words "and the other charges at present collected with the poor rate within the urban district." I have found it difficult to see how the education rate levied under the Act of 1902 can be called *ejusdem generis* with the rate levied at the time when this agreement was made between the parties, and which consisted merely of a school attendance rate. I am not sure that I could have come to the conclusion that this education rate is included in those words, but I have come to the conclusion that it is within the other words of the clause, "the rate for relief of the poor." Sect. 20 of the Poor Rate Collection Act 1869 and sect. 18 of the Education Act 1902 are the chief enactments to which one may refer as bearing upon that question, and I certainly think that what I am saying and what the court is saying in that respect is in accordance with the previous decision in *Ash* v. *Nicholl*, which was quoted in the argument. At all events, I prefer to rest my decision, agreeing with that of my Lord and my brother Lawrance, upon that part of the clause and not upon the other.

Appeal dismissed.

Solicitors: *Harrison* and *Powell*; *Helder, Roberts*, and *Co.*, for *Brockbank, Helder*, and *Co.*, Whitehaven.

Tuesday, Dec. 19, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

MAYOR OF LIVERPOOL (app.) *v.* BIRKENHEAD UNION (respa.). (*a*)

Rating—Poor rate—Water main—Occupation.

The appellants, who were the owners of a reservoir and of an aqueduct, were empowered by statutory powers to supply water to any sanitary authority within twenty miles of the aqueduct, and to execute works necessary for such supply.

By agreement with the W. Urban District Council, the council took the steps necessary under the Public Health Act 1875 *to enable the work to be done, and the appellants laid a main from their aqueduct to supply the council with water, and under the agreement the main was to remain the property of the appellants, and they retained the entire management and control of the same, and the water was measured by a meter where the water entered the pipes of the council.*

Held, that the appellants were liable to be rated as the occupiers of the main.

CASE stated by quarter sessions for the county of Chester on an appeal against a certain poor rate made and assessed for the parish of Bidston-cum-Ford on the 15th June 1904.

The appellants and the respondents, the Wallasey Urban District Council, were rated as occupiers of a certain water main running through the township of Bidston-cum-Ford, in the county, in the sum of 12*l.* gross and 10*l.* 10*s.* net rateable value, and both appealed against the rate, the appeal of the Wallasey District Council being allowed.

The water main in question consists of a portion of a line of pipes running from Delamere to Wallasey, used for the purpose of obtaining water from an aqueduct running from Vyrnwy to Liverpool, the property of the appellants, and conveying it to supply the district of the Wallasey Urban District Council.

The appellants are the owners of a reservoir at Vyrnwy, in Montgomeryshire, whence water is conveyed to Liverpool by means of the aqueduct, which passes through the county of Chester, in the neighbourhood of Delamere.

The appellants are empowered by the Liverpool Waterworks and Improvements Act 1887, s. 11, to supply water to any local or sanitary authority,

(*a*) Reported by W. DE B HERBERT, Esq., Barrister-at-Law.

company, or person any part of whose district or premises is situate within twenty miles of the aqueduct; and by the Liverpool Corporation Act 1893, s. 70, the appellants may agree to execute on behalf of any such local or sanitary authority, company, or person, any works necessary or proper for giving the supply.

The urban district of Wallasey is situate within twenty miles of the aqueduct, and in 1899 and 1900 the council of the urban district of Wallasey were desirous of obtaining water from the aqueduct, and on the 19th Sept. 1900 entered into an agreement with the appellants for that purpose.

In pursuance of the agreement the Wallasey Urban District Council took the steps necessary under the Public Health Act 1875 to enable the works mentioned in the agreement to be carried out, and the appellants proceeded to lay the main.

The main was completed on or about the 18th June 1903, and the respondents, the Wallasey Urban District Council, gave notice to the appellants requiring them to provide a supply of water of 500,000 gallons a day.

The appellants commenced to give such a supply, and from the 24th Sept. 1903 the main was used for the supply of the quantity of 500,000 gallons per day to those respondents, and also for certain supplies given to owners and occupiers of land in accordance with the agreement referred to below.

The main is a 21in. main, and is capable of supplying 2,000,000 gallons a day.

Before the completion of the works contracts were entered into between the appellants, the district council, and the owners or occupiers of certain farms on the line of the main for the supply to them by the appellants of water from the main, and the necessary pipes were laid and works completed for that purpose. Ever since the completion of the main and works the appellants have had the entire control and management thereof under the terms of the agreement of the 19th Sept. 1900, and the sole right to make connections with the main.

On the 20th May 1904 demand was made for payment of poor rates from the appellants in respect to that portion of the water main which runs through the township of Bidston-cum-Ford. The appellants made objection to the rating, and the objection was heard by the respondents, the assessement committee of the Birkenhead Union, who were of opinion that the appellants were not the rateable occupiers of the water main, but were also of opinion that they had no power to strike out the names of any parties from the rate, and that the appellants should apply to quarter sessions for relief.

The appellants accordingly applied for relief, and the appeal was heard on the 20th Oct. 1904.

Counsel for the appellants contended that the respondents, the district council of Wallasey, were the rateable occupiers of the water main, and that the appellants were not the rateable occupiers for the following reasons: That the main was laid by the Wallasey Urban District Council (through the appellants acting as their contractors under the power conferred upon them by the Public Health Act 1875), and the main was consequently originally the property of the Wallasey Urban District Council; that as part of the consideration for laying the main the real ownership thereof was transferred to the corporation, but that the respondent urban district council never divested themselves of the occupation of the main; that the appellants maintained the main for the Wallasey Urban District Council under the powers of the agreements, receiving payment of 1 per cent. of the costs of providing the main; that the main is used solely, except as is herein mentioned, for the supply of water to Wallasey; that the water, although measured for convenience at the Wallasey end of the main, is actually delivered to the district council at the point where the main joins the Vyrnwy Aqueduct; that the only persons deriving a supply from the main other than the district council are certain landowners, to whom supplies of water were granted with the joint consent of the corporation and urban district council as part consideration for easements for laying the main; that the urban district council had declined to give consent to the appellants supplying water to the Wirral Railway; that the urban district council would in Sept. 1905 be entitled to the full capacity of water that the main is capable of delivering; that, if there is anything in the nature of a joint occupation in the main, the urban district council are the paramount occupiers, and liable to be rated in respect thereof; that if the appellants were the occupiers in fact, then the provision for maintenance would be redundant; that if the water were not the property of the urban district council, but the property of the appellants, the provision preventing the appellants from supplying other persons would be unnecessary.

Counsel for the respondents, the Wallasey Urban District Council, contended the appellants were the rateable occupiers of the main for the following among other reasons: That the appellants were the owners of the main and works, and had the entire control and management of them, and had never parted with the occupation thereof; that the water in the main remained the property of the appellants because it was not and could not be appropriated to the district council until it had passed the meter, other persons having a right to obtain a supply of water from the appellants through the main, and that, even if the water became the property of the district council on passing into the main, the main was still in the occupation of the appellants.

The quarter sessions decided that the appellants should be rated in respect of the mains on the ground that they were the rateable occupiers of the same.

The agreement referred to above provided (*inter alia*):

1. The supply shall commence on such date as the corporation and the district council shall mutually agree upon, being a date not later than three months from the date upon which the works herein mentioned shall be completed.

3. The supply shall be given from the Vyrnwy Aqueduct at a point situate between Hatchmere and the Vale Royal Inn, Delamere, which point is indicated on the plan hereto annexed, or as near thereto as may be found practicable.

4. The district council shall forthwith take the necessary proceeding in conformity with the provisions of the Public Health Act 1875 to enable a main (or aqueduct of the dimensions hereinafter mentioned),

together with all works incidental thereto which the corporation shall deem necessary or expedient, to be laid and constructed from the Vyrnwy Aqueduct to the point situate at the boundary of the district of the said district council (through the lands and hereditaments situated both without and within the district of the district council) shown on the plan and according to the course indicated on the said plan, and for acquiring such lands and easements as may be necessary for the purpose, and, so soon as the said proceedings are complete and the said lands and easements have been acquired and all powers necessary to enable the said main and works to be constructed have been obtained, the district council shall give notice to the corporation requiring them to carry out the said works, and, upon receipt of the said notice from the district council as aforesaid requiring them to carry out the said works, the corporation shall apply to the Local Government Board in manner provided by the Liverpool Corporation Act 1893 for their sanction to borrow the money necessary to enable the said works to be carried out, and, as soon as such sanction shall be obtained, shall proceed with all reasonable speed to provide and construct the said main and works from the Vyrnwy Aqueduct to a point within the district of the district council as shown on the said plan, and the supply hereby agreed upon shall, after the said main and works have been completed, be delivered into the said main in accordance with the provisions of clause 1 of this agreement.

5. The water to be supplied under this agreement shall be measured by a meter to be provided by the corporation, and to be fixed in a chamber or building erected and maintained by the district council at their own expense and in accordance with a plan to be approved by the water engineer of the corporation, which chamber or building shall be situate at the point where the water is delivered into the pipes of the district council, and such water shall be under the sole control of the corporation, and shall be maintained by them. The district council shall at all reasonable times be at liberty by themselves or their engineers or surveyor, after giving twenty-fours' notice to the water engineer of their intention so to do, to inspect such meter and to require the accuracy thereof to be tested, all reasonable expenses of and incident to such testing being payable by the district council.

12. The main when laid shall with all incidental works and all the lands and easements acquired for the purpose of constructing the same and any renewals and reconstructions thereof be and remain the property of the corporation, and nothing in these presents contained shall be deemed to preclude the corporation from at any time supplying water from the said main to any other local authority, company, or person, provided such supply can be given without prejudicing or affecting the supply hereby contracted for.

13. The corporation shall maintain the said main and works, and shall not be liable to reconstruct the same. Any dispute or difference between the corporation and the district council as to what work should be treated as "maintenance" and what is "reconstruction" shall be submitted to arbitration in manner hereinafter appearing.

Horridge, K.C. and *F. E. Smith* for the appellants.—The appellants are not liable to be rated in respect of the main as they are not the occupiers. The powers for its construction are contained in sect. 54 of the Public Health Act 1875, and therefore the urban district council are the rateable occupiers as it is vested in them. They have never ceased to be occupiers.

Marshall, K.C., *Pickford*, K.C., and *Ross Brown*, for the respondents, were not called upon to argue.

Lord Alverstone, C.J.—In my opinion the decision of quarter sessions is absolutely right. The water in this case is to be delivered at a place many miles to the eastward of the jurisdiction of the Wallasey Board. I ought to say that it is to be delivered into a pipe there. It is not to be taken over so as to become the water of the district until it passes through the meter at the other end. The pipe passes through many parishes of the Birkenhead Union, and if any leakage occurs and the pipes are burst, or anything happens, the loss would be the loss of the Liverpool Corporation. The district council are to pay so much on water delivered in Wallasey. The appellants have got the right, with the consent of the district council, to supply other people, but I do not think that has much bearing on the case, because, in the year in question, they were not supplying other people, and therefore it might only affect a certain quantity, if they were able to do so or proposed to supply. In my opinion, the appellants are in the exclusive occupation of this pipe, or the hole in the ground which the pipe occupies, for the purpose of conveying water, which they are selling to the Wallasey District Board. In my opinion, there was clearly occupation of rateable subject-matter, and the decision must be maintained.

Lawrance, J.—I agree.

Ridley, J.—I agree.

Appeal dismissed.

Solicitors: *F. Venn* and *Co.*, for *Pickmere*, Town Clerk, Liverpool; *F. G. Mellows* and *Co.*, for *H. W. Cook*, Egremont, Cheshire.

Wednesday, Dec. 20, 1905.

(Before Lord Alverstone, C.J., Lawrance and Ridley, JJ.)

Mayor, &c., of Folkestone (apps.) *v.* Marsh and others (resps.). (a)

Public health—Agreement with local authority—Reservation of powers—Liability of frontagers—Private Street Works Act 1892 (55 & 56 *Vict. c.* 57).

Under an agreement made in 1879 *between a railway company, certain property owners, and the local authority, it was agreed that a road should be dedicated to the public and taken over by the local authority as a highway repairable by the inhabitants at large, but that the local authority should retain the same powers of requiring the respective owners and occupiers for the time being of land fronting, adjoining, or abutting on the road to sewer and make up, &c., all or such parts of the road, carriage-way, or footway as were not already sewered and made up, and their rights under the Public Health Act* 1875 *and a local Act were also reserved to the local authority.*

At the date of the agreement the road was properly made up, but the footway was not paved. The local authority having decided, under the powers conferred by the Private Street Works Act 1892, *to pave the footway, they served notices of apportionment on the frontagers.*

(a) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

Held, that the frontagers were not liable, as the road was a highway repairable by the inhabitants at large, and the powers which the local authority attempted to enforce did not apply to such a highway, and the local authority could not, under the agreement make the frontagers liable.

Case stated on certain objections raised by the respondents to the proposals for the execution of certain private street works in Shorncliffe-road, Folkestone, under and by virtue of the Private Street Works Act 1892, by the Mayor, &c., of Folkestone, acting by the council of the borough as the urban district council for the urban district of Folkestone (the appellants), heard and determined by the justices.

Upon the hearing of the objections the following facts were proved or admitted:—

The appellants, having duly adopted the Private Street Works Act 1892, directed their surveyor to prepare plans, sections, estimates, specifications, and provisional apportionments to make up part of a street on the westerly side of and running parallel with the portion of Shorncliffe-road lying between the railway bridge adjoining Shorncliffe Station and Cheriton-road and then and now forming part of such portion of Shorncliffe-road. The surveyor prepared the plans, sections, estimates, specifications, and provisional apportionment, and the same were on the 6th July 1904 duly approved by the appellants and the resolution approving the same was duly published and publicly passed, and copies thereof were duly served on the owners of the premises shown as liable to be charged in the provisional apportionment, including the respondents. The respondents duly served upon the appellants notices objecting to the proposals of the appellants, on the ground that the part of the street is a highway repairable by the inhabitants at large. Shorncliffe-road runs from a lane known as Coolinge-lane to a road known as Cheriton-road, and also to a street known as Manor-road. The length of such road to which the proposal of the appellants relates is that lying between the railway, and the portion of such length of road actually proposed to be made up under the Private Street Works Act 1892 is that portion thereof which now forms the footpath running above the eastern side thereof.

The appellants produced and proved an agreement under seal bearing date the 3rd Dec. 1879, and made between Sir Edward William Watkin, chairman of the board of directors of the South-Eastern Railway Company, and the Hon. William Pleydell Bouverie, commonly and hereinafter called Viscount Folkestone, of the first part, the Right Hon. Jacob, Earl of Radnor, of the second part, Bunwood Godbe of the third part, the then trustees of Ward and Mitchell's Charity of the fourth part, the South-Eastern Railway Company of the fifth part, and the appellants, who were then the surveyors of highways and were acting under the powers of the Folkestone Improvement Act 1855 and the additional powers conferred by the Public Health Act 1875, and were in such agreement described as the authority for executing the Folkestone Improvement Act 1855 and the urban authority for Folkestone within the meaning of the Public Health Act 1875, of the sixth part, whereby it was agreed that Shorncliffe-road should as from the 1st Jan. 1880 be dedicated to the public and should be accepted by the appellants as a public highway repairable by the inhabitants at large and should be maintained and repaired accordingly, and the appellants should be at liberty to plant trees and erect and maintain seats for the public use thereon respectively, and to do all other acts and exercise all other powers under the said Acts or either of them, but that nevertheless the appellants should retain and have the same powers of requiring the respective owners or occupiers for the time being of land fronting, adjoining, or abutting on the said road, so soon and to such an extent only as the same should be actually occupied for building purposes, to sewer, level, pave, metal, flag, kerb, channel, or make good all or any parts of the road or the carriage-way or footway or any other part of the said road which for the time being should not be sewered, levelled, paved, metalled, flagged, kerbed, channelled, and made good to the satisfaction of the urban authority. Provided always, that the respective owners or occupiers should not be liable to repair or make good such part or parts of the road or carriage-way or footway as were already made or metalled, and subject to the above-mentioned provisions such powers of executing and recovering in a summary manner expenses and taking proceedings in relation to the matters aforesaid or any of them as the urban authority would for the time being have or be capable of exercising under sect. 150 and other sections of the Public Health Act 1875 or under the Folkestone Improvements Act 1855 if the said road had for the time being not been accepted by the urban authority as a public highway and were not a highway repairable by the inhabitants at large.

It was admitted that at the date of the agreement the carriage-way had been formed and metalled by and at the expense of the railway company, and that the footpath now in question had been included in the work of the road, and formed, but had not been flagged, kerbed, or channelled.

The appellants also produced and put in evidence their minute-book containing resolutions passed at meetings held respectively on the 21st May 1879, the 4th June 1879, and the 3rd Dec. 1879 sanctioning the arrangement carried out by the agreement, and authorising the affixing of their common seal to such agreement. The appellants also proved that a search had been made in their minute-books from the 3rd April 1878 down to 1898, with the result that they had not found a record of any minute declaring Shorncliffe-road to be a highway repairable by the inhabitants at large or ordering the putting up of notices of the kind referred to in sect. 152 of the Public Health Act 1875. It was also proved or admitted that there was no such record from 1898 to the date of the determination by the justices.

It was also proved from July 1900 to the present time that no notices were published declaring Shorncliffe-road to be a highway repairable by the inhabitants at large, and that from 1880 to July 1900 the appellants' road foreman had never seen any such notice. There was no cross-examination upon this point, and no evidence was given on behalf of the respondents that such notice had been given. It was also proved by the appellants that the footpath in question was beached by

their workmen once or twice a year from 1880 to 1885; that it was a dirt path with beach over, but afterwards, the beach being slippery to walk over, was tarred by their workmen with tar paving, this being the only method of tarring then used; that there was not then and never had been any kerb or channel to the footpath, but the instructions to the appellants' officers and workmen had been that when houses were built the footpath would be made up at the expense of the adjoining owners, and that footpaths on a length of Shorncliffe-road other than the length in question were made up about 1884 and 1885 under the Public Health Act 1875 at the cost of the frontagers.

A copy of the South-Eastern Railway Act 1881 was produced and put in evidence, and the attention of the justices was called to (*inter alia*) sect. 12 (5) thereof, whereby the South-Eastern Railway Company were empowered to stop up a portion of Coolinge-lane hereinafter and hereinbefore referred to.

The respondents proved by the evidence of witnesses called by them or elicited on cross-examination of the appellants' witnesses the following facts:—

That prior to a stopping up of a portion thereof by the South-Eastern Railway Company hereinafter referred to, Coolinge-lane (which ran from the Sandgate-road to Cheriton-road) was a public highway for all purposes; that so much of Coolinge-lane as lay between its junction with the Cheriton-road and a point on the lane opposite to the northern side of the Shorncliffe Inn was stopped up by the South-Eastern Railway Company in or about the early part of 1882; that the company about the same time removed the bridge over their railway and the approaches thereto, the ground under the bridge being required by the company for the laying of additional metals and for the site of a goods yard; that Shorncliffe-road, from the Shorncliffe Inn in Coolinge-lane to Cheriton-road, had been made by the railway company before the stopping up referred to above, and that, if such road had not been made, there would after such stoppings up have been no means of access from Coolinge-lane to Cheriton-road, and that no other road but Shorncliffe-road was substituted.

It was admitted in cross-examination that the road was made, as mentioned in the recital of the agreement hereinbefore referred to of the 3rd Dec. 1879, before that date.

Shorncliffe-road lying between the railway (including the footway in question and the footway at the other side thereof) is 40ft. wide.

The footway in question had been tarred by the appellants about three times and the foundation was a mixture of dirt and chalk, and it was laid out as part of the road, though it was not made or repaired otherwise than as hereinbefore stated, and that permits for opening the footpath had been given by the appellants.

The respondents produced and put in evidence (the appellants not objecting) an old estate map, dated 1798, belonging to and coming from the custody of the Earl of Radnor, lord of the manor of Folkestone, and upon this map Coolinge-lane was shown as an ancient highway running from Sandgate-road to Cheriton-road.

The respondents also produced and put in evidence (the appellants not objecting) the map annexed to the tithe rent apportionment dated the 20th July 1842, and upon this map Coolinge-lane was also shown as an ancient highway.

On referring to a complaint which was exhibited by the appellants, it was seen that the appellants did not contend that the carriage-way portion of Shorncliffe-road is not a highway repairable by the inhabitants at large.

On behalf of the respondents it was contended: (*a*) That the appellants by their minutes and the agreement of the 3rd Dec. 1879 had declared that Shorncliffe-road should as from the 1st Jan. 1880 be dedicated to the public, and should be accepted by the appellants as a public highway repairable by the inhabitants at large; (*b*) that the agreement derived its force from sect. 146 of the Public Health Act 1875, and that sect. 146 was independent of sect. 152 of that Act; (*c*) that sect. 69 of the Folkestone Improvement Act 1855 required that new streets to be laid out after the date of that Act should not be of less width than 40ft. inclusive of the footway, and that the roadway in question would not be 40ft. wide without the footways; (*d*) that the appellants had exercised jurisdiction over the footway by giving permits to open the same; (*e*) that the effect of the exceptions in the agreement was to create contractual obligations, subject to which the appellants took over the road; (*f*) that, although the agreement purported to reserve to the appellants the powers of the Folkestone Improvement Act 1855 and of the Public Health Act 1875, the Private Street Works Act 1892 could not be read into such reservations, and that, by virtue of sect. 25 of the last-mentioned Act, sects. 150, 151, and 152 of the Public Health Act 1875 had no application to this case; (*g*) that the estate map and tithe map hereinbefore referred to proved that Coolinge-lane was an ancient highway (running without interruption from Sandgate-road to Cheriton-road) in existence prior to 1835, and that it was therefore repairable by the inhabitants at large; (*h*) that sect. 2 of the South-Eastern Railway Company's Act 1881 incorporated the Railway Clauses Consolidation Act 1845; that sect. 53 of the last-mentioned Act required the substitution of a new road before the old road could be stopped up; that Shorncliffe-road was the substituted road which the company had put into a proper state of repair under sect. 56 of the last-mentioned Act, and that therefore and thereupon the burden of repairing the substituted road fell upon the inhabitants at large. (In support of this contention *Friern Barnet Local Board* v. *Great Northern Railway Company*, 57 J. P. 53, was cited.)

On behalf of the appellants it was contended: (*a*) That the above-mentioned agreement of the 3rd Dec. 1879 must be taken as a whole, that effect must be given to the reservations contained therein, that the formalities for taking over a new road had not been complied with, and that the agreement itself did not constitute the road a highway (in support of these contentions *Eyre* v. *New Forest Highway Board*, 56 J. P. 517, was cited); (*b*) that Shorncliffe-road could not be regarded as a substituted road, because such road and the arrangements in connection therewith—*i.e.*, the minutes of the appellants and the aforesaid agreement—were completed before the railway obtained their Act in 1881; (*c*) that sect. 53 of the Railway Clauses Consolidation Act 1845 had no application (in support of this

contention sects. 16 and 46 of the same Act were referred to); (*d*) that the South-Eastern Railway Act 1881 varied the Railway Clauses Consolidation Act 1845 by authorising the stopping up of Coolinge-lane; (*e*) that upon the facts the justices were not warranted in law in finding the portion of Shorncliffe-road in respect of which the proceedings under the Private Street Works Act 1892 had been taken to be a highway repairable by the inhabitants at large.

The justices found that by virtue and in pursuance of the agreement of the 3rd Dec. 1879 the road in question was dedicated to the public and accepted by the appellants as such, and thereby became a public highway repairable by the inhabitants at large, and therefore that the appellants were not entitled to make up at the expense of the frontagers the footway in question. The decisions in *Bromley Local Board* v. *Lansbury* (*Times*, Dec. 5, 1894; 16 M. C. C. 574) and *Mayor, &c., of Derby* v. *Grudgings* (72 L. T. Rep. 594; (1894) 2 Q. B. 496) appeared to them to support the view they took. They also found that prior to the date at which a portion of Coolinge-lane was stopped up as aforesaid, such lane was as to the whole length thereof from Sandgate-road to Cheriton-road a public highway repairable by the inhabitants at large, and they also found alternatively to their finding, so far as consistent therewith, that Shorncliffe-road from the Shorncliffe Inn, in Coolinge-lane, to Cheriton-road was a new road made and provided by the South-Eastern Railway Company in substitution for the old road which they by their Act of 1881 obtained power to stop up. In view of sub-sect. 2 of sect. 79 of the South-Eastern Railway Company's Act of 1881, they were of opinion that the Railway Clauses Consolidation Act 1845 did bear upon the question; that the railway company put the substituted road into a proper state of repair within the time prescribed, this being the only obligation imposed upon them by sect. 56 of the Railway Clauses Consolidation Act 1845; and that thereafter the burden of repairing the substituted road fell upon the inhabitants at large, by whom the old road was repairable, and that therefore the road now is a highway repairable by the inhabitants at large. They were guided to this conclusion by the decision in *Friern Barnet Local Board* v. *Great Northern Railway Company* (57 J. P. 53). They also considered that the decision in *London and North-Western Railway Company* v. *Ogwan Urban District Council* (63 J. P. 295) bore slightly upon the point. They were also of opinion that, as sect. 16 of the Railway Clauses Consolidation Act 1845 gives the widest powers with regard to altering the course of roads, there is an implied power to stop any road as diverted, and that no application for such a purpose need be made under the Highway Acts.

The question for the opinion of the court was whether upon the facts of the above statement they came to a correct determination in point of law.

Macmorran, K.C. (*R. Cunningham Glen* and *Bethune* with him) for the appellants.—The section which authorises this agreement is sect. 146 of the Public Health Act 1875, but by its terms there is a reservation that the owners and occupiers should not be liable where the roads had already been made, but otherwise the liability was to attach to frontagers as if the road had not been accepted as a highway repairable by the inhabitants at large. If the agreement is good at all, it must be good *in toto*, and, further, the formalities that are necessary in taking over this road as a new road have not been complied with. They referred to

Dryden v. *Putney Overseers*, 34 L. T. Rep. 69; 1 Ex. Div. 263;
Attorney-General v. *Wandsworth District Board*, 6 Ch. Div. 539;
Mayor of Derby v. *Grudgings*, 72 L. T. Rep. 594; (1894) 2 Q. B. 496.

Scholefield for the respondents.—This is a highway repairable by the inhabitants at large, and the powers that the appellants seek to enforce are not applicable to such a highway. An agreement to this effect cannot give jurisdiction. [He was stopped.]

Lord Alverstone, C.J.—This case is, to my mind, rather difficult until you understand the position. Proceedings were taken against the frontagers under sections which correspond to sect. 150 of the Public Health Act. It is agreed in these proceedings that jurisdiction to make an order is only exercisable in the case of a highway not being a highway repairable by the inhabitants at large. Now, it seems to me that the Folkestone Corporation, the local authority here, assert that that is the condition of the highway. It is recited by the agreement of 1879 that the roadway, including the footway, is dedicated to the public, and shall be accepted by the urban authority as a public highway repairable by the inhabitants at large, and shall be maintained and repaired accordingly. Then, of course, it goes on to the part of the clause which causes the greatest difficulty to my mind: "But nevertheless the urban authority shall retain and have the same power of requiring the respective owners to make up the road," &c. At first I thought it was open to the view that Mr. Macmorran has clearly put before us, that, if that is to be taken to be a local agreement made under sect. 146, the proof that the highways are repairable is accompanied by the reservation to the local authority of the rights against frontagers. It seems to me that that cannot be made use of in a proceeding where the local authorities are invoking the powers of a statute which they can only invoke and exercise where the highway is not repairable by the inhabitants at large. It is a condition which may give the local authority a right as against people who are parties to the agreement, and possibly—I express no opinion as to that—some rights against persons who take with notice, and I do not know whether they would have rights against persons who took without notice. It seems to me quite impossible to say, where they are invoking the powers of a section, which can only be used where the highways are not repairable by the inhabitants at large, that they can in one breath obtain that jurisdiction, and then say that there is a secret reservation to which the particular frontagers are not parties, and assert that they still have their rights reserved. I think, therefore, that the decision of the magistrates is correct. I do not deal with the other points, because, although to my mind they are points of difficulty, we have

not had them fully argued. I am myself satisfied that this was nothing more than a substituted road for the old road, and that therefore it would *primâ facie* carry with it the old obligations, or, in other words, would be a highway repairable by the inhabitants at large. I only mention that because I do not want it to be assumed that I have acceded to the argument that the rights of the frontagers are any different, having regard to the circumstances in which this particular road was made. I think, for the short reasons which I have given, this appeal must be dismissed.

LAWRANCE, J.—I agree.

RIDLEY, J.—I agree.

Appeal dismissed.

Solicitors: *Holt, Beever,* and *Co.,* for *A. F. Kidson,* Town Clerk, Folkestone; *J. H. Rook,* Folkestone.

Friday, Jan. 12, 1906.

Before Lord ALVERSTONE, C.J., RIDLEY and DARLING, JJ.)

REX *v.* LANCASHIRE JUSTICES. (*a*)

Justices—Licensing — Disqualification — Justices incompetent to act sitting on bench—Refusal of renewal by licensing justices—Appeal—Licensing justices sitting on bench at quarter sessions on hearing of appeal—Validity of order.

Upon an appeal to quarter sessions from an order of licensing justices refusing to renew a licence, two of the licensing justices who were present at the licensing meeting, and who were parties to the making of the order appealed against, sat on the bench with the chairman and justices of quarter sessions during the hearing of the appeal; they retired with the other justices, and returned into court and sat on the bench when the decision was given and an order made dismissing the appeal, but they took no part whatever in court, or when the justices retired, in the discussion of the case or in the decision of the appeal:

Held, that, as the two justices were disqualified from acting on the appeal from their own order, they ought not to have sat on the bench while the appeal was being heard, and their presence on the bench, even though they took no part in the proceedings, rendered the order made by quarter sessions invalid, and the appeal ought to be reheard.

RULE calling on the justices of the county of Lancaster to show cause why a writ of *certiorari* should not issue to remove, for the purpose of quashing the same, an order made by the general Court of Quarter Sessions for the county of Lancaster, on the 12th April 1905, dismissing the appeal of one Arthur Heathcote against an order of the licensing justices of Manchester, on the 6th March 1905, refusing to grant him a renewed licence, upon the ground that two of the justices, whose order was the subject of the appeal, were members of the Court of Quarter Sessions which dismissed the appeal.

A rule *nisi* had also been obtained for a *mandamus* to the same justices to hear and determine the appeal, the rules being obtained on the application of Arthur Heathcote.

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

Affidavits were filed by Mr. Yates, K.C., the chairman of the quarter sessions, and by the two justices in question, Mr. R. Armitage and Mr. F. Moss.

From these affidavits the facts appeared to be as follows:—

On the 12th April 1905 the general court of Quarter Sessions for the county sat for the purpose of hearing licensing appeals. Mr. Yates, K.C., the chairman, presided, and among the other justices present were Mr. Armitage and Mr. Moss, both of whom had been members of the licensing meeting, and had taken part in refusing to renew the applicant's licence for the Angel inn, Gorton. These two justices sat one at each side of the chairman, and when the appeal was called on they told the chairman that they had taken part in the previous proceedings, and asked if they should leave the bench. The chairman agreed that they should take no part in the hearing of the appeal or in the decision, but said that he did not see any objection to their remaining on the bench. They accordingly remained on the bench while the appeal was being heard, but they addressed no remarks to the chairman, except as above mentioned, or to the other justices, and neither of them took any part in the discussion or hearing of the appeal. They retired with the other justices when they retired to consider their decision, but they took no part whatever in the discussion which then took place, or in influencing or arriving at the decision which the other justices arrived at. They returned into court with the other justices, and had resumed their seats next the chairman when the decision was announced. No objection was made to their presence on the bench until after the decision of the court was given.

The above rules were then obtained upon the ground that the proceedings at the quarter sessions on the hearing of the applicant's appeal were invalidated, by reason of the fact that two of the justices who had sat and had taken part in refusing to renew the licence in the first instance had also sat with the other justices in quarter sessions when the appeal was heard and determined by the quarter sessions, although those two justices had taken no part in the discussion or decision of the appeal.

No counsel appeared on behalf of the justices to show cause, but the affidavits made by the chairman and the two justices were read.

E. Sutton (*G. Jordan* with him) in support of the rules.—The presence on the bench at quarter sessions of the two justices who had taken part in the refusal of the licence invalidated the order made by the quarter sessions dismissing the applicant's appeal. It makes no difference that these two justices took no part in the discussion or decision of the appeal; it is sufficient that they were present on the bench. The court was improperly constituted, by reason of the fact that two of the justices who had been parties to the previous decision refusing the licence sat on the bench at quarter sessions, and it is immaterial whether they took any part in the hearing of the appeal or not:

Reg. v. *Meyer,* 34 L. T. Rep. 247; 1 Q. B. Div. 173;

Reg. v. *London County Council; Ex parte Akkersdyk,* 66 L. T. Rep. 168; (1892) 1 Q. B. 190.

The order made by the quarter sessions was therefore bad and ought to be set aside, and the appeal heard on the merits.

Lord ALVERSTONE, C.J.—In this case two justices appear to have sat on the bench who were obviously not competent to take part in the proceedings, to have sat on either side of the chairman, and to have retired and returned into court with him and the other justices. It was said that they took no part in the decision, but, in my opinion, it is extremely important that persons should not even appear to form part of a court, or be in a position in which they could be supposed to have any influence, where they are interested in a case. That seems to me to be the principle which Blackburn, J. enunciated in the case which has been cited of *Reg.* v. *Meyer* (*ubi sup.*), in which he had the concurrence of two other judges, and his judgment has been approved in this court. Blackburn, J. in that case expressly declined to go into the question whether the person acted or not, and he thought it better to maintain the rule that justices who were not competent to act, should not sit on the Bench when the appeal was heard. Both rules therefore will be made absolute, and the appeal must be re-heard by the quarter sessions.

RIDLEY and DARLING, JJ. concurred.

Rules absolute.

Solicitors for the applicant, *Pritchard, Englefield* and *Co.*, for *P. Holker Jordan* and *Bowden*, Manchester.

Monday, Jan. 15, 1906.

(Before Lord ALVERSTONE, C.J., RIDLEY, and DARLING, JJ.

MORGAN AND OTHERS (apps.) *v.* LICENSING JUSTICES OF AYLESFORD (resps.). (*a*)

Licensing—Renewal of licence—House not required—Licensing justices delegating their powers to sub-committees—Report of sub-committee—Duty to communicate to licensee—Report of house to quarter sessions—Question as to other houses in neighbourhood not reported—Admissibility of—Licensing Act 1904 (4 *Edw.* 7, *c.* 23), *s.* 1, *sub-s.* 2; *s.* 5, *sub-s.* 2.

During the hearing of an application for the renewal of a licence before the committee of quarter sessions appointed for that purpose, questions were asked on behalf of the applicant for renewal, of a witness in cross-examination, whether it was not the fact that there were other licensed houses in the neighbourhood of the applicant's house the licensees of which had been convicted for offences against the licensing laws, and whether it was not the fact that other licensed houses in the neighbourhood were not so well conducted as the applicant's house, and generally as to the conduct and management of other licensed houses in the neighbourhood, which had not been referred to quarter sessions. The committee having disallowed the questions in so far as they related to houses the renewal of the licences of which had not been referred to quarter sessions.

Held, that the mere fact that the questions related to houses which had not been reported to quarter sessions, was not a sufficient reason for disallowing the questions and excluding the evidence, and that the answers to the questions ought to have been admitted.

The justices of a licensing district can make inquiry as to licensed houses in their district by means of sub-committees, provided that they afterwards bring the knowledge they so obtain to the notice of the persons interested.

CASE stated for the opinion of the court by the committee to whom the Court of Quarter Sessions for the western division of the county of Kent had delegated such of their powers, under the Licensing Act 1904, as quarter sessions are required to delegate by sect. 5, sub-sect. 2, of the Act.

The appellants were the tenant and owners respectively of a certain beerhouse known as the Running Horse, situate in the Brook, Chatham, in the county of Kent. The beerhouse was first licensed before the year 1869, and the licence thereof had ever since been continuously renewed until the happening of the events hereinafter mentioned.

The respondents were the justices for the licensing district of the lathe of Aylesford in the county of Kent, within whose district the beerhouse was situate, and as such appeared and were heard on the question of the renewal of the licence of the beerhouse, pursuant to sect. 1, sub-sect. 2, of the Act.

At the annual licensing meeting for the district the appellant (Kate Morgan) duly applied for the renewal of the licence, but the justices referred the matter to the Court of Quarter Sessions, together with their report thereon, purporting to act under the provisions of the Licensing Act 1904.

A copy of the report was as follows:

In connection with the question so referred we report as follows: Before the general annual licensing meeting in the present year we carefully inquired into the question of the redundancy in the number of licensed houses for the sale of intoxicating liquor to be consumed on the premises in this licensing district, and appointed committees who visited all such houses in the more congested parts of the urban districts in the division—namely, the boroughs of Chatham and Gillingham, and the urban districts of Northfleet—and collected statistics and other particulars regarding the same. These committees were also instructed to select the houses the renewal of the licences of which they considered might with most advantage be referred this year to quarter sessions, with a view to such renewal being refused in accordance with sect. 1 of the Licensing Act 1904, the number of houses so selected in each district not to exceed one-third of the total number which they considered to be in excess of the requirements of the districts. These committees duly made their reports to us accordingly, which reports we adopted, and thereupon we gave directions to our clerk to give notice to the holders of the licences of these selected houses (which comprised all of those named in the above schedule) that the renewal thereof would be opposed at the general annual licensing meeting on the following grounds: (1) That such licence is not required to meet the wants of the neighbourhood; (2) that the existence of such licence renders the number of houses licensed for the sale of intoxicating liquor in the neighbourhood excessive. These notices were duly served, and at the general annual licensing meeting held on the 10th Feb. 1905 we heard police evidence with regard to each particular

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

house and the other licensed houses contiguous thereto, and counsel and solicitors for the respective licensees, and we postponed our decision until the adjourned general annual licensing meeting held on the 10th March, when, after careful consideration, we resolved to refer to quarter sessions the question of the renewal of the licences of the houses in the above schedule under the powers conferred by sect. 1 of the Licensing Act 1904 on the grounds above stated. It is possible that in future years we shall refer to quarter sessions the question of the renewal of a number of other licences upon the same grounds as those specified in the above schedule, being, in our opinion, only approximately about one-third of the total number of redundant licences in the licensing district. We do not consider that any reduction is at present required in the licensed houses in the rural parts of the district. The facts with regard to the several urban portions of this licensing district were as follows: "Borough of Chatham. The population at the last census was 38,146. The number of houses with 'on'-licences is 152, of which seventy-three are fully licensed, and seventy-nine are 'on' beerhouses, giving a ratio of one such house to every 250 inhabitants, which we consider to be excessive. The borough may be conveniently divided into three districts: (*a*) The Brock district; (*b*) the High-street district; and (*c*) the remainder of the borough (except the portion of the Old Brompton district, which is referred to hereafter under the head of Gillingham). The Brook district consists of the street known as the Brook and streets leading into it. It is the worst district in Chatham, and the majority of the bad characters of both sexes in the town reside there. There are fifteen 'on'-licensed houses in the district, of which five are fully licensed and ten are 'on' beerhouses. We consider that about one-half of these licences should be done away with, but this year we are referring to quarter sessions three only of such licences. With regard to the licences so referred to the following are the particulars ascertained by us. Name of house, Running Horse; situation, The Brook; nature of licence, 'on' beer; tied; structure and accommodation, brick built, old, rather small, two entrances, two bars and one tap-room; rateable value, 24*l.*; class of customers, working class; amount of trade, fair." [Then there were the names, distances, and description of the nearest licensed houses, four houses being given, three within fifty yards and one within twenty yards.]

On the consideration of this report by the committee of quarter sessions on the 23rd May 1905, the appellants and the respondents being represented by counsel, it was contended on behalf of the appellants that the report was not made in accordance with law, and that there were no facts contained in the report which gave the committee jurisdiction to consider the matter or to refuse the renewal of the licence.

The grounds of the objection were as follows: (1) That it appeared from the report that the justices for the licensing district had delegated their duties to committees prior to the general annual licensing meeting, and it was contended that this they had no jurisdiction to do; (2) that those committees had made their reports to the justices, and that the justices had adopted and acted upon their reports without setting out the reports or the facts contained therein in their report to quarter sessions, and that the appellants had consequently no opportunity of meeting or contradicting the state of facts, assumed or real, on which the committees or the justices had acted in referring and reporting on the beerhouse, and further, that it appeared that the justices had acted upon evidence not given upon oath or at the annual licensing meeting; (3) that, even assuming there was an excess of licensed houses in the district, there was nothing in the report to show that the appellants' beerhouse was the house that was not required to meet the wants of the neighbourhood, or that the existence of the licence of the beerhouse rendered the number of houses licensed for the sale of intoxicating liquors in its neighbourhood excessive, and that there was no fact disclosed in the report which could sustain a valid objection to the renewal of the licence.

The committee overruled these objections and proceeded with the hearing, but agreed to state a case for the opinion of the court.

During the progress of the hearing counsel for the appellants proposed to put the following question to the police witness called by the respondents:

Is it not the fact that there are licensed houses in the neighbourhood of the appellants' house and doing a similar trade the licensees of which have been convicted during the last five years for offences against the licensing laws?

The question so far as it related to licensed houses, the renewal of the licences of which had not been referred to quarter sessions, was disallowed by the committee. Counsel for the appellants further proposed to cross-examine the witness as to whether it was not the fact that other licensed houses in the neighbourhood of the appellants' beerhouse, and doing a similar trade, were not so well conducted as the appellants' beerhouse, and generally as to the conduct and management of other licensed houses in the neighbourhood of the appellants' house, which had not been referred to quarter sessions. This cross-examination was objected to by the committee and disallowed.

The hearing proceeded, and the committee decided to refuse the renewal of the licence, subject to this case.

The questions for the opinion of the court were: (1) Were the objections or any of them to the report well founded? (2) Should the question proposed to be put, or the cross-examination proposed, have been allowed?

If the court should answer the questions in the negative, then the appeal was to be dismissed; if the court should answer either of the questions in the affirmative, then the case was to be remitted to the committee.

Hohler for the appellants.—There are two questions raised by the case—first, whether or not the report referring the licence of this house to quarter sessions was properly made; and, secondly, whether or not certain questions asked in cross-examination were admissible. It is submitted that the report of the justices sitting as the renewal authority was not made in accordance with the Act. The licensing justices referred the question of the licensed houses in the district to committees, who were to inquire into the circumstances of the houses and were to select those which they considered ought to be referred to quarter sessions. These committees did so, and made reports to the licensing justices, and the justices adopted those reports without hearing evidence as to each house. It is submitted that they were wrong in adopting and acting upon these reports without either showing those reports to the appellants, or giving the appellants an

opportunity of meeting the statements contained in those reports. [Lord ALVERSTONE, C.J.—The case in that respect is like the case of *Rex* v. *Farnham Justices* (86 L. T. Rep. 839; (1902) 2 K. B. 363), where the justices appointed a sub-committee to examine into the details of each house.] The present case is not the same as the *Farnham* case, as in that case the justices heard the evidence as to each house in open court. The procedure adopted by the renewal authority in this case was in contravention of the express provisions of sect. 1 of the Act of 1904. By rule 16 of the Licensing Rules 1904 the appellants were entitled to have a copy of the report, or so much of it as related to their house. That is conceded, but it refers to the final report to the quarter sessions, and does not touch the reports made by these committees. [Lord ALVERSTONE, C.J.—Then we have to deal with this case on the supposition that the appellants had not got the whole contents of the reports of the sub-committees to the licensing justices.] Yes. [He referred to *Rex* v. *Tolhurst* (93 L. T. Rep. 76; (1905) 2 K. B. 478), and was stopped.]

Percival Hughes for the respondents.—First, with regard to the question whether the renewal authority had before them a statement of facts which was not put before the compensation authority, the licensee had no right to see the private report on which the renewal authority acted. The justices act on the renewal authority in a twofold capacity. They have the right to act as objectors, and as to that they are entitled to use their own knowledge of the houses. [Lord ALVERSTONE, C.J.—The point is, Can they act on the result of their inquiry without communicating that to the licensee?] Yes, they may do so, so long as they allow the evidence to be given in court and to be cross-examined to. They adopted the report of their sub-committees *quâ* objectors and not as adjudicators, and the licensee was not entitled to that report. [Counsel stated that he was instructed that, as a matter of fact, the whole of the facts contained in the sub-committees' reports appeared in the report made to quarter sessions, of which the appellants had due notice, and the case then proceeded upon that basis.] Then, with regard to the questions which were disallowed, the compensation committee were right in excluding those questions in so far as they related to houses which had not been reported to them. They have not improperly narrowed the ambit of the discussion by disallowing these questions, as they have sufficiently differentiated between the different houses to satisfy the judgments in

Raven v. *Southampton Justices*, 90 L. T. Rep. 94; (1904) 1 K. B. 430;
Rex v. *Tolhurst* (*ubi sup.*).

Lord ALVERSTONE, C.J.—In this case two questions arise, one relating to the action of the renewal authority, the licensing justices, and the other relating to the action of the quarter sessions on a report sent to them by the renewal authority. On the first question I will only express an opinion, without deciding a point which I do not think really arises, in such a way as not to prejudice the discussion of the matter in future. In the case of *Rex* v. *Tolhurst* (*ubi sup.*) I said — and I see no reason to change my opinion—that if the justices were going to report on facts they ought to give the persons affected an opportunity of seeing what those facts were and of offering evidence upon those facts, and if there were any grounds for supposing that in the report adopted by the renewal authority there were statements of fact with regard to this house, or to the merits of the matter on which the appellants had not had an opportunity of being heard, I should certainly have given effect to that objection; but it seems to me, as far as I can understand the matter, that question does not really arise, particularly as it appears that certain questions were allowed to be put by the renewal authority, although they were rejected by the quarter sessions. Every one knows the difficulty there is in working this Licensing Act, and in such a place as Chatham, where it was obvious that some action was necessary, the justices had a difficult task before them. With regard to making inquiry by sub-committees, I do not wish to say anything to fetter the power of the justices, provided they afterwards brought the knowledge they so obtained to the notice of the persons whose interests would be affected thereby. That follows from what we said in the cases of *Rex* v. *Farnham Justices* (*ubi sup.*) and *Raven* v. *Southampton Justices* (*ubi sup.*). But in this case there was a special reason why they should give all the information they had to the compensation committee, because their instructions to the sub-committees were that they should only report on a number of licences not exceeding one-third of the total number of licences which they considered to be in excess of the number required. That had an important bearing on the action of the quarter sessions. If the renewal authority had acted upon facts supplied to them by the reports of their sub-committees which the appellants had not had an opportunity of seeing, the matter might have been different. I think, however, that it will probably turn out that the statement made by counsel for the respondents, upon his instructions, as to the report to the quarter sessions containing all the facts set out in the reports of the sub-committees, is correct, because on looking at the report sent to the quarter sessions I find a number of particulars given about the Running Horse, the rateable value, the class of customers, and amount of trade, and probably that was all that was given in the original reports furnished by the sub-committees. There was nothing else in the report that related to this particular house, and I think it highly probable that there was nothing else in the original report. Then it is stated that evidence was given about every one of these houses, and that the parties interested were represented. Therefore, if the only point in this case had been that the renewal authority had acted upon information or statements of fact which they had not heard in evidence, or on which they had given the licensee no opportunity of giving evidence, I should not have been prepared to give effect to the appellants' objection upon that ground, and I agree with what has been said that less evidence might be required where the renewal authority were only going to report a house to the quarter sessions than might be necessary where it was a question of refusing a licence. I now come to the second objection, which seems to me to be rather a serious one.

Under sect. 1 of the Act of 1904, the authority which is to deal with the refusal of the renewal in such cases is the quarter sessions. The quarter sessions have to give to all persons interested an opportunity of being heard, and then, subject to the payment of compensation, they might refuse the renewal. They had before them in this case a report from the renewal authority, which *ex concessis* related to one-third only of all the licences which ought, in the opinion of the justices, to be suppressed. It was a bad neighbourhood, said to be one of the worst in Chatham, and it contained an excessive number of licensed houses. The appellants wished to ask certain questions which are set out in the case; they were not allowed to ask whether it was not the fact that the licensees of some of the other houses in the neighbourhood had been convicted, and, further, whether there were not other licensed houses in the neighbourhood which were not so well conducted as the appellants' house. Those questions were rejected, not on the ground that the houses were too far off, nor on the ground that, in the opinion of the justices, there was such a difference between the houses that the question was not relevant, but simply on the ground that the question related to houses which had not been reported to them. When we remember that the sub-committees only reported as to one-third of the houses that they thought ought to be extinguished, I think the compensation authority ought not to have rejected the cross-examination on that ground. Therefore, without saying anything to fetter the discretion of the justices as to how they should act on the evidence when given, I think they ought to have admitted the cross-examination in order to give the licensee an opportunity of testing the matter. I think, therefore, on this second ground the appeal must be allowed, and the case must be remitted to the quarter sessions, with a direction not to reject this class of evidence.

Ridley, J.—I agree.

Darling, J.—I agree. *Appeal allowed* (*a*).

Solicitors for the appellants, *Ince*, *Colt*, and *Ince*, for *Basset* and *Boucher*, Rochester.

Solicitors for the respondents, *Sismey* and *Cook*, for *Arnold*, *Baker*, and *Day*, Rochester.

(*a*) No point was taken, raised, or argued in the case as to whether the committee of quarter sessions had power to state a case, but the case was argued and decided upon the assumption that the committee had power to state a case, and that there was a final order made. It was afterwards decided in *Rex* v. *Justices of Southampton; Ex parte Cardy* that the committee had power to state a case.

Monday, Jan. 15, 1906.

(Before Lord Alverstone, C.J., Ridley and Darling, JJ.)

Smith and others (apps.) *v.* Couzens and others (Licensing Justices of Portsmouth) (resps.). (*a*)

Licensing—Renewal of licence—Order for alterations—Structural alterations—Alterations for securing "proper conduct of the business"—Order for stopping up one door and locking another—Jurisdiction of licensing justices—Licensing Act 1902 (2 *Edw.* 7, *c.* 28), *s.* 11, *sub-s.* 4.

Licensing justices, upon an application for the renewal of a licence, have jurisdiction under sect. 11, *sub-sect.* 4, *of the Licensing Act* 1902 *to make an order requiring one door to the licensed premises to be nailed up and another door to be locked and kept locked except for certain specified purposes, as, under that sub-section, the power of the justices to order alterations is not limited to alterations of a structural character, but extends also to alterations in the premises which, although not structural in their character, have reference to the proper conduct of the business, and the order for the locking of the door would be an order for securing the proper conduct of the business.*

Case stated by the Recorder of Portsmouth, in the matter of appeals by the appellant Alfred Smith, the licensee of the Naval Hotel public-house, Wickham-street, Portsea, in the county borough of Portsmouth, and by the appellants trading as Fuller, Smith, and Turner, of the Griffin Brewery, Chiswick, the owners of the public-house, from an order made by the licensing justices of the borough of Portsmouth on the 8th March 1905.

The appeals came on for hearing before the recorder at the general quarter sessions of the peace for the borough of Portsmouth on the 8th April 1905, and were taken together by the consent of the recorder and all the parties, and, having viewed the premises and having heard evidence and counsel on both sides, the recorder found the following facts to have been proved or admitted:—

The appellant Alfred Smith was the holder of a full licence at the Naval Hotel, and, in accordance with a notice served upon him, deposited with the clerk to the respondent justices, on applying for a renewal of his licence, a plan of his licensed premises, showing the whole of the premises included in the licence, and distinguishing by the colour pink the rooms or parts of the premises used for the sale or consumption of intoxicating liquor; and also showing the several entrances to the premises from two parallel streets, known as Wickham-street and Havant-street respectively, with the dimensions and description of each room and the position of every counter screen and partition. The plan correctly described the premises, and accompanied and formed part of this case.

The respondent justices at the adjourned annual licensing meeting, held on the 8th March 1905, purporting to act under sect. 11, sub-sect. 4, of the Licensing Act 1902, made an order that the following alterations which they (the justices)

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

therein stated that they thought reasonably necessary to secure the proper conduct of the business should be made by the appellant Alfred Smith (the licensee) in that part of the premises where intoxicating liquor was sold or consumed—that is to say: "With a view to confining the sale or consumption of intoxicating liquor to the Wickham-street end of the said premises the entrance door to the bottle and jug department of the said premises in Havant-street shall be nailed up, and the entrance door to the public bar of the said premises in the same street shall be kept locked and not used except for domestic purposes, or for delivering intoxicating liquor, coals, or other goods when necessary, or for the private use of the licensee or his household or *bonâ fide* lodgers on the said premises, and the key of such entrance to the said public bar in Havant-street shall be kept by the licensee." A copy of this order formed part of the case.

Notices of appeal were duly given by the appellant Alfred Smith, and by the appellants Fuller, Smith, and Turner respectively, and the grounds of appeal were identical in each case.

A block plan accompanied and formed part of this case, and correctly showed the immediate surroundings of the Naval Hotel. The Naval Hotel had bars and bottle and jug entrances in two distinct parallel streets, Wickham-street and Havant-street. Such entrances externally were distant from door to door 122 yards in one direction and 106 yards in the opposite direction. Internally the premises were 136ft. long, and did not exceed 14ft. 3in. in width at the parts occupied by the bars.

Counsel for the respondents contended, first, that the alterations directed by the order to be made were structural alterations, and were properly directed in accordance with sect. 11, sub-sect. 4, of the Licensing Act 1902, and cited *Bushell* v. *Hammond* (91 L. T. Rep. 1; (1904) 2 K. B. 563); secondly, that the justices could make an order for any alteration, structural or non-structural, in the licensed premises, and that the correct interpretation of the Act was that if such order directed structural alterations then no other requisition for structural alterations could be made within the next five years.

Counsel for the appellants contended: (1) That the order of the justices was without jurisdiction; that the things therein ordered under the name of alterations, to be made in that part of the premises where intoxicating liquor was sold or consumed, were not alterations, or, alternatively, were not alterations within the meaning of sect. 11, sub-sect. 4, of the Act. (2) That the order, under the pretence of ordering alterations, in fact sought to impose upon the appellant Alfred Smith an undertaking to keep and observe certain conditions with reference to the conduct of his licensed premises, contrary to law. (3) That the order, under the pretence of ordering things necessary to secure the proper conduct of the business, in fact prohibited all the business theretofore legitimately carried on at the Havant-street entrance to the premises.

The recorder held that sect. 11, sub-sect. 4, of the Licensing Act 1902 only conferred upon the licensing justices power to make orders for alterations in the licensed premises and alterations of a structural character; and that this point did not seem to have been raised or decided in the case of *Bushell* v. *Hammond* (*ubi sup.*) cited by the respondents.

Consequently he held that, while the earlier part of the order—namely, that "The entrance door to the bottle and jug department of the said premises in Havant-street shall be nailed up"—might be within the provisions of the section, all the rest of the order was not, inasmuch as it did not purport to order any structural alterations in the licensed premises, or, indeed, any alterations in the premises at all; and that that part of the order was therefore *ultra vires*.

He thereupon quashed the whole order; as, in his judgment upon the merits of the case, the first part thereof (above quoted), standing by itself, was unnecessary and useless, even if severable and made with jurisdiction. Save as aforesaid, he was of opinion that the order taken as a whole was a reasonable order and within the jurisdiction of the justices.

The question of law for the opinion of the court was whether the justices had jurisdiction to make the order.

The Licensing Act 1902 (2 Edw. 7, c. 28) provides:

Sect. 11 (2). Any alteration in any licensed premises for the sale by retail of intoxicating liquors to be consumed thereon, which gives increased facilities for drinking, or conceals from observation any part of the premises used for drinking, or which affects the communication between the part of the premises where intoxicating liquor is sold, and any other part of the premises or any street or other public way, shall not be made without the consent of the licensing justices assembled either at the general annual licensing meeting, or at special sessions under section four of the Alehouse Act 1828, and the licensing justices may, before giving their consent, require plans of the proposed alterations to be deposited with their clerk at such time as they may determine; and, if any such alteration is made, save under the order of some lawful authority, without such consent as aforesaid, a court of summary jurisdiction, on complaint, may by order declare the licence to be forfeited, or direct that, within a time fixed by the order, the premises shall be restored to their original condition. (4) On any application for the renewal of a licence for the sale by retail of intoxicating liquors to be consumed on the premises, the licensing justices may require a plan of the premises to be produced before them, and to be deposited with their clerk, and, on renewing any such licence, they may by order direct that, within a time fixed by the order, such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in that part of the premises where intoxicating liquor is sold or consumed, but any such order shall be subject to an appeal to a court of quarter sessions, as provided by the Alehouse Act 1828, and, if any such order for structural alteration is made and complied with, no further requisition for the structural alteration of the premises shall be made within the next five years. If the licensed person makes default in complying with any such order, he shall, on summary conviction, be liable to a fine not exceeding twenty shillings for every day during which the default continues. (5) Notice of any order under this section shall be forthwith given by the clerk to the owner of the premises in respect of which the order is made.

Avory, K.C. (*Tyrrell Giles* with him) for the licensing justices, who were respondents in the court below.—The order which the licensing justices made, as to the nailing up of one door and the locking of another door, was an order

Under sect. 1 of the Act of 1904, the authority which is to deal with the refusal of the renewal in such cases is the quarter sessions. The quarter sessions have to give to all persons interested an opportunity of being heard, and then, subject to the payment of compensation, they might refuse the renewal. They had before them in this case a report from the renewal authority, which *ex concessis* related to one-third only of all the licences which ought, in the opinion of the justices, to be suppressed. It was a bad neighbourhood, said to be one of the worst in Chatham, and it contained an excessive number of licensed houses. The appellants wished to ask certain questions which are set out in the case; they were not allowed to ask whether it was not the fact that the licensees of some of the other houses in the neighbourhood had been convicted, and, further, whether there were not other licensed houses in the neighbourhood which were not so well conducted as the appellants' house. Those questions were rejected, not on the ground that the houses were too far off, nor on the ground that, in the opinion of the justices, there was such a difference between the houses that the question was not relevant, but simply on the ground that the question related to houses which had not been reported to them. When we remember that the sub-committees only reported as to one-third of the houses that they thought ought to be extinguished, I think the compensation authority ought not to have rejected the cross-examination on that ground. Therefore, without saying anything to fetter the discretion of the justices as to how they should act on the evidence when given, I think they ought to have admitted the cross-examination in order to give the licensee an opportunity of testing the matter. I think, therefore, on this second ground the appeal must be allowed, and the case must be remitted to the quarter sessions, with a direction not to reject this class of evidence.

Ridley, J.—I agree.

Darling, J.—I agree.

Appeal allowed (a).

Solicitors for the appellants, *Ince, Colt,* and *Ince,* for *Basset* and *Boucher,* Rochester.

Solicitors for the respondents, *Sismey* and *Cook,* for *Arnold, Baker,* and *Day,* Rochester.

(a) No point was taken, raised, or argued in the case as to whether the committee of quarter sessions had power to state a case, but the case was argued and decided upon the assumption that the committee had power to state a case, and that there was a final order made. It was afterwards decided in *Rex* v. *Justices of Southampton; Ex parte Cardy* that the committee had power to state a case.

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Smith and others (apps.) *v.* Couzens and others (Licensing Justices of Portsmouth) (resps.). (a)

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Case stated by the Recorder of Portsmouth, in the matter of appeals by the appellant Alfred Smith, the licensee of the Naval Hotel public-house, Wickham-street, Portsea, in the county borough of Portsmouth, and by the appellants trading as Fuller, Smith, and Turner, of the Griffin Brewery, Chiswick, the owners of the public-house, from an order made by the licensing justices of the borough of Portsmouth on the 8th March 1905.

The appeals came on for hearing before the recorder at the general quarter sessions of the peace for the borough of Portsmouth on the 8th April 1905, and were taken together by the consent of the recorder and all the parties, and, having viewed the premises and having heard evidence and counsel on both sides, the recorder found the following facts to have been proved or admitted:—

The appellant Alfred Smith was the holder of a full licence at the Naval Hotel, and, in accordance with a notice served upon him, deposited with the clerk to the respondent justices, on applying for a renewal of his licence, a plan of his licensed premises, showing the whole of the premises included in the licence, and distinguishing by the colour pink the rooms or parts of the premises used for the sale or consumption of intoxicating liquor; and also showing the several entrances to the premises from two parallel streets, known as Wickham-street and Havant-street respectively, with the dimensions and description of each room and the position of every counter screen and partition. The plan correctly described the premises, and accompanied and formed part of this case.

The respondent justices at the adjourned annual licensing meeting, held on the 8th March 1905, purporting to act under sect. 11, sub-sect. 4, of the Licensing Act 1902, made an order that the following alterations which they (the justices)

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therein stated that they thought reasonably necessary to secure the proper conduct of the business should be made by the appellant Alfred Smith (the licensee) in that part of the premises where intoxicating liquor was sold or consumed—that is to say: "With a view to confining the sale or consumption of intoxicating liquor to the Wickham-street end of the said premises the entrance door to the bottle and jug department of the said premises in Havant-street shall be nailed up, and the entrance door to the public bar of the said premises in the same street shall be kept locked and not used except for domestic purposes, or for delivering intoxicating liquor, coals, or other goods when necessary, or for the private use of the licensee or his household or *bonâ fide* lodgers on the said premises, and the key of such entrance to the said public bar in Havant-street shall be kept by the licensee." A copy of this order formed part of the case.

Notices of appeal were duly given by the appellant Alfred Smith, and by the appellants Fuller, Smith, and Turner respectively, and the grounds of appeal were identical in each case.

A block plan accompanied and formed part of this case, and correctly showed the immediate surroundings of the Naval Hotel. The Naval Hotel had bars and bottle and jug entrances in two distinct parallel streets, Wickham-street and Havant-street. Such entrances externally were distant from door to door 122 yards in one direction and 106 yards in the opposite direction. Internally the premises were 136ft. long, and did not exceed 14ft. 3in. in width at the parts occupied by the bars.

Counsel for the respondents contended, first, that the alterations directed by the order to be made were structural alterations, and were properly directed in accordance with sect. 11, sub-sect. 4, of the Licensing Act 1902, and cited *Bushell* v. *Hammond* (91 L. T. Rep. 1; (1904) 2 K. B. 563); secondly, that the justices could make an order for any alteration, structural or non-structural, in the licensed premises, and that the correct interpretation of the Act was that if such order directed structural alterations then no other requisition for structural alterations could be made within the next five years.

Counsel for the appellants contended: (1) That the order of the justices was without jurisdiction; that the things therein ordered under the name of alterations, to be made in that part of the premises where intoxicating liquor was sold or consumed, were not alterations, or, alternatively, were not alterations within the meaning of sect. 11, sub-sect. 4, of the Act. (2) That the order, under the pretence of ordering alterations, in fact sought to impose upon the appellant Alfred Smith an undertaking to keep and observe certain conditions with reference to the conduct of his licensed premises, contrary to law. (3) That the order, under the pretence of ordering things necessary to secure the proper conduct of the business, in fact prohibited all the business theretofore legitimately carried on at the Havant-street entrance to the premises.

The recorder held that sect. 11, sub-sect. 4, of the Licensing Act 1902 only conferred upon the licensing justices power to make orders for alterations in the licensed premises and alterations of a structural character; and that this point did not seem to have been raised or decided in the case of *Bushell* v. *Hammond* (*ubi sup.*) cited by the respondents.

Consequently he held that, while the earlier part of the order—namely, that "The entrance door to the bottle and jug department of the said premises in Havant-street shall be nailed up"—might be within the provisions of the section, all the rest of the order was not, inasmuch as it did not purport to order any structural alterations in the licensed premises, or, indeed, any alterations in the premises at all; and that that part of the order was therefore *ultra vires*.

He thereupon quashed the whole order; as, in his judgment upon the merits of the case, the first part thereof (above quoted), standing by itself, was unnecessary and useless, even if severable and made with jurisdiction. Save as aforesaid, he was of opinion that the order taken as a whole was a reasonable order and within the jurisdiction of the justices.

The question of law for the opinion of the court was whether the justices had jurisdiction to make the order.

The Licensing Act 1902 (2 Edw. 7, c. 28) provides:

Sect. 11 (2). Any alteration in any licensed premises for the sale by retail of intoxicating liquors to be consumed thereon, which gives increased facilities for drinking, or conceals from observation any part of the premises used for drinking, or which affects the communication between the part of the premises where intoxicating liquor is sold, and any other part of the premises or any street or other public way, shall not be made without the consent of the licensing justices assembled either at the general annual licensing meeting, or at special sessions under section four of the Alehouse Act 1828, and the licensing justices may, before giving their consent, require plans of the proposed alterations to be deposited with their clerk at such time as they may determine; and, if any such alteration is made, save under the order of some lawful authority, without such consent as aforesaid, a court of summary jurisdiction, on complaint, may by order declare the licence to be forfeited, or direct that, within a time fixed by the order, the premises shall be restored to their original condition. (4) On any application for the renewal of a licence for the sale by retail of intoxicating liquors to be consumed on the premises, the licensing justices may require a plan of the premises to be produced before them, and to be deposited with their clerk, and, on renewing any such licence, they may by order direct that, within a time fixed by the order, such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in that part of the premises where intoxicating liquor is sold or consumed, but any such order shall be subject to an appeal to a court of quarter sessions, as provided by the Alehouse Act 1828, and, if any such order for structural alteration is made and complied with, no further requisition for the structural alteration of the premises shall be made within the next five years. If the licensed person makes default in complying with any such order, he shall, on summary conviction, be liable to a fine not exceeding twenty shillings for every day during which the default continues. (5) Notice of any order under this section shall be forthwith given by the clerk to the owner of the premises in respect of which the order is made.

Avory, K.C. (*Tyrrell Giles* with him) for the licensing justices, who were respondents in the court below.—The order which the licensing justices made, as to the nailing up of one door and the locking of another door, was an order

which they had jurisdiction to make under sect. 11, sub-sect. 4, of the Licensing Act 1902. The questions which arise are these: Whether the order that was made was in fact an order for structural alterations, and whether the justices have any power under the sub-section to make any order except an order as to structural alterations. The learned recorder was wrong in holding that the order as to the locking of the door was not within the jurisdiction of the justices, inasmuch as the locking of the door was not a structural alteration, and he was wrong in holding that the sub-section merely dealt with alterations which were structural alterations in the premises. It is submitted, first, that sect. 11, sub-sect. 4, is not limited to a structural alteration, but, secondly, even if it is, that the alteration of the door by locking it would be a structural alteration. It is, at all events, an alteration which comes within the operation of the sub-section. The reasonable construction to be put upon the sub-section is that such alterations as are, in the opinion of the justices, reasonably necessary to secure the proper conduct of the business may be ordered, but if the order involves a structural alteration of the premises, then the justices cannot order another structural alteration within five years. It is quite clear that under the sub-section such an alteration can be ordered, and the case is really concluded by *Bushell* v. *Hammond* (91 L. T. Rep. 1; (1904) 2 K. B. 563), where the Court of Appeal held that under this sub-section the licensing justices had jurisdiction, upon granting a renewal, to make an order that the back entrance to premises should be kept closed and locked. [He referred to sub-sects. 1 and 2 of sect. 11.]

Pickford, K.C. (*S. H. Emanuel* and *Brodrick* with him) for the appellants (the licensee and owners of the house).—The recorder was right in quashing the whole order. The second part of the order as to the locking of the door was not an order which the licensing justices had power to make under this sub-section. Apart from the case of *Bushell* v. *Hammond* (*ubi sup.*) the locking of the door was neither an alteration in the premises nor a structural alteration in the premises. If the contention of the justices is right, then if there were a covenant in a lease that the tenant should not make an alteration in the premises, there would be a breach of that covenant, perhaps entailing forfeiture, if the tenant ordered a back door to be kept locked. It does not matter whether the word "structural" is used or not; to come within the sub-section, the alteration must be an alteration in the premises, as distinguished from an alteration in the conduct of the business, and an order to lock one door and keep it locked is not, and cannot be, such an alteration in the premises. It may be an alteration in the user of the premises or in the mode of conducting the business, but it cannot be a structural alteration of the premises. In reading sub-sect. 4, we must read the word "structural" into the first part of it. The first part of the sub-section enables the justices to order "such alterations" as they think necessary for the proper conduct of the business, and the latter part says "and if any such order for structural alterations" is made, &c. The words "such order for structural alterations" must mean the order referred to in the earlier part of the sub-section, that is, an order for alterations for securing the proper conduct of the business. The word "structural," therefore, has to be read into the whole sub-section, and governs the whole sub-section. The recorder was right in holding that the whole order was bad, because it was really a compound order containing two distinct subject-matters, one as to the nailing up of the door which might be within their jurisdiction, the other as to the locking of the door, which could not be within their jurisdiction, as not being a structural alteration. Then with regard to *Bushell* v. *Hammond* (*ubi sup.*), the present case does not come within that case. In that case the order was to put a substantial iron gate across the back entrance to the premises and to keep it locked, and that was an order for alteration in the premises. That was not at all a similar case to the present case, where the order was to nail up one door and keep another door locked. *Bushell* v. *Hammond* (*ubi sup.*) had reference to only one entrance, and the order made with regard to that entrance was an order which made an alteration in the premises. Here we are dealing with two separate doors, and the justices cannot validate an order as to locking one door by making another order as to nailing up the other door, which they had power to do. The case is a totally different case from *Bushell* v. *Hammond* (*ubi sup.*), and the recorder was perfectly right in saying that the point raised in this case was not decided in that case. It is submitted that the order to lock a door was not a structural alteration, or any alteration of the premises within the meaning of the sub-section. [He referred to *Rex* v. *Dodds and others* (*Licensing Justices of Birkenhead*) (93 L. T. Rep. 319; (1905) 2 K. B. 40), as showing that the justices had no power to require an undertaking from the licensee as to the observance of conditions.]

Avory, K.C. in reply. — Even assuming that *Bushell* v. *Hammond* (*ubi sup*) does not directly decide the point, it is submitted that it does indirectly decide it, and no one thought of arguing the point in that case. Part of this order does involve structural alteration, and that would be sufficient, though an order may be made under the sub-section which does not involve structural alteration. The order in this case was an order which affected the communication between the part of the premises where liquor was sold and the street, and according to *Bushell* v. *Hammond* (*ubi sup.*) any alteration which affected the entrance into the licensed premises would be an alteration which the justices would have power to order under this sub-section. If a door, which is the entrance to the licensed premises from the street, is ordered to be locked up, then that is an order which affects the communication with the street, and, according to that case, it is an "alteration" which comes within the sub-section.

Lord ALVERSTONE, C.J.—Speaking for myself alone I must repeat what I have said during the argument that to accede to the contention for the appellants (the licensee and owners) would, in my opinion, be to fritter away a most salutary part of this Act of Parliament. Now, upon this particular appeal in which the whole order made by the licensing justices has been quashed, though I am not going to shrink from dealing with the broader part of the case to which counsel for the respondent justices has called our attention, I think it

right to say that in my opinion this order was in any event good because it was an order for structural alterations. There was an order made to block up one door in Havant-street, and an extra term imposed in that order that the other door in that street should be kept locked except when goods were being delivered in and out. Upon that part of the case counsel for the appellants said that the order is divisible, and even if it were not, or assuming it to be good as to blocking up one doorway, it is bad because this extra term as to the locking of the other door is not an order as to something which is structural in itself, but relates to what he has called the conduct of the business. With regard to that contention it seems to me that the principle involved in the judgment of the Master of the Rolls in *Bushell* v. *Hammond* (*ubi sup.*) really covers that consideration. He said (1904) 2 K. B. at p. 566): "The licensing justices made an order involving the least possible disturbance to the premises and inconvenience to the applicant; they required the licensee not to allow the back entrance to be used as a means of access for customers, and for that purpose ordered him to keep the door locked and leave the key in the custody of a member of his family, instead of requiring more drastic alterations to be made in the premises at considerable expense to the licensee." In my view, that sentence could not have been so framed by a learned judge who is as careful in his language as the present Master of the Rolls is, if he had meant to say that that order was only good because the iron gate across the entrance was required. It seems to recognise the principle that where the licensing justices are making an order which is within their jurisdiction to make, they may impose upon it or include in it conditions and orders which will involve the least possible disturbance and still give certain privileges to the licensee. I think, therefore, that as the order stands, it is impossible to say, even on the narrowest view of the sub-section, that it was not an order which could be made under the sub-section; and I decline to be a party to a decision which would have the effect of saying that if there was a structural alteration by shutting up the second door, it would not be a structural alteration if the licensee instead of shutting up the door were allowed to keep that door open—provided it is kept locked at other times—for the purpose of bringing in goods, which were practically the very same terms as those which were recognised as being proper terms with regard to the door in question in the case of *Bushell* v. *Hammond* (*ubi sup.*). In my view the point, if a good point, as raised by counsel for the licensee in this case, was a good point against the order made in *Bushell* v. *Hammond* (*ubi sup.*), and therefore, indirectly, and I think directly, the order made by the licensing justices in this case was justified by the decision of the Court of Appeal in that case. I also desire to say that I assent to the view contended for by counsel for the respondent justices with regard to the proper construction of sub-sect. 4, and I do so for this reason, that in my opinion it was not intended that a statutory provision of this kind should be construed in the narrow way contended for on behalf of the licensee, unless the language makes it necessary. Now, the decision to which counsel for the licensee has referred, of *Rex* v. *Dodds and Others* (*Licensing Justices of Birkenhead*) (93 L. T. Rep. 319; (1905) 2 K. B. 40), as to the want of jurisdiction of the licensing justices to impose conditions, has nothing to do with this case. That turned entirely upon the language of the Licensing Act 1904, and there is an express prohibition or limitation contained in the first section of that Act which is not, as the Court of Appeal thought, consistent with the argument that was urged with regard to the other sections. But in the present case, under sect. 11, sub-sect. 4, upon an application for the renewal of a licence, the licensing justices may require the plan of the premises to be produced before them, and they may then require, and by order direct, that "such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in that part of the premises where intoxicating liquor is sold or consumed." Stopping there, I cannot see how it can be reasonably urged that an order to keep a door, which was ordinarily open, permanently locked, and another door open merely for the purpose of letting in or delivering out goods, is not an order for an alteration of the premises reasonably necessary to secure the proper conduct of the business. Looking to the purview of the section it seems to me the justices ought to have the power of making such an order, and I do not think that the language of this sub-section takes it away from them. Then the words of the sub-section go on: "but any such order shall be subject to an appeal to a court of quarter sessions, as provided by the Alehouse Act 1828" —that, no doubt, refers to the general appeal section, sect. 27, of the Alehouse Act 1828. I do not think that applies specially to structural alterations, and therefore all that can be said about it is that it is colourless one way or the other, but there is an appeal if there is an objection to the order. Then the sub-section goes on to say that as soon as "such order for structural alteration is made and complied with, no further requisition for the structural alteration of the premises shall be made within the next five years." It is quite permissible to read that in this way: "and if any such order involves structural alterations, and that is made and complied with, no further requisition for structural alteration shall be made within the next five years." I am unable to see why that provision is to limit the power of the justices to make an order for the alteration of the premises with reference to the conduct of the business independent of the structure, nor do I see any reasonable argument in favour of such a construction of the sub-section. I do not think that the language of the sub-section compels us to adopt such a view, and therefore I shall adhere to the view that what was ordered in this case was an alteration of the premises which the justices had power to make, even though it did not involve structural alterations. It is obvious, therefore, that the decision of the recorder was too narrow, and that this appeal ought to be allowed.

Ridley, J.—I agree. I think if the case were one of structural alteration there might well be a distinction between an order for locking a door and an order saying that an iron gate should be added to the premises as in the case of *Bushell* v. *Hammond* (*ubi sup.*). If that case had rested upon the fact that the justices did really require

a new iron gate to be placed across the door, that would make a distinction between that case and the present, if in this case the order only ordered a door to be locked up, but, in my opinion, it does not rest upon that distinction. I think that the order made in this case, if fairly read, must be taken as dealing with the entrance at the back in a similar way to that in which the order in *Bushell* v. *Hammond* (*ubi sup.*) dealt with the back entrance to the premises there in question. In that case there was but one entrance in question, a back entrance, and it was ordered that that back entrance should be closed and that an iron gate should be placed across the entrance, and that the iron gate should be kept locked and should be opened only at necessary times for the delivery of beer, coals, or other goods. Now, in this case there were two doors in question. The justices therefore had to deal with a back door in order to confine the sale or consumption of intoxicating liquors to the Wickham-street end of the premises. The object of the order in this case was the same as the object of the order in *Bushell* v. *Hammond* (*ubi sup.*), but in this case there were two doors which had to be dealt with instead of the one door dealt with in that case. The licensing justices therefore said, close up the entrance door to the bottle and jug department, and as to the other door to the public bar, keep that locked except for certain purposes. Now, counsel for the licensee admits, and I do not think he can deny, that the nailing up of the one door was as much a structural alteration as would be the placing of an iron gate across it. So at least I understood him to say, and it would be difficult to argue otherwise. Therefore, even though in *Bushell* v. *Hammond* (*ubi sup.*), there was an iron gate ordered to be added, it is extremely difficult to distinguish that case upon the facts: but even if it is not so, the reasoning of the court in that case seems to me to be very strong indeed to show that such a distinction, if present to the mind of the court, was regarded as of no value, and it is difficult to suppose that they dealt with a case of this character without taking notice of that distinction in some way or other if it existed, and the words of the Master of the Rolls, to which the Lord Chief Justice has called attention, appear to be conclusive of the matter. But I am further of opinion that what the Lord Chief Justice has said as to the construction of these words in sub-sect. 4 is upon the whole the more correct view, and therefore I adopt the argument of counsel for the justices upon the ground on which he argued that we ought to adopt it. If we are to read the words "by order direct such alterations as they think reasonably necessary to secure the proper conduct of the business," as meaning structural alteration only, it is, I think, difficult to understand why the word "structural" does not there appear; and we ought not to read "such alterations as they think reasonably necessary to secure the proper conduct of the business" as meaning structural alterations only, unless it is so stated by the sub-section. I think that the sub-section does not so state it. That word "structural" is not there, nor does it appear to me that it was intended to be there from the condition or additional provision added at the end of the sub-section when it goes on to say, "if any such order for structural alteration is made and complied with," then there is to be no further requisition for structural alteration of the premises for five years. Now, if "any such order" is not necessarily an order for structural alteration, it is an order which may be simply an order for alterations thought necessary to secure the proper conduct of the business; and surely an order dealing with the access to the house by a back entrance, and having for its object the shutting up of that back entrance, is an order which may be thought reasonably necessary to secure the proper conduct of the business. It seems to me that the words "any such order" are satisfied, in relation to the other words of the sub-section, by the meaning I have put upon them. Then, further, there is a reason for saying that structural alterations, as distinguished from other alterations, may be added in the latter part of the section, because of the expenditure necessary to carry them out. That expenditure having once been incurred by the tenant of the house, he is not to have any further requisition made upon him for a structural alteration for five years. That is a reason which very well applies where expenditure is necessary for a structural alteration, but it would not apply where the order is for an alteration not requiring such expenditure. Upon the whole, for these reasons I think that is the proper reading of the sub-section.

DARLING, J.—I must say that I have very great doubt as to whether the conclusion at which my Lord and my brother Ridley have arrived is the right one, but I will not undertake to differ, because I have not a sufficiently strong opinion the other way to entitle me in my judgment to do so, and for this further reason that the decision to which they have come is certainly a decision which to my mind, it would be expedient the law should be, even if the statute has not already enacted it. I think that this order in so far as it ordered the nailing up of the door in Havant-street, was an order for a structural alteration of the premises, and that, whatever was the case with reference to the rest of the order, it was a good order so far as that went. The order went on to require the licensee to lock and keep locked a door communicating between the premises in Havant-street and the part of the premises in Wickham-street. It is said on behalf of the respondent justices that that is such an order as the justices had power to make under sect. 11. That is where I have a doubt upon the matter, and my doubt is for this reason that the licensing justices can only order an alteration by virtue of sect. 11, if it be an alteration in the premises. Now, that the alteration in this case is an alteration in the method of carrying on the business I have no doubt, but whether it was an alteration of the premises within this sub-section I do very gravely doubt. If it was, it seems to me that our decision comes to this, that to lock a door is to make an alteration in the premises. I do not see how one can say that to lock a door and keep it locked, to have to lock it in the face of certain persons, but not in the face of certain other persons, is to make an alteration in the premises. It must be that to lock this door and to keep it locked, as ordered by this order, is in itself an alteration in the premises. The first words of sub-sect. 2 are "any alteration in any licensed premises"; then that sub-section goes on to provide that the

magistrates may, if they think fit, order plans of the proposed alterations to be deposited. It may, no doubt, well be said that that refers to the making of actual serious alterations, that is, real structural alterations, and if it meant the locking of a door it would not be necessary to draw a plan to show that the door was locked. But it does appear to me that there is some reason for thinking that the Legislature all through contemplated these structural alterations, and did not use "alterations" in any sense but structural alterations. Sub-sect. 4 of sect. 11 goes on to say, "may by order direct that, within a time fixed by the order, such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in that part of the premises," showing that the alterations are still to be not alterations in the mode of carrying on such business, but are still to be alterations in the premises. Then comes the part of the sub-section which to my mind raises the gravest doubt of all. The same sub-section goes on and says: "And, if any such order for structural alteration is made and complied with, no further requisition for the structural alteration of the premises shall be made within the next five years." Now, the decision to which we are coming in this case involves this, that if this order had said nothing about the nailing up of the door in Havant-street, the justices could have ordered any number of alterations, such as this alteration of the locking of the door, within five years. If they had made as part of the order an order which related simply to the locking of the inner door, then they might have gone on to order the locking of any other door next year, or the doing of anything not a structural alteration, because by the judgment of this court the distinction is drawn between alterations in the premises and structural alterations. Here, again, I very much doubt whether any such thing was contemplated by the Legislature, and whether it was not intended that all the licensing justices had power to do must be in reference to structural alterations, and that they were not empowered to order any kind of alterations and then go on within five years to order any other kind of alterations. There is, I think, a further passage in this sect. 11 which does not remove any doubts, but goes rather to confirm them, in sub-sect. 5: "Notice of any order under this section shall be forthwith given by the clerk to the owner of the premises in respect of which the order is made." That provision applies to every order made under this section, and I should be curious to know whether the clerk would have given notice of this order to the owner of the premises if it had simply been an order to lock that inner door, the communication between one half of the house and the other. But if our decision in this case is right he would have to give that notice. If the order were simply to keep one door of the licensed premises locked that would be an alteration in the premises and notice must be given to the owner of the house. That consideration confirms my doubt whether an order, which simply orders the locking of a door which anybody does or may do in his own house, can be said to be an order requiring such a thing as that to be done. A person may lock up his own house, and use one part of it at one time and another part at another time; but it would seem an extraordinary thing that if a person locks a door notice would have to be given to the owner of the house if anybody who can do so requires the person to lock it. My Lord and my brother Ridley have expressed the view that this case is covered by the decision in *Bushell* v. *Hammond* (*ubi sup.*). With regard to that I do not think it is so covered by that case. I come to the conclusion that that case really was one in which the magistrates required a door to be put up. They said: "We require what was an open space to be closed by means of a substantial door, and I read that to mean—and I think that what counsel for the appellant in that case said at the beginning of his argument shows it—"we order a door of which we prescribe the kind and quality to be put up and then we go on and order it to be located." I therefore think that no mere expressions in that case, which may possibly be made to cover this case, can be regarded as really being meant to cover it, such as those expressions which are attributed to the Master of the Rolls according to the law report, but which differ in the *Law Journal* report of the case. I therefore come to the conclusion that whatever was done in that case and whether my doubts as to the construction of the section are well founded or not, the present case is not covered by the authority of *Bushell* v. *Hammond* (*ubi sup.*). The suggestions I have made are mere doubts; they are not opinions which I hold with sufficient firmness to make me think that I should be justified in differing from the decision of the other members of the court.

Appeal of the licensing justices allowed. Leave to appeal.

Solicitors for the appellants, *Hickson* and *Moir*, for *Frederick G. Allen*, Portsmouth.

Solicitors for the respondent justices, *Speechly, Mumford*, and *Craig*, for *Lamport, Bassitt*, and *Hiscock*, Southampton.

Wednesday, Jan. 17, 1906.

(Before Lord ALVERSTONE, C.J., RIDLEY and DARLING, JJ.)

REX *v.* LICENSING JUSTICES OF CHESHIRE; *Ex parte* KAY'S ATLAS BREWERY LIMITED. (*a*)

Licensing — Renewal of licence — Borough not being county borough, but having separate commission of peace—Reference of renewal to quarter sessions—Appointment of one of the justices to act on committee of quarter sessions—Right of justice who heard application for renewal to sit on committee—Licensing Act 1904 (*4 Edw.* 7, *c.* 23), *s.* 5, *sub-s.* 5.

When the justices of a borough, not being a county borough, but having a separate commission of the peace, appoint, under sect. 5, *sub-sect.* 5 *of the Licensing Act* 1904, *one of their number to act on the committee of quarter sessions appointed under the section for the purpose of determining questions as to the refusal of the renewal of licences, they may appoint one of their number who was himself present on the hearing of applications for the renewal of licences and was a party to referring the matter of such renewals and making reports thereon to*

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

quarter sessions under sect. 1, sub-sect. 2 of the Act; and the justice so appointed is not disqualified from acting on such committee when determining the question of the refusal of the renewal of a particular licence by the fact that he presided at the meeting of the licensing justices of the borough when the matter of the renewal of that particular licence was considered and was referred to the quarter sessions, with the report of the justices thereon.

RULE calling upon the justices forming the Cheshire County Licensing Committee (sitting as the compensation authority, under the provisions of the Licensing Act 1904), to show cause why a writ of *certiorari* should not issue to bring up and quash an order made by them on the 9th June 1905, whereby the application for the renewal of the licence of the Grapes inn, Market-place, Hyde, in the county of Chester, was refused.

The rule was obtained on the application of Kay's Atlas Brewery Limited, who were the owners of the Grapes inn, which was a beerhouse licensed before and continuously since the year 1869, and which was also licensed for the sale of wines.

The borough of Hyde was not a county borough, but had a separate commission of the peace.

On the 2nd March 1905, the licensing justices for the borough at their general annual meeting referred the question of the renewal of the licence of the Grapes inn to the quarter sessions for th county under sect. 1, sub-sect. 2 of the Licensing Act 1904. At this meeting of the licensing justices a Mr. Blackwell, who was a justice of the peace for the borough, presided as chairman.

On the 9th June 1905, the committee of quarter sessions appointed under sect. 5, sub-sect. 2 of the Licensing Act 1904, for the purpose of determining questions as to the refusal of the renewal of licences, held their meeting for the purpose of hearing applications for the renewal which had been referred to them. The committee, after hearing counsel for the justices of the borough of Hyde and counsel for the brewery company, refused the renewal of the licence of the Grapes inn.

Mr. Blackwell had been appointed by the justices of the borough of Hyde, in pursuance of the provisions of sect. 5, sub-sect. 5, of the Licensing Act 1904, as the one of their number to act, with reference to the determination of questions as to the refusal of renewals of licences, on the committee appointed under the section by quarter sessions.

He was present at the meeting of the committee of quarter sessions which refused the renewal of the Grapes inn; he left the court with the other justices when they retired to consider the question of the renewal of the licence of the Grapes inn, and he returned with them and was present when their decision was given. But, although the justices of the borough of Hyde appeared by counsel before the committee, Mr. Blackwell stated in his affidavit that he had taken no part in instructing counsel to appear for the justices of Hyde to oppose the renewal.

Before the hearing of the case, counsel for the brewery company objected to any justice who had sat at the licensing meeting for the borough of Hyde on the 2nd March sitting and adjudicating on the question of the renewal of the licence of the Grapes inn.

The above rule was then obtained upon the following grounds: That the licensing committee was improperly constituted in that Mr. Blackwell, a justice of the peace for the borough of Hyde and appointed by the justices of the peace for the borough to act on that committee, did (notwithstanding the protest of counsel for Kay's Atlas Brewery Limited) sit as one of the committee and hear and adjudicate upon the application, though he had sat as chairman of the magistrates sitting at brewster sessions for the licensing district of the borough of Hyde, who had referred the application to the committee, and who had reported to the committee that the licence was quite unnecessary, and that the wants of the licensing district of the borough of Hyde were more than amply provided for without it; and who (on the hearing of the application before the committee) appeared and were heard by counsel instructed on their behalf to oppose the renewal of the licence. That, by reason of the above fact, there was a real possibility, or a real likelihood of bias, on the part of Mr. Blackwell; and that Mr. Blackwell was disqualified by interest from sitting as one of the committee on the hearing of the application.

The Licensing Act 1904 (4 Edw. 7, c. 23) provides:

Sect. 1 (2). Where the justices of a licensing district, on the consideration by them, in accordance with the Licensing Acts 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on-licences requires consideration on grounds other than those on which the renewal of an existing on-licence can be refused by them, they shall refer the matter to quarter sessions, together with their report thereon, and quarter sessions shall consider all reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises, and, unless it appears to quarter sessions unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the justices of the licensing district), an opportunity of being heard and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates.

Sect. 5 (2). Quarter sessions may delegate any of their powers and duties under this Act to a committee, appointed in accordance with rules made by them under this section, and, except in a county borough, shall so delegate their power of confirming the grant of a new licence and of determining any question as to the refusal of the renewal of a licence under this Act and matters consequential thereon, and county licensing committees shall cease to be appointed under the Licensing Act 1872. (5) The justices of any borough, not being a county borough but having a separate commission of the peace, shall be entitled to appoint one of their number to act, with reference to the determination of any question as to the refusal of the renewal of a licence under this Act, and any matters consequential thereon, on the committee appointed under this section by quarter sessions, and for those purposes any justice so appointed shall be deemed to be an additional member of the committee.

Danckwerts, K.C. and *B. M. Montgomery* showed cause against the rule.—Mr. Blackwell was not disqualified from sitting on the committee of quarter sessions and adjudicating on the question of the refusal to renew the licence of this

house. The fact that he had sat as chairman of the licensing justices for the borough when the application to renew the licence was made to the justices, and had taken part in referring the matter to quarter sessions, was no disqualification for his taking part in the subsequent proceedings before the committee. The proceedings before that committee were not an appeal to the committee from the decision of the licensing justices. By sect. 1, sub-sect. 2, of the Licensing Act 1904, when the licensing justices of a district are of opinion that the question of the renewal of an existing on-licence requires consideration on grounds other than those on which the renewal could be refused by them under sub-sect. 1, then they cannot decide the question of that renewal themselves, but they are bound to refer the matter of the renewal to quarter sessions, together with their report thereon, and quarter sessions have to consider all such reports so made to them. Therefore the licensing justices have no power to determine finally and judicially the question whether the licence is to be renewed or not. All they have power to do is, if a *primâ facie* case is made out for the refusal of the licence, to refer the matter to quarter sessions, and the quarter sessions are the authority who have to decide the question:

Rex v. *Tolhurst*, 93 L. T. Rep. 76; (1905) 2 K. B. 478.

The hearing of the matter as to the refusal of the licence is, therefore, in no sense an appeal from the licensing justices, inasmuch as the licensing justices never decided any such question. Any objection that may be taken to Mr. Blackwell as sitting on an appeal from the licensing justices of whom he was one fails. Sect. 5, sub-sect. 2, provides that the quarter sessions shall delegate their power of determining questions as to the refusal of the renewal of licences to a committee, and sub-sect. 5 says that the justices of a borough, not being a county borough but having a separate commission of the peace, may appoint one of their number to act on the committee of quarter sessions —that is, they may appoint any one of their number. If the Act had intended that the justice to be appointed on the committee should not be one of the licensing justices of the borough who had heard the application for renewal, then the Act would have said so, but it has not said so, and no doubt the very object of the provision was that there might be one of the licensing justices, who was supposed to know the wants and circumstances of the neighbourhood, present on the committee to inform them as to each particular case. The procedure under sub-sect. 5 seems to be a novel one, but there is no reason for limiting the choice of the justices to the appointment of one of their number who had taken no part in the previous proceedings as to the renewals. On the contrary, there is every reason for holding that the intention of this provision was that the justices should appoint one of their number who knew something of the matter. By sect. 8, sub-sect. 2, the Act was made to apply to a county borough as if it were a county, and the whole body of justices for the borough were to be substituted for quarter sessions. In that case the compensation authority is the whole body of the borough justices, exactly the same body as constituted the renewing authority; and therefore in that case all the justices who were entitled to sit in the first instance would be entitled to sit in the second instance. That shows that the Act contemplated that a justice who had sat in the first instance as a member of the renewing authority might also sit as a member of the compensation authority. If Mr. Blackwell had taken part in instructing counsel to appear before the committee he might have been disqualified, but he has said in his affidavit that he took no such part. [They referred to rule 11 of the Licensing Rules 1904].

Trevor Lloyd (*S. S. Kay* with him) in support of the rule.—Whether the proceedings before the licensing justices was a decision or not on the question of the renewal, it was at all events a conclusion to which the justices as a whole had come, and every justice who had taken part in arriving at that conclusion under sect. 1, sub-sect. 2, was disqualified from sitting on the committee of quarter sessions. Although there may be nothing in the Act which expressly disqualifies Mr. Blackwell from sitting on that committee, he is disqualified on principle from so sitting. All the justices who sat in the first instance to hear applications for renewals were disqualified from sitting in quarter sessions on the appeals to them in regard to refusals to renew. They were in fact respondents to the appeals, and if any one of them sits who is interested in the result, the court is thereby improperly constituted, and the order made may be quashed on *certiorari*:

Reg. v. *Hertfordshire Justices*, 6 Q. B. 753.

Before the Act of 1904 there can be no doubt that Mr. Blackwell would have been disqualified, and the Act makes no change in that respect. It is clear from sect. 1, sub-sect. 2, that the justices of the licensing district are interested persons, and they have a right to be heard and to be heard by counsel before the committee of quarter sessions. In this case the licensing justices appeared before the committee and were so heard by counsel, and this particular justice might have appeared. That being so, every one of them was disqualified from sitting on the committee, which was really hearing appeals from the decisions of the licensing justices themselves. The only point is whether the decision of the licensing meeting was in the nature of a judicial proceeding, and it is submitted that it was. When the matter is referred to quarter sessions the justices who have a right to sit are exactly the same justices who, before the Act of 1904, would have had the right to sit in the case of appeals to quarter sessions from refusals to renew. Under the old practice upon appeals from renewals this justice would have been disqualified from sitting on the appeal, and the same disqualification still exists. Then, in the next place, the fact of his having taken part in the discussion of the matter in the meeting of the licensing justices shows that there was bias on his part. Upon both grounds, first, that Mr. Blackwell had no right to sit on the committee of quarter sessions having sat as a member of the meeting of the licensing justices; and, secondly, on the ground of bias, this rule ought to be made absolute. He referred to

Allinson v. *General Council of Medical Education and Registration*, 70 L. T. Rep. 471; (1894) 1 Q. B. 750.

Lord ALVERSTONE, C.J.—This case to my mind presents very considerable difficulties; and, although I think we ought to discharge the rule, I am by no means satisfied that the case is so free from difficulty as the argument addressed to us against the rule would seem to imply. Quite apart from the special provisions of the Licensing Act of 1904, in my opinion there is a good deal which may properly be urged in favour of the view that a justice, who has been a party to a decision which has been come to by the licensing authority to report as to a particular licence, and to refer the question of the renewal of that licence to quarter sessions, ought not to sit when the question is determined by the committee as to what the action on that report should be—that is, whether the licence should be renewed or not. It seems to me that, quite apart from any question of instructing counsel, the position of the justice who has adjudicated in this case was very like the position of those justices who, on the authorities to which our attention has been called by counsel in support of this rule, were not entitled to sit at quarter sessions. The difficulty I have felt is not lessened by the very fair admission of Mr. Danckwerts that if the justice in this case had been one of the justices who had instructed counsel to appear before the committee of quarter sessions and support the decision of the licensing justices, true not as a member of that committee, but as one of the licensing justices of the district, then he ought not to have sat on that committee. I do not say that the two positions are at all inconsistent; I only point out that it rather shows that there is a difficult question here which has to be considered. Now, if this consideration of the question by the licensing committee was in the nature, or ought to be regarded as in the nature, of an appeal from the decision of the licensing justices, the balance in my mind would then have been in favour of holding —at any rate, with such a tribunal as this—that a justice who had come to a decision on a question which was the subject of an appeal ought not to sit when the appeal was heard. I need not go through either the previous statutes or the authorities dealing with that matter; I only indicate that to show that this matter requires very careful consideration. Had this been an appeal from a decision of this justice, I should have thought that different considerations ought to apply; but when we look at the Licensing Act of 1904 I cannot think that the statute would have been framed as it is if this objection had been intended to operate so as to prveent the justice in question in this case from sitting on the committee of quarter sessions, when the question of the renewal of this licence came before them. Under sub-sect. 2 of sect. 1 of the Act of 1904, when the justices of a licensing district, on the consideration by them of applications for renewal, are of opinion that the question of the renewal of any particular existing on-licence requires consideration on grounds other than those on which the renewal of an existing on-licence can be refused by them, then they shall refer the matter to quarter sessions. I again point out, as I pointed out in *Rex* v. *Tolhurst* (93 L. T. Rep. 76; (1905) 2 K. B. 478), that that provision excludes from the consideration of quarter sessions the grounds upon which the justice in question would have acted judicially as a member of the licensing justices in refusing the renewal of the licence. The necessarily repeated references to the rule we laid down in *Rex* v. *Tolhurst* (*ubi sup.*) seem to me to show that the reasons which we then gave are confirmed by subsequent discussion on the matter—namely, that where a question is raised upon an application for renewal, the licensing justices must act as they would have acted previously—that is, on sworn evidence. I desire, however, to say, as it has a bearing upon the point which has been argued in this case, that we there pointed out that the amount of evidence which may be sufficient for the purpose of enabling the justices to form their opinion as to whether a particular house should be reported to the quarter sessions or not, may be properly treated as different from the amount which may be regarded as sufficient if they had to decide judicially whether or not a particular licence should be renewed. Then in that case we went on to point out that the evidence of the character of a district, and the locality of a public-house, and the number of other public-houses in the district, might be sufficient to justify the justices in making a report to quarter sessions that the question of the renewal of any licence required consideration on grounds other than those on which the licensing justices could act. I merely refer to that for the purpose of affording reason for my judgment that this proceeding before the committee of quarter sessions ought not to be regarded as an appeal. It is a proceeding of a novel kind; a preliminary step by the licensing justices, acting, as I still think, in a judicial capacity, embodying what they think and what their view is, in a report which is to inform the Court of Quarter Sessions how to act. Therefore there is an argument on sect. 1, sub-sect. 2, itself, which I think supports Mr. Danckwerts' contention to this extent, that it differentiates this case from being an ordinary case of a decision on appeal from the licensing justices. That being the part of sect. 1 that is material, we then come to sect. 5, sub-sect. 5. [His Lordship read the sub-section.] That is an express provision in the same Act of Parliament that directed this report to be made. It seems to me that if it had been intended to prevent the members of the licensing committee from being one of those justices. the section ought to have gone on to say, "not being a member of the licensing committee"; or, if there was going to be a still further limited prohibition in respect of a justice who had reported, there ought to have been something to indicate that a justice who had taken part in a report under sub-sect. 2 of sect. 1 should not be one of those justices; and I am pressed by the point which my brother Darling put early in the argument, that the borough would be deprived, if this be the true construction, of sending to quarter sessions a justice, if he was a member of the licensing committee of justices, who would have considerable experience, and, if it is to be dealt with as a particular case, the justice who did know, and who would be able judicially to consider the evidence which had been given at quarter sessions, in view of the information that he had acquired, not for the purpose of giving a decision but for the purpose of making a report, when he was acting as a member of the licensing committee of justices. On the whole, therefore, it

seems to me that, upon the face of the Act itself, it is inconsistent with the scheme of this Act that I should give effect to the contention that no justice who has made a report should be allowed to act as a nominative justice under sub-sect. 5 of sect. 5. Then, further, although it does not rest upon the Act, so far as one is entitled to look at the rules, I cannot help thinking that the connection between the licensing justices, or the renewal authority as I will call them, and the compensation authority, was obviously meant to be very close, because by rule 11 of the Licensing Rules 1904, to which Mr. Danckwerts has called our attention, there is to be a meeting between the two; and if all the members of the renewal authority are members of the compensation authority there need not be a meeting at all. Therefore, it is quite clear that the compensation authority was not to exclude the knowledge which was acquired by the justices as members of the licensing authority. I agree that that may not bear directly upon this particular case, and the appointment of a particular justice; but, at the same time, it does seem to me to show, or help to show, that I am taking the correct view that this preliminary report to put the quarter sessions in motion is not in the nature of a judicial decision, and that the consideration of that report by the committee of quarter sessions is not an appeal from that decision in such a sense that a justice who has been a party to making that report ought not to sit as a member of that committee of quarter sessions when the report comes up for consideration. Then there is the other point which counsel in support of the rule pressed in aid of his argument that this justice might have appeared upon the discussion of the case before the committee of quarter sessions. If he so appeared, but appeared only as a member of the committee of the licensing justices that decided to report that argument would have been stronger; but I think that the words used in sect. 1, sub-sect. 2, as to those who may appear, "including the justices of the licensing district," merely mean that those justices shall have a *locus standi* if they choose to appear. Therefore it does seem to me that the fact that this justice was a member of the licensing meeting that decided to report—if in fact he took no part in appointing counsel to appear before the committee of the quarter sessions, and did not appear in fact himself—is not a sufficient ground for contending against him that he ought to be excluded from the committee of quarter sessions. At the same time I have felt the difficulty which counsel has properly pressed upon us, that he could have been one of the justices who did appear before the committee of quarter sessions; and in one sense, though I do not know that it was stated, probably some of the other justices of the licensing authority who served upon the committee, did appear and instruct counsel. The case, to my mind, presents considerable difficulties; but, upon the whole, I think, for the reasons which I have given, and for others which have been given by my learned brothers during the course of this argument, this statute, giving, as it does, the express power to this borough to be represented upon the compensation authority by one of their members appointed specially for that purpose, there is not a good objection to this justice sitting as a member of that compensation authority, even though in fact he was also a member of the licensing justices and has made a report to quarter sessions under sect. 1, sub-sect. 2. I therefore think that this rule should be discharged.

RIDLEY, J.—I am of the same opinion; but I wish to add, speaking for myself, that I have not been so much pressed with the difficulty of the question as my Lord has been. I think that in coming to the decision to which we have come I consider myself entirely in accordance with the ancient principle—which still ought to be supported—that no justice who has come to any decision in any judicial proceeding before him, ought to sit, or is qualified to sit, on another tribunal which has to determine whether that decision is a right one or not. I am deciding this case quite independently of that principle. If it were otherwise my decision would be different; but I think we have to deal with this case under the Licensing Act of 1904, and that Act is an entirely new departure in several respects, as it appears to me, from the former licensing law; and one of the main departures is that instead of the first tribunal before whom the question of the renewal of any particular on-licence may come, having to decide it, it is not to be decided by that tribunal, in cases which were then in the minds of the Legislature, where it might or might not be desirable, quite independently of the particular reasons given for shutting up any particular house, that other matters ought to be taken into consideration—that is to say, the character of the neighbourhood, and the numbers of the different licensed houses in it. Thereupon, the Legislature said that, in such cases as those, if the justices of the licensing district, on the consideration by them of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on licenses requires consideration on grounds other than those upon which they could determine it, they shall refer the matter to quarter sessions. Now, I think, that is a new departure; and, I think, it is distinctly marked out, from what may be called a judicial proceeding, or what may be called a decision in the sense that it affects any particular individual. The substantial and important words are that, if the question of the renewals requires consideration upon such grounds, it is to be referred to another tribunal; and, indeed, if the Act stood by itself, without our decision in *Rex* v. *Tolhurst* (*ubi sup.*), it might have been argued, as I think it was argued upon that occasion, that the justices might refer the matter to quarter sessions without having heard evidence. It has been decided in that case, and rightly decided as I think, that the justices ought to hear evidence on oath, and that the former law, relating to other questions coming before justices, applies to this proceeding. That, however, does not make the report, in my opinion, such a decision against anyone as to disentitle the justices who take part in making the report from appearing in the court of appeal upon it, if there were a court of appeal. But this committee is not really a court of appeal at all; it is only because one is obliged to use the words in that way, in a case like the present, that the words are so used. The proceeding is not an appeal

at all. The only tribunal which deals with the matter is the licensing committee at quarter sessions, and it might be said that the Act of Parliament would deal with such a question. I think it has dealt with it, because it is obvious that it was necessary to make some sort of relation between the justices who were of opinion that the renewal of any particular licence required consideration, and who made a report on the one hand, and the county licensing committee upon the other. Now, how have the Legislature dealt with the matter? As is pointed out by the Act, so far as the justices of any borough, which has a separate commission of the peace, but which is not a county borough, are concerned, they may "appoint one of their number to act, with reference to the determination of any question as to the refusal of the renewal of a licence under this Act, and any matters consequential thereon, on the committee appointed under this section by quarter sessions; and for those purposes any justice so appointed shall be deemed to be an additional member of the committee." The Legislature have, therefore, deliberately said that the justices of the borough may appoint one representative of their number to act upon the determining committee. I cannot help thinking that, if it had been intended that any justice taking part in these proceedings, such as the present, under sub-sect. 2 of sect. 1, should be disqualified from so acting, then the section would have so stated it. Unless it does so state it, I am of opinion that there is no principle which prevents this justice from acting on the committee appointed by quarter sessions. In support of this view strong reliance ought to be placed upon this fact that if the argument of counsel in support of this rule is correct, then the justice who is appointed to act for the year, we will suppose, will disqualify himself from so acting on that committee if he ever once appears in the tribunal before which the proceedings under sub-sect. 2 of sect 1 have to be taken. For these reasons I agree that the rule should be discharged.

DARLING, J.—I am of the same opinion; and, as the parties to this litigation may not be content that the matter should end here, I think it well to state how the case presents itself to my mind. It seems to me that we cannot decide this question simply upon any general rule as to appeals, and the general rule that persons who have once decided a question should not take part in reviewing their own decisions, was not without exception. Judges of the Queen's Bench, Common Pleas, and Exchequer, when those old courts existed, often sat with other judges of the same court on appeals from their own decisions, and it was very common, and as soon as the circuit was over, for counsel to come and move for rules against conclusions of evidence, and so on; sometimes, all the members of the court would sit there, and, sometimes one judge would sit with other judges to review his own decision, and so on. Then there are other exceptions; and there is still the case of the Court for Crown Cases Reserved, where the judge who has reserved the point for the consideration of that court, often sits—and there is not the slightest objection to it—and takes part with other members of the court, and really is a great help to them, because he has heard all the evidence, and he can put that at the disposal of the other judges. Now, to deprive the judges of the former power that they had in the Courts of Queen's Bench, Common Pleas, and Exchequer, legislation was necessary, but it did not put an end to what occurs in the Court for Crown Cases Reserved. Now we come to this Act of 1904. I think one is entitled to look at what is the character and intention of this legislation. It provides for the doing of things which are not precisely like the things done in the ordinary practice of courts of law, and what these licensing justices, and justices of boroughs and counties dealing with these licensing matters, are authorised to do, is sometimes a matter which may be done when they are a court, and sometimes a matter which may be done when they are not a court at all. Sect. 1 says that there shall be the licensing justices, that they shall meet, and that they may make a report, and in making that report they may use their own knowledge of the borough in which they live and of the state of the habits of the people, the number of public-houses, and so on. They may deal with all that and they may make a report. Then, when the question of the renewal of the licences comes up, their report goes to the justices at quarter sessions. Certain persons have a right to appear at quarter sessions, and support or oppose the renewal of these licences; but they must be persons who are interested in the renewal or refusal of the licences. Then, sub-sect. 2 of sect. 1 of the Act says that the quarter sessions shall consider all the reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises, and any other persons appearing to the quarter sessions to be interested in the question of the renewal of the licence—including the justices od the licensing district—an opportunity of being heard. That says that the justices of the licensing district—not only the justices who have heard the application and have made the report, but all the justices of the licensing district—are persons interested in the renewal or refusal of the licence. The Legislature having said that with regard to all licensing justices, have therefore said it of this very justice with regard to whom the rule is moved, and have said it of every other justice in the borough whether he took part in hearing the application or not. The Legislature have done that intentionally. They have called the justices interested persons; but if the matter had been left there these justices would not have been able to do anything else except what the Legislature have said they might do. They would not have been able to go to the quarter sessions or to appear there by counsel. They could not go there to adjudicate, and they could not appear there in any form. The Legislature have said that the justices being persons interested in the question of the renewal, might go to quarter sessions and be represented by counsel. But did the Legislature mean to give them any other power different to what a judge, who has taken part in a decision, ordinarily is allowed? In my opinion it did, because after passing the enactment in sect. 1, they went on to enact in sect. 5, sub-sect. 5, that the justices of such a borough as this should be entitled to appoint one of their number to act with reference to the determination of any

question as to the refusal of the renewal of a licence. Now, that would not necessarily mean or be restricted to those justices who had sat and heard the application for the renewal in the first instance, but it would mean the whole body of the justices of the borough, including those who had heard the application and those who had not heard it. The Legislature had provided already that these justices, because they had an interest in the renewal of the licence, might make a report and go to the quarter sessions; but they were not satisfied with merely doing that. They took particular care to see that these justices, who were interested in the refusal or the renewal of licences, should have a very different power, and, after providing that they might go to the quarter sessions and argue the case there, they went on further to provide that if the justices of the borough so wished they might send one of their number "to act with reference to the determination"—the words really could not be stronger to my mind—"of any question as to the refusal of the renewal of a licence." These same justices had already, it is to be presumed, made a report, and the Act presumes that they had made a report. Then the Legislature evidently thought that the justices at quarter sessions might want some information from the justices of the borough over and above what was in the report, and they therefore indicate that, in addition to making a report, they must send one of their number to assist in the determination of the question upon the report. Then who would the Legislature wish to go? They are choosing the justice from the borough from which the report has come, and I suppose they would not wish the justice in the borough who knew the least about the licensed houses to go, but they would choose the justice in the borough who knew most about the licensed houses to go. The reason for sending the justice from the borough must be that, coming from the borough from which the report has come, he has knowledge as to the facts which the justices, who come to quarter sessions, not from that borough, have not got; and he must be sent because he can put that knowledge at the disposal of the justices at quarter sessions. Who would know most about the matter? To my mind, clearly a justice who had been sitting and hearing the discussions about these licences, and who had helped to make these reports. But it may be said that he has got a bias. The same thing might be said of any other of the justices who goes to quarter sessions, because the Legislature have chosen a justice—if we use bias in a wide sense—with bias. They have chosen a man with an already formed view before he comes to quarter sessions, and before he has heard any evidence, and who has already formed a view as to whether there are too many or too few public-houses in the borough from which he comes. If we choose to call that bias, they have, therefore, chosen a justice with a bias; but it may or may not be as much a bias as if he had taken part in the report. It may be bias in favour of the report or against it. When I find that this legislation is absolutely an exception to the ordinary rules which govern judicial proceedings, because nothing like this legislation has occurred before; and when I do not find any words introduced in the sub-section to say that the justice who may be sent from the borough to the committee appointed by quarter sessions shall not be a justice who has already considered these matters, then I come to the conclusion that those words were not intended by the Legislature to be there. If they had been intended to be there, they would have been distinctly put in, and we must not imply that they are there; and therefore, with less hesitation than my Lord, I think that the decision to which he has come is right.

Rule discharged.

Solicitors: for the applicants, *Sharpe, Parker, Pritchards, Barham,* and *Lawford,* for *Frederic Knowles,* Hyde; for the respondents, *Philpot* and *Morrell,* for *Reginald Potts,* Chester.

Wednesday, Jan. 17, 1906.

(Before Lord ALVERSTONE, C.J., RIDLEY and DARLING, JJ.)

REX *v.* JUSTICES OF SOUTHAMPTON; *Ex parte* CARDY. (*a*)

Licensing — Renewal of licence — Reference to quarter sessions of question of renewal—Committee of quarter sessions—Refusal to renew—Jurisdiction of committee to state case — Licensing Act 1904 (4 *Edw.* 7, *c.* 23), *s.* 1, *sub-s.* 2, *s.* 5, *sub-s.* 2.

When the question of the renewal of an existing on-licence is referred, under sect. 1, *sub-sect.* 2, *of the Licensing Act* 1904, *to the quarter sessions, the committee of the quarter sessions appointed under sect.* 5, *sub-sect.* 2, *of the Act, in determining the question as to the refusal of the licence, are acting in a judicial capacity, and have therefore power to state a special case for the opinion of the High Court.*

RULE for a *mandamus.*

The rule was directed to the keepers of the peace and justices for the county of Southampton, acting by a committee duly appointed under the provisions of the Licensing Act and Rules 1904, calling upon them to show cause why a writ of *mandamus* should not issue commanding them to hear and determine the matter of an application by Alexander Cardy to the justices to state and sign a special case for the opinion of the court, upon the hearing by them of the reference and report of the justices of the Southampton licensing district in the county of Southampton, on the refusal by such last-mentioned justices to renew to Alexander Cardy, the licence in respect to the Yew Tree Inn, situate at Bitterne, in that county.

The rule was obtained at the instance of Alexander Cardy, upon the affidavit of his solicitor (Mr. Charles Lamport), which set out the following facts:—

On the 27th Feb. 1905 the appellant's solicitor applied to the licensing justices of the Southampton division of the county of Southampton on behalf of the applicant, Alexander Cardy, the tenant of the Yew Tree Inn, Bitterne, for the renewal to him of the on beer licence then held by him in respect of the Yew Tree Inn.

The application was referred by the justices to the quarter sessions of the county, under the provisions of the Licensing Act 1904 (4 Edw. 7, c. 23), s. 1.

(*a*) Reported by W. W. OAR, Esq., Barrister-at-Law.

The only ground of objection in opposition to the renewal was one served by the clerk to the justices of the Southampton Petty Sessional Division, which stated that the renewal of the licence for the sale by retail of beer and cider on the premises known as the Yew Tree Inn, in the parish of Bitterne, would be opposed on the following ground—that is to say, "on the ground of redundancy."

It was contended before the committee of quarter sessions on behalf of the applicant that the above ground of objection was unintelligible and bad for uncertainty, and did not constitute a valid or legal objection to the application for renewal of the licence.

The committee held that the ground of objection was in their opinion sufficient in point of law.

At quarter sessions, general evidence was given as to the population and number of licensed houses and their position, but it was contended that there was not such sufficient evidence before the court as to enable it to differentiate between the Yew Tree Inn and any other licensed houses in the district, in accordance with the decision in *Raven* v. *Southampton Justices* (90 L. T. Rep. 94; (1904) 1 K. B. 430), and that the court was not therefore entitled to deprive the applicant of his licence.

Counsel for the applicant thereupon applied to the said Court of Quarter Sessions in the exercise of their discretion to grant a special case to be stated by them for the opinion of the High Court, upon the point raised that the ground of objection was unintelligible and bad for uncertainty, and did not constitute a valid or legal objection to the application for renewal of the licence. The Court of Quarter Sessions refused the application without any exercise of discretion and without considering the matter upon its merits, but solely upon the ground, as stated by the chairman of the court, that they were advised that they had no power to grant a special case.

The above rule for a *mandamus* was then obtained.

The Licensing Act 1904 (4 Edw. 7, c. 23) provides:

Sect. 1 (2). Where the justices of a licensing district, on the consideration by them, in accordance with the Licensing Acts 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on-licenses requires consideration on grounds other than those on which the renewal of an existing on-licence can be refused by them, they shall refer the matter to quarter sessions, together with their report thereon, and quarter sessions shall consider all reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises and, unless it appears to quarter sessions unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the justices of the licensing district), an opportunity of being heard and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates.

Sect. 5 (2). Quarter sessions may delegate any of their powers and duties under this Act to a committee, appointed in accordance with rules made by them under this section, and, except in a county borough, shall so delegate their power of confirming the grant of a new licence and of determining any question as to the refusal of the renewal of a licence under this Act and matters consequential thereon, and county licensing committees shall cease to be appointed under the Licensing Act 1872.

Sect. 9 (4). The expression "quarter sessions" means, as respects a county, the court of quarter sessions for that county.

Duke, K.C. (*J. A. Simon* with him), for the justices, showed cause against the rule.—The quarter sessions, or their committee, when acting under this jurisdiction as to the refusal of the renewal of licences, have no power to state a special case, and this court has no jurisdiction to compel them by *mandamus* to state a case. There is no statutory power under which they can be required to state a case, and the only instance where a *mandamus* has gone to them to state a case, is where they had agreed to state a case and had afterwards refused to do so. Beyond that they cannot be compelled to state a case. The origin and practice as to quarter sessions stating cases are explained by Blackburn, J. in *Reg.* v. *Sutton Coldfield Overseers* (29 L. T. Rep. 840; L. Rep. 9 Q. B. 153); by Field, J. in *Reg.* v. *Chantrell* (33 L. T. Rep, 305; L. Rep. 10 Q. B. 587); and by Lord Cairns, L.C., in *Walsall Overseers* v. *London and North-Western Railway Company* (39 L. T. Rep. 453, at pp. 454-5; 4 App. Cas. 30, at pp. 39-42). The duties which the committee were performing were not those which they are performing as ordinary justices of the peace, and therefore the considerations applicable to them when acting as justices are immaterial. The commission of the peace did not give the justices power to approach the Court of King's Bench in every matter in which they had a difficulty; for instance, in *Rex* v. *Inhabitants of Salop* (13 East, 95) Lord Ellenborough said that the court would take no cognisance of a case reserved by the sessions upon the trial of an indictment by a jury at sessions. In the cases of *Reg.* v. *Glamorganshire Justices*, and *Reg.* v. *Pontypool Justices* (66 L. T. Rep. 444; (1892) 1 Q. B. 621) it was held that licensing justices were a court of summary jurisdiction, and could therefore state a case; but that view was overruled by *Boulter* v. *Kent Justices* (77 L. T. Rep. 288; (1897) A. C. 556), which raised the very question as to whether justices at a licensing meeting were a court of summary jurisdiction, and it was held by the House of Lords that they were not such a court, at least for those purposes. In *Reg.* v. *Bird* (62 J. P. 309), it was held that licensing justices were not a court of summary jurisdiction, and had no power to state a case. [LORD ALVERSTONE, C.J.—Although Lord Herschell, in *Boulter's* case (*ubi sup.*), overruled *Reg.* v. *Glamorganshire Justices* (*ubi sup.*), he did not overrule *Reg.* v. *Pontypool Justices*. In *Hagmaier* v. *Willesden Overseers* (90 L. T. Rep. 683; (1904) 2 K. B, 316) this court held that justices in special petty sessions sitting to settle jury lists could not state a case. That was the state of the law at the time of the passing of the Act of 1904, and there is nothing in that Act which modifies anything said in *Boulter's* case, that the licensing justices do not sit as a court of summary jurisdiction. The reference of these matters as to renewals to quarter sessions is under sect. 1, sub-sect. 2, and, under sect. 5, sub-sect. 2, the quarter sessions are bound to delegate these duties to a committee, and sub-sect. 5 of that section makes it clear that when this com-

mittee is sitting to hear these references or reports they are not sitting in the same capacity as the old quarter sessions to hear appeals. Under the law, as it existed before, justices when exercising licensing jurisdiction were not a court, and under the special and peculiar provisions of the Act of 1904 it is plain that they are designated as a body to deal administratively with these questions as an administrative body, and would not be required to conform to the rules applicable to justices acting otherwise than in an administrative capacity.

Pickford, K.C. (*Temple Cooke* with him) in support of the rule.—The committee of quarter sessions have power to state a case. In the case of *Morgan* v. *Aylesford Justices*, heard a few days ago by this court, this court did entertain and deal with a case stated by a committee of quarter sessions, but the power of the committee to state a case for this court was not argued, and was not in any way referred to, or called to the attention of the court. The "quarter sessions" is defined in the Act; in sect. 9, sub-sect. 4, it is defined as meaning the court of quarter sessions for the county. This jurisdiction is given to the quarter sessions, to be exercised through its committee, and the court of quarter sessions has always had the power to state a case. If you give to a court a new jurisdiction, then you give it to that court subject to the well-known incidents of that jurisdiction. Quarter sessions have power to state a special case when they are acting judicially, and they were acting judicially in this case; it is a wider power than that given by sect. 11 of the Quarter Sessions Act 1849. They can make an "order," which distinguishes them from a court of summary jurisdiction, and a party aggrieved could raise the point of law upon that order. As Lord Cairns said in *Walsall Overseers* v. *London and North-Western Railway Company* (4 App. Cas., at p. 40), all that was necessary was that the court of quarter sessions, in making its order, should not make it an unspeaking or unintelligible order, but should make it what he calls a "speaking order," and then the party could go to the King's Bench upon that order. "If a new jurisdiction is given to an existing court—that is to say, a jurisdiction to deal with some new matters in a different mode and with a different procedure—if that jurisdiction be so given to a well-known court, with well-known modes of procedure . . . it must, unless the contrary be expressed or plainly implied, be given to that court to be exercised according to its general inherent powers of dealing with the matters which are within its cognisance" (per James, L.J. in *Dale's* case, 43 L. T. Rep., at pp. 775-6; 6 Q. B. Div., at pp. 450-1). This new jurisdiction—that is, as to the refusal of the renewal of licences—is not given to the justices of the county, but it is given to the quarter sessions (sect. 1, sub-sect. 2), and it is under that sub-section that the quarter sessions get their jurisdiction. This portion of the jurisdiction is taken away from the licensing justices, the non-judicial body, and is given upon a reference or report to the quarter sessions, the judicial body—that is, when the non-judicial body have to deal with questions of refusal of renewals upon grounds other than the four grounds in sub-sect. 1, the section withdraws the case from them and gives it to the judicial body. That was done with the intention of preserving the powers and jurisdiction of the court as a judicial body, and, if it had been intended to give this jurisdiction to the quarter sessions only as a non-judicial body, the Act would have done so directly. The jurisdiction so given is to be exercised by the quarter sessions, or their committee, not as licensing justices, but as a judicial body. The committee therefore had power to state the case, and, as they have not exercised their discretion but have declined jurisdiction, the rule ought to be made absolute.

Lord ALVERSTONE, C.J.—I am of opinion that this rule should be made absolute. I desire it to be understood that I express not the slightest opinion as to the circumstances in which the quarter sessions ought to state a special case, or the grounds on which they ought to entertain an application for a special case. I have not heard the matter argued at length, but it seems to me that, if a point should arise such as that which is mentioned in the applicant's affidavit, that the word "redundancy" was not sufficient, to say that the quarter sessions ought to state a case on that or that it would be right to state a case on that, would be absurd. We have really nothing to do with that. The whole point raised here is this. Counsel in showing cause against the rule has very properly argued this case on the applicant's affidavit, and on that affidavit it appears that the justices decided that they could not entertain the application for a case on the ground that they had not power to state it. Now, this case therefore raises the question: Does the tribunal which is dealing with the question of renewal of licences under the Licensing Act of 1904 possess the power to state a special case? I should have thought that if the body which acts is acting judicially, the case scarcely admits of argument because I think it has been for a very long time recognised that if an order is made which embodies statements really making the order (as Lord Cairns calls it in the case of *Walsall Overseers* v. *London and North-Western Railway Company*, 4 App. Cas., at p. 40) a "speaking order," and it is a final order one way or the other, then the Court of King's Bench can look at the whole of the order and say whether it ought to stand or ought to be quashed, and can affirm the order or quash the conviction or discharge the order, subject always to the class of cases which since the case of *Reg.* v. *Sutton Coldfield Overseers* (*ubi sup.*) has, I think, never been doubted—namely, that the Court of King's Bench will not entertain special cases where there will not be a final resulting order, one way or the other, depending on the view the justices take of the special case. Therefore the real point of this case is this, as was put by Mr. Duke, is the committee of quarter sessions, acting under the powers of the Licensing Act 1904, giving a judicial decision or is it not? Now, counsel contended, as the main part of his argument, that the committee are in the position of the licensing justices; that therefore a good deal of the reasoning in the case of *Boulter* v. *Kent Justices* (77 L. T. Rep. 288; (1897) A. C. 556) applies, and that the committee ought to be considered as exercising delegated administrative jurisdiction, reporting to the Home Secretary as to how their powers had been carried out, and that therefore the decision that they gave ought

not to be regarded as being the proceeding of a court or a judicial proceeding. Speaking for myself, I think that view is too narrow. It is quite true that the Licensing Act of 1904 limited the grounds upon which the licensing justices could refuse the renewal of the existing on-licences to certain specified grounds which are enumerated in sect. 1, sub-sect. 1 of the Act. Then that section went on to say, in sub-sect. 2, that where the justices "are of opinion that the question of the renewal of any particular existing on-licences requires consideration on grounds other than those on which the renewal of an existing on-licence can be refused by them"—that is, those enumerated in sub-sect. 1, "they shall refer the matter to quarter sessions, together with their report thereon." We have to start from that point and see what the quarter sessions have to do. They have to consider the report, and they may "after giving the persons interested in the licensed premises, and, unless it appears to quarter sessions unnecessary"—that, no doubt, would be where they were not going to act and did not require further evidence in consequence of the evidence of the persons themselves—"any other persons appearing to them to be interested in the question of the renewal of the licence . . . an opportunity of being heard, . . . refuse the renewal of any licence to which any such report relates." Looking at the statute and the nature of the question raised and the directions as to the duty of quarter sessions, I should have thought that the proceeding before the quarter sessions was certainly in the nature of a judicial proceeding which is to be entertained by quarter sessions, and, although I do not attach any great importance to a mere definition clause, it is quite plain that the body there spoken of in the first instance is meant to be the Court of Quarter Sessions of the county. I do not think that that consideration would be at all conclusive, because it might well be that there was other language which showed that the Court of Quarter Sessions was not acting in a judicial capacity, but was doing something similar to that which was being done by the justices in the case of *Hagmaier* v. *Willesden Overseers* (90 L. T. Rep. 683; (1904) 2 K. B. 316) where we held that justices sitting and acting at a special petty sessions, under the Juries Act 1825, for settling the jury lists, were not a court of summary jurisdiction, and had therefore no power to state a case for the opinion of the court under the Summary Jurisdiction Acts. Then the provision in sect. 5, sub-sect. 2, that quarter sessions shall delegate their powers of confirming the grant of new licences and of determining questions as to the refusal of the renewal of existing licences, to a committee, seems to me to show that the lesser body, the committee, to whom the duty is delegated, are exercising the powers of quarter sessions. That being so, I should come to the conclusion that, upon such inquiry so conducted and such a decision, it was a case of a new jurisdiction given to a court to act through a committee of its members—a lesser number of that court, and that the principle which counsel in support of this rule referred to, citing the judgment of James, L.J. in *Dale's* case (43 L. T. Rep., at pp. 775-6; 6 Q. B. Div., at pp. 450-1) as an instance, that where a new jurisdiction is given to a court *primâ facie* they have got all their own powers which they would exercise ordinarily in connection with that jurisdiction, is a principle to which effect ought to be given in this case. It seems to me that, subject to the committee of the justices of quarter sessions, sitting as the compensation authority under the Act, exercising their discretion on the merits upon an application made to them to state a case and to their granting or refusing a case or declining to draw up their order in the form of a case, which would be a discretion with which this court would not interfere, that committee has the power either to state a case or to frame an order stating such facts as would make it a speaking order, and would enable this court to exercise a judgment upon the question whether or not the order was good or bad. In my opinion, therefore, upon the one ground upon which these justices have said that they declined to act—namely, upon the ground that they had no power to act or to state a case, the view taken by the committee was too limited, and I think therefore that this rule should be made absolute upon that ground. With regard to the case of *Boulter* v. *Kent Justices* (*ubi sup.*) I will only say a few words. In *Boulter's* case it was pointed out that the justices of a licensing meeting were not a court, and it was held that a court of quarter sessions had no power to make the objector pay costs because he was not a party to any *lis*. That may be perfectly right, and of course it is right and is binding on us in every way, but it seems to me not to help us much in coming to a conclusion as to what is the true view of the committee of quarter sessions when they are exercising the jurisdiction conferred on them under sub-sect. 2 of sect. 1. I therefore think that in arriving at the conclusion which I have expressed we are not in any way going against the decision in *Boulter's* case (*ubi sup.*). I may say, speaking for myself, that had I come to the conclusion that the committee of quarter sessions was not acting judicially and was not making a judicial order, I should have come to a different conclusion, and have come to the same kind of conclusion which I expressed in the case of *Hagmaier* v. *Willesden Overseers* (*ubi sup.*), to which I have referred. I think that in this case the committee of quarter sessions were acting judicially, and I come to the conclusion that the rule should be made absolute.

RIDLEY, J.—I agree with my Lord for the reasons he has given.

DARLING, J.—I am of the same opinion, but as this is an important case, and the first case that has given rise to this contention, I should like to give my own reasons. The question arises because of the passing of the Licensing Act of 1904. The first section of that Act effects a transfer, from the licensing justices to the quarter sessions, of the power to refuse the renewal of certain licences upon certain grounds, and the body to which that power is given is always spoken of, throughout this Act of 1904, as the "quarter sessions," until we come to the interpretation clause, in sect. 9, sub-sect. 4, and there it says, "The expression 'quarter sessions' means, as respects a county, the Court of Quarter Sessions for that county." That being so, we must treat it that those powers are transferred to the Court of Quarter Sessions. I had some doubt in the case at one time because of two matters. Sect. 5 in sub-sect. 5, enacts

that: "The justices of any borough, not being a county borough but having a separate commission of the peace, shall be entitled to appoint one of their number to act, with reference to the determination of any question as to the refusal of the renewal of a licence under this Act and any matters consequential thereon, on the committee appointed under this section by quarter sessions." Now, upon that it appears to me that the justice who is so appointed under that sub-section does not exactly become a member of the Court of Quarter Sessions. He is not appointed to the whole quarter sessions, but he does become a member of the committee to which the Court of Quarter Sessions is, by another sub-section of sect. 5, allowed and enjoined to delegate its powers of renewing or refusing licences. Another point which pressed me a little was that, in sect. 6 (*e*) of this Act a Secretary of State is given power to regulate the procedure of quarter sessions on the consideration of the reports of justices of a licensing district under this Act, and because "quarter sessions" means a court of quarter sessions, the Secretary of State is given power to regulate the procedure of the Court of Quarter Sessions in the matter referred to. Now, as a matter of course, it is not usual to give the Secretary of State power to regulate the procedure of courts of justice, though, possibly, there may be other instances than the present, but at all events it is not usual. The Legislature can give the power, if they so choose, and in this case they have distinctly said that the Secretary of State shall have power to regulate the procedure of "quarter sessions," and then they have said that "quarter sessions" means the Court of Quarter Sessions, so that they have said that he has power to regulate the procedure of the Court of Quarter Sessions. I come to the conclusion, therefore, notwithstanding these objections, that this body, to which the refusal of the renewal of licences is transferred, is the Court of Quarter Sessions, and I also come to the conclusion that they remain a court, and they do not become something not a court. They remain a court, but new duties have been imposed upon them, and imposed upon them, as it seems to me, as a court of quarter sessions, and new powers also have been imposed upon them which they had not before this Act was passed. Now, being a court of quarter sessions, what could a court of quarter sessions do? What a court of quarter sessions can do is very precisely explained by Lord Cairns, L.C. in the case of *Walsall Overseers* v. *London and North-Western Railway Company* (39 L.T. Rep., at p. 454; 4 App. Cas., at p. 40), and it results from that that the Court of Quarter Sessions may state a case. That was the way in which they had long exercised the duty put upon them by the commission of the peace, the duty of consulting with the judge of assize, and, later, of consulting with the judges of the Court of King's Bench; of course, they could not come to see the judges of the Court of King's Bench who were sitting in London. The judges of the Court of King's Bench did not go down to the country except as judges of assize, and therefore, if they wished to consult them, they must consult them in writing, and it became the practice to consult them by means of stating a case, but it seems to me erroneous to suppose that when they stated a case they did not make an order. They did make an order, and Lord Cairns says that there were two modes in which it might be done. The one was "consultative" simply, and he says (4 App. Cas. at p. 40): "But supposing that the Court of Quarter Sessions did not adopt that course"—that is, the consultative course—"there was still another mode by which any question of law which appeared to the Court of Quarter Sessions doubtful, might be left open for the exercise of the judgment of a higher tribunal. All that was necessary was that the Court of Quarter Sessions, in making its order, should not make it an unspeaking or unintelligible order, but should in some way state upon the face of the order the elements which had led to the decision of the Court of Quarter Sessions. If the Court of Quarter Sessions stated upon the face of the order, by way of recital, that the facts were so and so, and the grounds of its decision were such as were so stated, then the order became upon the face of it a speaking order; and if that which was stated upon the face of the order, in the opinion of any party, was not such as to warrant the order, then that party might go to the Court of Queen's Bench and point to the order as one which told its own story, and ask the Court of Queen's Bench to remove it by *certiorari*, and when so removed to pass judgment upon it, whether it should or should not be quashed. In that case, as I said just now, the jurisdiction of the Court of Queen's Bench was merely a jurisdiction to leave the order standing or to remove it out of the way"; and he points out what really goes to the difference between a *Cour d'Appel* and a *Cour de Cassation*. In the one case you had an appeal and in the other you simply dealt with the order by quashing it. What was the result of that? The order might take the form, although it was an order, of a special case, and that was what the applicant asked for in this case. He asked for an order that the order should take the form of a special case. The justices said they refused an order in the form in which it was asked because they held that they had no jurisdiction to make an order of that kind. In that I think they were wrong. In my opinion they were a court of quarter sessions; they had power to make an order and they had power to make an order in the form of a special case, and therefore to make such an order as was asked for. They were not, in my opinion, therefore bound to state a special case, but they were bound to make an order, and as they had power to make the order in the form in which it was asked, in the form of a special case, they were wrong in saying that they had no power to make an order, which is what they did say. I should like to point out a matter which has not been referred to in the course of the argument, or at all. Even when a special case is stated and sent up to this court there is still an order, although it is an order which takes the form, or part of which takes the form, of a special case. There is the order and then there are conditions stated, and then there are alternatives and arguments, and the whole is called a special case, but it is a mistake to suppose that there is not an order. There is, and always was, an order when a special case came to this court, a *certiorari* to bring up the order, and the special case came with it. But there was a *certiorari* to bring up

the order, and that went on until 1879, when the Summary Jurisdiction Act of 1879, in sect. 40, said that: "A writ of *certiorari* or other writ shall not be required for the removal of any conviction, order, or other determination in relation to which a special case is stated by a court of general or quarter sessions for obtaining the judgment or determination of a Superior Court." But until that time the order and the special case did not come to this court except by means of a *certiorari*, and there is still an order, although the section I have just read obviates the necessity for a *certiorari* to bring that order into this court. In my opinion, therefore, when the committee of quarter sessions were asked to state a special case they were asked to make an order, which they could have made, and in a form in which they could have made it, and they refused to exercise jurisdiction wrongfully when they said: "We cannot make such an order as that, because we have no jurisdiction to make it." I quite agree with my Lord that they would have been, as far as I can see, well justified in saying: "We shall make the order, but, though we could state a special case, we shall not do it." I think, for the reasons I have given, that they could state a special case, and therefore I think that the rule should be made absolute.

Lord Alverstone, C.J.—I wish to say a word about the case recently heard before us of *Morgan* v. *Aylesford Justices*. The point that no special case could be stated was not raised in that case; and, of course, so far as the question of jurisdiction is concerned, this decision governs that case; but it may be that in that case there was no final order. I do not know how that was, but it must not be taken that in *Morgan* v. *Aylesford Justices* we meant to decide any point inconsistent with the existing law. We do not entertain a special case where there is not a final order. We did not intend in any way to depart from the practice which was recognised in *Reg.* v. *Sutton Coldfield Overseers* (*ubi sup.*). We gave judgment on the assumption that there was one; I do not say whether there was or not.

Rule absolute.

Solicitors for the applicant, *Speechly, Mumford,* and *Craig,* for *Lamport, Bassitt,* and *Hiscock,* Southampton.

Solicitors for the respondents, *Robbins, Billing,* and *Co.,* for *H. Barber,* Winchester.

Tuesday, March 6, 1906.

(Before Lord Alverstone, C.J., Ridley and Darling, JJ.)

Rex v. Justices of Southampton; *Ex parte* Fuller, Smith, and Turner. (*a*)

Licensing—County borough—Renewal of licence—Reference of renewal to whole body of justices for county borough—Refusal to renew—Right of appeal from justices in county borough to quarter sessions for county—Licensing Act 1904 (4 *Edw.* 7, *c.* 23), *s.* 5, *sub-s.* 4; *s.* 8, *sub-s.* 2.

When the whole body of justices for a county borough, acting upon a reference and report to them by the borough licensing committee as to renewal of a licence, refuse the renewal of the licence subject to compensation, there is no appeal from their decision to the Court of Quarter Sessions for the county.

Rule for a *mandamus*.

The rule called upon the keepers of the peace and justices for the county of Southampton to show cause why a writ of *mandamus* should not issue commanding them to hear and determine at the next general quarter sessions to be held for the county of Southampton the appeal by the persons trading as Fuller, Smith, and Turner, appellants, and fifteen justices of the peace for the county borough of Southampton and George Bassett, clerk to the justices, respondents, touching the refusal of the said fifteen justices, acting as the compensation authority within the meaning of the Licensing Act 1904 and the Licensing Rules 1904, at their principal meeting on the 25th May 1905, to grant to one Edwin Donkin, by way of renewal (subject, however, to compensation), a licence for the sale by retail of beer, to be consumed on and off the premises, at a certain house and premises known as the York Inn, in Evans-street, in the county borough of Southampton, in the occupation of Edwin Donkin, whereof Messrs. Fuller, Smith, and Turner, of the Griffin Brewery, Chiswick, were the owners.

The rule was obtained at the instance of Messrs. Fuller, Smith, and Turner, the owners of the premises.

The facts as set out in the affidavit of the applicants' solicitor, upon which the rule was obtained, were as follows:—

At the annual general licensing meeting, or some adjournment thereof, held for the county borough of Southampton, upon the 2nd March 1905, Edwin Donkin (the licensee of the York Inn) duly attended in pursuance of a notice of objection to the renewal of the licence of the inn, served upon him upon the 1st Feb. 1905, and applied for the renewal of his licence.

The justices then present, acting as the renewal authority within the meaning of the Licensing Rules 1904, referred the matter of the renewal to the whole body of justices acting in and for the county borough, together with their report thereon.

The whole body of justices acting in and for the county borough of Southampton, and purporting to be the compensation authority, at their principal meeting, within the meaning of the Licensing Rules, upon the 25th May 1905, having read the report and having heard no evidence upon oath (other than production of and proof of service of the report), except such evidence as was produced by Edwin Donkin (the licensee), refused the renewal of the licence, subject to the payment of compensation under the Licensing Act 1904.

Donkin (the licensee) and Messrs. Fuller, Smith, and Turner (the owners) thought themselves aggrieved by the act of the justices purporting to act as such compensation authority, in refusing to renew the licence, and they gave notice in writing to the justices and to George Bassett, their clerk, of their intention to appeal against the refusal to renew the licence to the next general quarter sessions of the peace to be held in and for the county of Southampton at Winchester and of the cause and matter of the appeal, and duly entered into recognisances.

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

At the general quarter sessions held in and for the county of Southampton at the city of Winchester, on the 27th June 1905, being the next practicable general quarter sessions of the peace for the county of Southampton after the refusal to renew the licence, the licensee and owners of the York Inn duly appeared by counsel to prosecute their appeal and proved that copies of their notice of appeal had been duly served upon the justices and upon their clerk, but the justices did appear either personally or by counsel.

The Court of Quarter Sessions for the county of Southampton refused to hear the appeal on the ground that they had no jurisdiction to hear an appeal from the whole body of justices acting in and for the county borough of Southampton, and acting as such compensation authority as aforesaid.

The above rule for a *mandamus* was then obtained.

The Licensing Act 1904 (4 Edw. 7, c. 23) provides:

Sect. 1 (1). The power to refuse the renewal of an existing on-licence, on any ground other than the ground that the licensed premises have been ill-conducted or are structurally deficient or structurally unsuitable, or grounds connected with the character or fitness of the proposed holder of the licence, or the ground that the renewal would be void, shall be vested in quarter sessions instead of the justices of the licensing district, but shall only be exercised on a reference from those justices and on payment of compensation in accordance with this Act. (2). Where the justices of a licensing district, on the consideration by them, in accordance with the Licensing Acts 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on-licences requires consideration on grounds other than those on which the renewal of an existing on-licence can be refused by them, they shall refer the matter to quarter sessions, together with their report thereon, and quarter sessions shall consider all reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises and, unless it appears to quarter sessions unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the justices of the licensing district), an opportunity of being heard and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates.

Sect. 5 (2). Quarter sessions may delegate any of their powers and duties under this Act to a committee appointed in accordance with rules made by them under this section, and, except in a county borough, shall so delegate their power of confirming the grant of a new licence and of determining any question as to the refusal of the renewal of a licence under this Act and matters consequential thereon, and county licensing committees shall cease to be appointed under the Licensing Act 1872. (4) The justices of a licensing district being a county borough shall exercise their powers under the Licensing Acts 1828 to 1902, as to the renewal of licences through the borough licensing committee appointed under section thirty-eight of the Licensing Act 1872, and such number as the whole body of justices acting in and for the borough determine shall be substituted for seven as the maximum number, and seven shall be substituted for three as the minimum number of that committee.

Sect. 8 (1). The area of quarter sessions for a county shall for the purposes of this Act include any borough (not being a county borough) or any part thereof which is locally situated in that county. (2) This Act shall apply to a county borough as if it were a county, with the substitution for quarter sessions of the whole body of justices acting in and for the borough.

Sect. 9 (4). In this Act the expression "quarter sessions" means, as respects a county, the Court of Quarter Sessions for that county.

Sect. 10 (1). This Act . . . shall be construed as one with the Licensing Acts 1828 to 1902.

Duke, K.C. (*J. A. Simon* with him) showed cause against the rule.—The question is whether an appeal lies to the quarter sessions for the county from the general body of justices in a county borough, exercising their jurisdiction under the Licensing Act 1904, with regard to licences extinguished with compensation in the same manner as formerly it lay with regard to the non-renewal of licences. The intention of the Act of 1904 was to except these cases of extinction of a licence with compensation from the general principle as to appeals which had prevailed under the Alehouse Act 1828, and the justices were right in holding that there was no appeal. Until the Act of 1904, in all cases of refusal of a renewal of a licence there was a right of appeal to the quarter sessions for the county, which existed under sect. 27 of the Alehouse Act 1828, so that this would have been an appealable matter but for the Act of 1904. The operation of sect. 27 of the Act of 1828 was limited by sect. 75 of the Licensing Act 1872 to renewals or transfers, so that the right of appeal to quarter sessions from the refusal to renew was kept alive until the Act of 1904. Before the Act of 1904 one of the grounds of refusal to renew was that there were too many public-houses in the district, and that the house was not required, and *Sharpe* v. *Wakefield* (64 L. T. Rep. 180; (1891) A. C. 173) decided that the justices could refuse the renewal upon that, among other grounds. Then came the Act of 1904, which created a new jurisdiction to justices to extinguish licences with compensation, and it created a uniform system for the whole country, in which the country, for the purpose of this Act, is divided into counties and county boroughs, and there is set up in each county borough an authority to deal with the cases of houses not required for public accommodation and not open to objection on other grounds. The distinction between these two classes of houses is drawn in sect. 1. The justices in the two sets of areas —the county and the county borough—have in each case a fund for providing compensation where licences are to be extinguished with compensation, and the powers given to justices of county boroughs with regard to this fund are identical with those given to the county justices. The only place where the separate jurisdiction of the county boroughs is defined is in sect. 8, and the effect of that section is to create the county borough as a separate area for the purposes of the Act. Sub-sect. 1 deals with the area of quarter sessions, and includes boroughs, but excludes county boroughs, which shows that the county boroughs are a separate area by themselves. Then sub-sect. 2 expressly says that the Act is to apply to a county borough "as if it were a county"—so that that makes it for the purposes of the Act "a county"—"with the substitution for quarter sessions of the whole body of justices" of the county borough. The whole

body of justices in the county borough are thus substituted for the quarter sessions, and it is to them that reports from the county borough go instead of to the quarter sessions; and by sect. 10 the quarter sessions means the Court of Quarter Sessions for the county. Then by sub-sect. 4 of sect. 5, the justices of a licensing district, in the case of a county borough, are to act, as to the renewal of licences, through the borough licensing committee. Substituting in sect. 1, sub-sect. 2, "the borough licensing committee" for "the justices of the licensing district," and for "quarter sessions" "the whole body of justices" of the county borough, that sub-section would be this: Where the borough licensing committee, on the consideration by them . . . of applications for the renewal of licences, are of opinion, &c., they shall refer the matter to the whole body of justices acting in and for the borough. Before the Act there were the licensing justices of the borough—not the whole justices, but a certain number appointed to act for the whole—and an appeal to quarter sessions of the county; since the Act there are the borough licensing committee, with—not an appeal, but a reference of the reports to the whole body of justices, and the whole scheme of the Act goes to show that the whole body of justices is the final authority, and that there is no appeal from them to the quarter sessions for the county. The county borough is separated from the county and becomes a complete entity or county in itself, and just as there could not be an appeal from the quarter sessions of one county to the quarter sessions of another county, so there cannot be an appeal from the whole body of the justices of the county borough to the quarter sessions for the county.

Pickford, K.C. (*S. H. Emanuel* and *H. Brodrick* with him) in support of the rule.—It is submitted that there is an appeal to the county quarter sessions in this case. Before this Act of 1904 the whole body of justices for the county borough had the whole jurisdiction as to renewals, and from their decision there was an appeal to quarter sessions. The strongest point here is that the applicants had that appeal, and if they have not got it now it must be taken away either in express terms or by the most express implication. There was an appeal against the refusal to renew; there is a refusal to renew in this case; the compensation authority cannot refuse to renew without compensation, but still it is a refusal to renew, and it has to be shown that that appeal has been taken away. In the recent case as to the power of the committee of quarter sessions to state a case it was held that where there is a well-known body with a well-known jurisdiction and incidents of that jurisdiction, and you give that body some new jurisdiction it had not before, you give that jurisdiction to that body subject to all the incidents of its existing jurisdiction. Here a part of the jurisdiction of the whole body of the justices in the borough is left to them. When they had it before there was an appeal; that was one of the incidents of their jurisdiction. If there is left to them part of what they had before, then, *primâ facie*, it is left to them subject to the same right of appeal. Dealing with the history of the case, sect. 1 of the Act of 1828 provided that every application for the grant—including the grant of a new licence or a renewal—went to the whole body of justices in the borough. Then sect. 27 gave an appeal to the next quarter sessions for the county from any act of the justices sitting in any part of their jurisdiction connected with the granting or renewing of licences. So far as the appeal goes, that was taken away from the recorder and was given to the county quarter sessions by a subsequent Act; but the whole body of justices dealt with new grants and renewals, subject to an appeal as to both to county quarter sessions. So it stood until the Act of 1872, when the granting of new licences was taken away from the whole body of justices and was given to a licensing committee; but the confirming of new licences in the borough was still in the whole body of justices, so that their jurisdiction then was the granting of renewals and the confirming of new grants. Then sect. 75 of the Act of 1872 took away the appeal in every case except in the case of a refusal to renew or to transfer. After that the application to renew went to the whole body of the justices, and from them there was an appeal to quarter sessions. Then came the Act of 1904, which by sect. 1, sub-sect. 1, transferred the power to refuse the renewal in certain cases to quarter sessions. That was no longer an appeal to quarter sessions. On reading sect. 8, sub-sect. 2, it comes to this, that the refusal to renew was left to the whole body of justices, except in the case of the refusal for the four grounds specified in sub-sect. 1 of sect. 1, which was exercised by the borough licensing justices or committee under the powers of sect. 5, sub-sect. 4. There is still the same jurisdiction, only limited. Before the Act it was the entire jurisdiction over all questions connected with renewal. It is not a new jurisdiction, and there are no words in the Act to say that the portion of the jurisdiction that is left to them is so left to them without the appeal that existed with regard to the whole jurisdiction when they had the whole jurisdiction. The case is stronger than if it were a new jurisdiction. There is still the old jurisdiction left to them to be exercised through the licensing committee, where the grounds for refusing the renewal are the four grounds in sub-sect. 1 of sect. 1, and it is admitted that in exercising that portion of their jurisdiction there is an appeal to quarter sessions. Then there is left to the whole body of the justices themselves, exercising it themselves and not through a committee, another portion of their jurisdiction—namely, the refusing renewals on other grounds, subject to compensation—and that is left to them subject to the same appeal as before, and there are no words in the Act which have either expressly or by necessary implication taken it away; on the contrary, by sect. 10, the Act is to be read as one with the previous Licensing Acts. He referred to the judgment of Collins, M.R. in *Rex* v. *Drinkwater; Ex parte Conway* (70 J. P. 1).

Lord Alverstone, C.J. — Nobody can say that this is an easy case, and, in fact, I do not think that any of these cases under this Licensing Act are easy. They form a very good exercise for the skill of advocates at the Bar, and they try judges very much in making up their minds as to what the decision should be. I am far from saying that the decision we have arrived at in this case is the right one, but it seems to me, looking

at this Act broadly, as, in my judgment, it ought to be looked at, and construed with regard to its broad intentions, that this rule ought to be discharged. Counsel in support of the rule has put the point in the clearest possible way, and in a way which enables us to deal with it at once. There existed before the year 1904 in the matter of refusals to renew licences by the licensing authority in county boroughs, then the whole body of justices in such county boroughs, a right of appeal to quarter sessions. Now, by sect. 10 of the Licensing Act of 1904, this Act is to be read as one with all the preceding Licensing Acts. There is no express enactment in this Act which either gives or takes away the right of appeal to quarter sessions which previously existed in such a case as this, and therefore, if that right of appeal is taken away, it must necessarily be by implication. I think, in order to get a clear view of the matter, and to make one's judgment logical, we must look at this matter from the beginning. Before 1828, or by the Alehouse Act of 1828, all the powers in these licensing matters were to be exercised by all the licensing justices. Then came the Licensing Act of 1872, which in sect. 38 provided, with regard to grants of new licenses in boroughs with ten or more justices, that those should go to the licensing committee of the justices, the question of the renewal still remaining with the whole body of the justices. That was the state of things when the Licensing Act of 1904 was passed, so far as it is material for this particular question which we have now to consider. The broad scope of the Act of 1904 was to limit the ordinary jurisdiction, or the grounds of the jurisdiction exercisable by the licensing authority, who were to have the power of refusing renewal on certain limited grounds only which are mentioned in sect. 1, sub-sect. 1, of the Act, while the power to refuse the renewal on any other ground was vested in quarter sessions instead of the justices of the licensing district. In other words, the Act conferred upon quarter sessions a new jurisdiction, not an appellate jurisdiction, but an original jurisdiction—namely, to have the right of refusing the renewal of a licence upon other grounds than those which were the subject of the previous enacting words, one of those grounds being that which was the subject of appeal in *Sharpe* v. *Wakefield* (*ubi sup.*)—namely, that there were too many licences for the particular district. The Act thus introduced an entirely fresh enactment, giving the justices of the licensing district new duties. They were to form an opinion that the question of the renewal required consideration on grounds other than those on which the renewal of an existing on-licence could be refused by them, as specified in sub-sect. 1 of sect. 1, and they were to make a report, and quarter sessions were to consider all reports, and might, if they thought it expedient, after giving certain persons the right of being heard, refuse the renewal of any licence to which such report related. With reference to counties the enactment is pretty clear, and the broad feature of the enactment is that which I have endeavoured to explain as clearly as I could—namely, that it confers a new jurisdiction upon quarter sessions to hear once and for all the question of renewal, subject to this preliminary condition that there should be in the report of the licensing justices an examination of the licences which the quarter sessions are going to consider upon that report. In working out the machinery for carrying out that broad intention of the Act, it is not unimportant, in my judgment, to consider with reference to the points argued before us two or three of the provisions of sect. 5. Sub-sect. 2 of sect. 5 says that the quarter sessions shall, except in a county borough, delegate their powers of confirming the grant of a new licence and of determining any question as to the refusal of the renewal of a licence to a committee appointed in pursuance of the section. Therefore not only was there a departure from the old appellate jurisdiction of the quarter sessions, but there was a power given to them to delegate to a committee and a duty imposed upon them to delegate to the committee the discharge of some of their duties. It may not be unimportant to notice in that connection, as we had to deal with the matter in another case under certain circumstances, that there was a member of the justices of a non-county borough to be added to that committee of quarter sessions for certain purposes under the Act. Now, in the same section (sect. 5) the persons who drafted the Act remembered that there was that kind of committee—that is, a licensing committee—in certain boroughs which had at that time only power to deal with new licences and had no power to deal with renewals, and accordingly sub-sect. 4 enacts that the justices of a licensing district, being a county borough, shall exercise their powers as to the renewal of licences through the borough licensing committee. So far, therefore, the Act proceeds on parallel lines both as regards counties and as regards county boroughs, and in county boroughs the report as to the refusal of the renewal of a licence is to be made by the borough licensing committee appointed under sub-sect. 4 to the whole body of justices of the county borough. Then comes the section upon which, to a large extent, the present question turns, and the enactment which creates the difficulty—namely, sub-sect. 2 of sect. 8, which provides that the Act shall apply to a county borough "as if it were a county, with the substitution for quarter sessions of the whole body of justices acting in and for the borough." There is thus a substitution for quarter sessions of the whole body of justices of the borough. Now, I think, a perusal of the Act shows that that is not merely what I may call a drafting clause, because, as Mr. Pickford rightly pointed out, I doubt whether you can always substitute the whole body of justices in the borough for quarter sessions everywhere through the Act. Therefore I think we are bound again to look at the broad scope of this enactment, and see what the intention was, and it seems to me that the intention was to substitute in a county borough the whole body of justices of the borough to perform the functions that were to be performed by quarter sessions in the county. The sub-section, after saying that this Act shall apply to a county borough as if it were a county, goes on to say "with the substitution" "of the whole body of justices" for quarter sessions. That being so, if there is a necessary implication that the right of appeal to quarter sessions in such a case is taken away, it, at any rate, makes the scheme of the Act consistent. We have in each case a consideration of the matter by a superior body, no

longer an appellate body, or no longer acting to hear appeals from a previous body, but acting upon a preliminary report of a previous body. I agree with the criticism that if we look at the past condition of things the sub-section might have been drafted more clearly, because the whole body of justices acting in and for the borough were not an appellate body originally; they were the body which had to deal with the question of renewal. Quarter sessions was only an appellate tribunal for the purpose of that question. But, looking at the general scope of this Act as I read it from sect. 1, I think the construction I am putting on the Act is the only one that is consistent with that main purpose. Mr. Pickford naturally refers to sect. 10, and says that this Act is to be read as one with the other Licensing Acts. We have decided that in cases where the Act gave no very clear indication of a departure from the original procedure, the old procedure was to remain. I need not go through those cases, but notably there was one in which we had to consider what the position of the licensing justices was when they determined to report; and I quite agree that if, consistently with the scheme and intention of the Act as evidenced from the 1st section, we could say that the appeal should be continued, then the position of counsel in showing cause against this rule would be different. For years I have endeavoured to explain this matter, and I hope with some clearness. In my opinion, the intention of the Act was to put the county boroughs in the same position as a county for the purpose of final determination of questions as to whether the licences should be renewed or not, that determination being in the case of a county by the quarter sessions, or rather by a committee of the quarter sessions, and in the case of a county borough by the whole body of the justices of the borough. I must say that, in my opinion, the view I have taken is more consonant with the other provisions of the Act, which, as I think, merely point to these questions being dealt with locally by the bodies which have to deal with them, and I think it would be rather a departure from that principle if we were to hold that, the whole body of the justices in the county borough having acted upon a report of their licensing committee, there should be a further appeal from their decision, or an appeal in that case where under the like circumstances there is no appeal from the quarter sessions. For these reasons, I think that this rule ought to be discharged.

Ridley, J.—I am of the same opinion. I must say that I felt very considerable difficulty in the course of the argument, as this Act of Parliament is rather an intricate one, and it is certainly open to the observation that there are some of the words, if we are to take them merely as words in this enactment, which are not fully given effect to by our decision. I do do not think we can read the provisions of sect. 6, sub-sect. 2, as meant to apply to a county borough in all the places where those words occur. But I think, as was said in the previous decision at which this court arrived, that this Act gave effect to an entirely new state of things. It was an entirely new thing that where the question arose whether the licence should be renewed or not, the first body of justices which had to consider that matter should come to no final decision upon it, but should report its consideration to another body as to what the proper consideration of the matter should be. In the case of counties, it was enacted that the justices of the licensing districts were, if they should think proper to do so, to refer to quarter sessions for their consideration the matter of the refusal of the renewal of licences upon certain grounds. The quarter sessions was the tribunal that was chosen as the proper one to decide whether or no upon those grounds the licence should be refused or renewed, and if refused, what the compensation should be that should be paid. Then, when we come to deal with the county boroughs, which had to be brought into the scheme as well as the counties, the question is whether the Legislature did, in the enactment we have to construe, leave in existence the appeal from the county borough justices to the quarter sessions which would be made under provisions which are not touched by this portion of the Act, or whether they intended to leave those boroughs to deal entirely and completely with these matters by themselves. I have come to the conclusion that the latter is the proper view of the Act, what was to be done in the counties by the justices of the licensing district in the first instance was to be done in the case of the county boroughs by the borough licensing committee. That borough licensing committee is brought into existence for this purpose by sect. 5, sub-sect. 4, and matters as to renewals were to be referred by them to the whole body of the borough justices. I think that the Legislature, having enacted that, did not intend that there should be an appeal from that whole body of the borough justices to quarter sessions, and I think, looking at the matter with the scheme of the Act and its new provisions, that that is the meaning of the Act. It is true, and this is, perhaps, the main argument to the contrary, that sect. 27 of the Alehouse Act 1828, gave a right of appeal against the action of the justices to the quarter sessions. I do not think that there is any act done by the borough licensing committee which is to be the subject of appeal, nor can it be contended that in referring the question of the renewal of any particular licence for consideration to the whole body of justices, the borough licensing committee have done a thing which is subject to appeal. I think, as I said in the case recently before us of *Rex* v. *Cheshire Licensing Justices* (1906) 1 K. B. 362), that in referring a report on a particular licensed house to the whole body of justices in the borough the licensing committee are not doing a thing which is a judicial proceeding. Therefore, we cannot satisfy the Act of Parliament by saying that there is an appeal which remains, and which we do allow to exist, from the borough licensing committee to the whole body of the justices of the county borough. I do not shelter myself at all by pretending that I think that this sect. 27 of the Alehouse Act 1828 can be satisfied by such an argument. I think the bolder and sounder course is to say at once, as I do say, in agreeing with the Lord Chief Justice, that, in my opinion, the general scope of the Act of 1904, was to abolish as inconsistent with its own enactments, although it did not directly repeal it, any such appeal as would enable persons to appeal to quarter sessions from the whole body of the justices of the county

borough who had disallowed licences subject to compensation.

DARLING, J.—I am of the same opinion. The view I take of the matter is this. The Act of Parliament begins, and for a long time continues, as though it dealt with counties only, neglecting the ordinary boroughs, because it simply treats them as portions of the county and not as having a separate entity at all. It had neglected altogether to deal with those other entities, which are called county boroughs. A great deal of the language which it had used would not have been applicable to the county boroughs at all. It had not included the county boroughs, because it had included the boroughs without mentioning the county boroughs, and therefore the county boroughs were excluded. But the body that was to refuse renewals of licences was the quarter sessions. The county boroughs had no quarter sessions in the sense of this Act at all, because the definition clause in the Act—sect. 9, sub-sect. 4—says that "the expression 'quarter sessions' means, as respects a county, the Court of Quarter Sessions for that county," and nothing is said as to any other court of quarter sessions. The quarter sessions were given the power to renew those licences upon the report made to them by certain subordinate justices. If they accepted that report and refused to renew the licence, then the licensee was to be compensated for the loss of his licence out of a fund which had been raised, and which in the present case would be raised in the county borough. The Act appears to give to quarter sessions various powers to do various things, which, it seems to me, it would be very convenient should be done in a county borough. Sect. 5, sub-sect. 1 says that quarter sessions may divide their area into districts; sub-sect. 2 says that quarter sessions may delegate any of their powers and duties to a committee, and so on. Sub-sect. 3 says that they make rules to be approved by a Secretary of State. But I do not see any provision that they may do any of these things in a county borough. Now we come to sect. 8, and sub-sect. 1 says that "the area of quarter sessions for a county shall for the purposes of this Act include any borough (not being a county borough)"—that is what I lately called attention to—"or any part thereof which is locally situated in that county." It is made perfectly plain that the county borough has not been dealt with by that provision as to quarter sessions. Then sub-sect. 2 of sect. 8 provides that "this Act shall apply to a county borough as if it were a county." That seems to me to have done exactly what the Act, up to that time, had not affected to do. It has now applied the Act to the county borough; that is how I read the words "as if." It does not say that the Act shall apply to the county borough. It says that the Act shall apply to the county borough as if the county borough were a county. Now let us put the county borough on a level with the county. Then the result is this; the quarter sessions of the county have got all these powers under the Act. Who is going to exercise them in the county borough? Are the quarter sessions of the county to exercise those powers in the county borough which they exercised in the county, or are we to make the county borough something self-contained? The same sub-section goes on: "With the substitution for quarter sessions of the whole body of justices acting in and for the borough." To my mind, that puts the whole body of the justices in the position of justices acting within the county borough, treating the county borough as if it were a county. The consequence is, as to this committee, which first of all deals with the question of the renewal of licences, the appeal, if we call it an appeal, the application for revision, to use a neutral term, lies not to the quarter sessions, but to the whole body of the justices of the county borough. Then, it is said, but these justices cannot state a case. I do not agree with that. I think that they are given practically the powers of quarter sessions. They could not be called quarter sessions, because in the county borough there is already something which has the name of quarter sessions—namely, the court of the recorder—and therefore the Act could not use that expression if Parliament meant to give this power to persons whom they did mean to give it to—that is, the whole body of justices of the county borough. But seeing that they gave this power to the whole body of the justices of the county borough, and made them practically the quarter sessions by saying that they were to be the substitute for the quarter sessions and that the county borough was to become as though it were a county, then it may be that what I am saying as to their power to state a case is not necessary to this point; but I mention it, because it leads me to come to the conclusion to which I do come. I think that they would have power to state a case; and I think that the intention of the Legislature was that they should, within the county borough, have the same kind of authority that the quarter sessions have within the county. It is because I think that they have the same powers as the Court of Quarter Sessions with regard to this subject, that I think that no appeal lies from them to the quarter sessions of the county.

Rule discharged.

Solicitors for the applicants, *Godden, Son,* and *Holme,* for *Lamport, Bassitt,* and *Hiscock,* Southampton.

Solicitors for the respondent justices, *Robbins, Billing,* and *Co.,* for *H. Barber,* Winchester.

Wednesday, March 7, 1906.

(Before Lord ALVERSTONE, C.J., RIDLEY and DARLING, JJ.)

MOSES (app.) *v.* IGGO (resp.). (*a*)

Fishery Acts—Fishery district—Licence to fish—River a tributary of salmon river—Water of river diverted into mill race and mill dam—Fishing in dam—Whether dam is a "tributary" — Salmon Fishery Act 1865 (28 *& 29 Vict. c.* 121), *ss.* 3, 5, 35—*Freshwater Fisheries Act* 1878 (41 *& 42 Vict. c.* 39), *ss.* 6, 7.

Under the provisions of the Salmon Fishery Acts a fishery district and fishery board were constituted, and the limits of the district were duly declared. From a river which was a tributary of the river Ouse, which contained salmon, water was diverted into a mill race, and between the river and the mill race there was formed a three-cornered dam for the purpose of increasing

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

the water power of a mill. The water from the river entered the mill race under a bridge, and the dam was fed from the race through an opening in the bank about a yard wide, in front of which there was a grating of iron bars about an inch apart, but there was no clough to hold the water in the dam, and the water flowed to and fro between the race and the dam without hindrance, and when the water in the race was lower than the water in the dam the latter returned into the race. All the water which was diverted from the river into the mill race and dam either passed over the mill wheel and thence into the river, or continued in an extension of the race and passed into the river about half a mile further down. The mill dam contained trout, and the dam, race, and river were within the geographical limits of the fishery district:

Held, that the mill dam was a "tributary" of the river, and that a person fishing for trout therein required the licence of the fishery board.

Case stated by two justices of the peace for the Sheffield district of the West Riding of the county of York.

At a petty sessions held at Sheffield for the upper division of Strafforth and Tickhill, in the West Riding, on the 13th June 1905, an information was preferred by one Charles Moses (the appellant) a water bailiff in the employ of the Yorkshire Fishery Board, against Albert Iggo (the respondent), under sect. 35 of the Salmon Fishery Act 1865 (28 & 29 Vict. c. 121), as extended to "trout and char" by sects. 6 and 7 of the Freshwater Fisheries Act 1878 (41 & 42 Vict. c. 39), for that he, the respondent, on the 29th April 1905, at Storrs Bridge Mill dam, near Loxley, in the West Riding, being a place within the geographical limits of the Yorkshire Fishery District, after the time appointed by law in that behalf there unlawfully fished with a rod and line for trout, without a proper licence in that behalf.

This information was heard and determined by the justices, the respondent being present and being legally represented. The justices were unable to agree, and they therefore dismissed the information, subject to this case.

On the hearing of the information the following facts were proved or admitted and found by the justices.

Storrs Bridge Mill dam was within the geographical limits of the Yorkshire Fishery District, and was the property of one James Swift, and was a three-cornered dam built between the river Loxley and the race feeding Storrs Bridge Mill, for the purpose of increasing the water power to Storrs Bridge Mill. The dam was not formed under any Act of Parliament. The water from the river entered the mill race at the point marked A on the plan attached to the case, and Storrs Bridge Mill dam was fed from the mill race through an opening in the bank marked C on the plan, which was about a yard wide, in front of which opening was a grating of vertical iron bars about an inch apart. There was no clough to hold up the water in the dam, which was about 5ft. deep, being some 12in. deeper than the mill race. The water flowed to and fro through the opening between the race and dam without hindrance. The dam contained trout, to which the grating was little or no obstruction.

The photographs and plan attached to this case were put in at the hearing for the purpose of showing the character and surroundings of Storrs Bridge Mill dam.

When the level of the water in the mill race was reduced below the level of the water in the dam the water in the latter returned to the mill race and thence either passed over the mill wheel and through the mill cloughs direct into the river, or continued to flow down an extension of the mill race giving water power to other mills, and so eventually all the water returned to the river some half mile or so below Storrs Bridge Mill dam.

There was a pipe in the dam bottom (marked D) by which the water in the dam might be emptied into the river. There were no other outlets for the water in the dam. The whole of the water from time to time entering the dam eventually returned to the river Loxley, from which it was originally diverted.

The river Loxley is a tributary of the river Don, which is a tributary of the river Ouse, which is a river containing salmon.

The limits and bounds of the Yorkshire Fishery District were originally defined and declared by the Home Secretary by certificate given by virtue of the powers given by the Salmon Fishery Acts 1861 to 1873, and in such certificate were then declared to comprise (*inter alia*) "so much of the rivers Derwent, Wharfe, Nidd, Ure, Swale, Ouse, and Humber and their tributaries as lies within the county of York," but the limits of the Yorkshire Fishery District were subsequently, by certificate dated the 21st Jan. 1896 of the Board of Trade acting under the powers conferred by sect. 3 of the Salmon and Freshwater Fisheries Act 1886 (49 & 50 Vict. c. 39), altered, extended, and defined as follows: "The limits of the rivers Derwent, Wharfe, Nidd, Ure and Swale, and Ouse, and the fishery district of the said rivers include all such estuaries, rivers, streams, brooks, lakes, ponds, canals, dykes, cuts, drains, channels, watercourses, and waters as lie within the limits defined by certain lines and boundaries in the said certificate set forth and described.

The Yorkshire Fishery Board, in pursuance of the powers vested in them under sect. 7 of the Freshwater Fisheries Act 1878, with the approval of the Board of Trade, issued a scale of licence duties on the instruments used for fishing for trout and char, within the limits of their district. A copy of the scale approved by the Secretary of State was annexed to and formed part of this case.

The Storrs Mill dam was situate in that part of the West Riding which was within the limits of the Yorkshire Fishery District, as defined by the lines and boundaries in the last-named certificate so set forth and described.

The appellant was duly appointed as their water bailiff by the Yorkshire Fishery Board.

On the 29th April 1905 the respondent was found fishing for trout in the Storrs Mill dam. The respondent was duly authorised to fish in the dam, but did not possess and had not obtained from the Yorkshire Fishery Board any licence authorising him to fish for trout within the district under the jurisdiction of the board.

On the part of the appellant it was contended that as the respondent was fishing in waters in a mill dam which were only temporarily diverted from the river Loxley by means of a mill race,

with which race the above rivers had free communication, and which waters eventually returned into the river Loxley, and thence ran into the rivers Don and Ouse, no part of the waters being conveyed altogether away from the river for domestic or any other purpose, such waters were a tributary of the river Ouse, and the respondent therefore required a licence from the Yorkshire Fishery Board to fish for trout therein. The appellant referred to and relied on the case of *Cook* v. *Clarebrough*, decided in the Divisional Court on the 27th March 1903, but which appeared to be unreported.

The respondent referred to and relied on the case of *Stead* v. *Nicholas* (85 L. T. Rep. 23; (1901) 2 K. B. 163), and contended that the dam was an artificial reservoir and not a tributary of the river Don, and was therefore not within the limits of the Yorkshire Fishery District, and that in consequence no licence to fish for trout from the Yorkshire Fishery Board was required.

The justices therefore, being in disagreement as to the point of law arising therein, dismissed the information, and the question was whether they were right in so dismissing it.

If the court should be of opinion that the justices were legally right in dismissing the information, then the appeal was to be dismissed; but if the court should be of the contrary opinion, then the case was to be remitted to the justices with the opinion of the court thereon, or the court were to make such order as to the court might seem fit.

The plan showed the position of the dam with regard to the river and the mill race, which ran in a slanting direction from the river. The river at the place in question made a sudden bend almost at right angles, and in the corner so formed between the mill race and the river the dam, which was a triangular or three-cornered dam, was formed. A footpath ran round the three sides of the dam separating it on two sides from the river, and on the third side from the race. At the head of the mill race, where it joined the river, there was a clough (marked A), and through this the water came from the river into the race under a bridge over the race; and about the middle of the dam there was an opening (marked C) in the bank or footpath which separated the dam from the race, and through this inlet the dam was fed from the race. In the bottom of the dam there was a pipe (marked D), through which the water in the dam could be drained off into the river, and below the Storrs mill there was an outlet (E) from the mill race into the river.

The Salmon Fishery Act 1865 (28 & 29 Vict. c. 121) provides:

Sect. 3. In this Act and the Salmon Fishery Act 1861, the following words shall have the meanings hereinafter assigned to them, unless there be something in the subject or the context repugnant to such construction — that is to say, "river" shall include such portion of any stream or lake, with its tributaries, and such portion of any estuary, sea, or sea coast, as may from time to time be declared, in manner hereinafter provided, to belong to such river. "Salmon river" shall mean any river as above defined frequented by salmon or young of salmon.

Sect. 5. The limits of a river shall be defined for the purposes of this Act, and a fishery district shall be formed, by a certificate under the hand of one of Her Majesty's Principal Secretaries of State [now the Board of Trade, by sect. 3 of the Salmon and Freshwater Fisheries Act 1886 (49 & 50 Vict. c. 39)], describing the limits of the river or district by a reference to a map or otherwise, as to the said Secretary may seem expedient. . . .

Sect. 35. From and after a time to be appointed as aforesaid in a fishery district, any person fishing in that district with a rod and line for salmon without a proper licence shall be liable to a penalty of not less than double the amount to be paid for the requisite licence, and not exceeding five pounds.

The Freshwater Fisheries Act 1878 (41 & 42 Vict. c. 39) provides:

Sect. 6. The provisions of the Salmon Fishery Acts 1865 and 1873, which relate to the formation, alteration, combination, and dissolution of fishery districts, and to the appointment, qualification, proceedings, and powers of conservators, shall extend and apply to all waters within the limits of this Act frequented by trout or char; and the term "salmon river" in the fourth and nineteenth sections of the Salmon Fishery Act 1865, and in the twenty-sixth section of the Salmon Fishery Act 1873, shall mean any river frequented by salmon, trout, or char.

Sect. 7. In any fishery district subject to a board of conservators, the conservators shall have power to issue licences for the day, week, season, or any part thereof to all persons fishing for trout or char, and, in the event of the power being exercised in any fishery district, the provisions of the thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, and thirty-seventh sections of the Salmon Fishery Act 1865, and of the twenty-first, twenty-second, twenty-fourth, and twenty-fifth sections of the Salmon Fishery Act 1873 (relative to licences), shall, with respect to such district, be construed as if the words "trout or char" were inserted throughout after the word "salmon." Provided as follows: (1) A licence to fish for salmon shall have effect as a licence to fish for trout and char; (2) the fee payable for a licence to fish for trout or char exclusively of salmon in any district shall not exceed one-third of the maximum amount chargeable for fishing for salmon under the provisions of the twenty-first section of the Salmon Fishery Act 1873.

The Freshwater Fisheries Act 1884 (47 Vict. c. 11) provides:

Sect. 2. Fishery districts may be formed, and conservators appointed, for water frequented by any freshwater fish, and section six of the Freshwater Fisheries Act 1878 shall apply as if "freshwater fish" were therein substituted for "trout or char," and "salmon, trout, or char," and section twenty-seven of the Salmon Fishery Act 1865 shall apply as if "freshwater fish" were therein substituted for "salmon," and any conservators so appointed shall have the powers conferred on conservators by the Salmon Fishery Act 1876.

Willis Bund for the appellant.—The justices ought to have convicted, but they declined to convict on the authority of the two cases of *Harbottle* v. *Terry* (48 L. T. Rep. 219; 10 Q. B. Div. 131) and *Stead* v. *Nicholas* (85 L. T. Rep. 23; (1901) 2 K. B. 163). Those cases are absolutely different from the present case, which is really concluded in the appellant's favour by the unreported case of *Cook* v. *Clarebrough* decided by this court. (*a*)

(*a*) The case of *Cook* v. *Clarebrough* was decided in the Divisional Court on the 27th March 1903 by Lord Alverstone, C.J., Wills and Channell, JJ., on the question whether a tributary stream when dammed up ceased to be a tributary, if its water passed out and ultimately issued through the old channel into the main river.

In the earlier of the two cases, the case of *Harbottle* v. *Terry* (*ubi sup.*), a series of reservoirs was formed by a water company under local Acts of Parliament for the supply of water to a neighbouring town; dams were placed across a stream which was a tributary of the Tyne, and the water was taken by underground pipes from these dams into the highest of the reservoirs and thence into the lower reservoirs, and from the reservoirs the water was taken for the supply of the town. In that case the water did not return into the river again; in this case it does return into the river. In that case there was a diversion of the water from the stream into a reservoir from which it was to be taken for the supply of a town, and the water was not to return into the stream again as river water. Here the water being diverted for a time returns in the same state into the river. In *Stead* v. *Nicholas* (*ubi sup.*) the waters of a brook were impounded in a reservoir, and the water in the reservoir was conveyed by pipes for domestic use. No fish could enter the reservoir, from the old course or channel of the brook below the reservoir and no water passed from the reservoir into the brook again, and the court there held that these Acts had no application to the reservoir. Those cases merely decided that when a dam is put across a stream, and the water is diverted from the stream, in the one case for the water supply of a town and in the other case for domestic use, no part of the water returning as river water into a stream, the water so diverted is no longer a tributary, and the *ratio decidendi*

The case arose under the same sections of the Salmon Fishery Act 1865, and it raised the question, what is a tributary of a river?

The facts were these (see the Forty-second Annual Report of the Inspectors of Fisheries (1902), p. 51): There was a small brook which ran down from the moors into the river Derwent, which became a tributary of the Trent. In this brook certain weirs were put across, which dammed up the water at three different points, forming three pools called the Lumsdale ponds. The brook contained trout. The defendant in the case was found fishing in one of these pools for trout without a licence; the pool was within the geographical limits of the Trent Fishery District, and the only question was whether the fact of the stream being dammed up took it out of the section, and whether the defendant required a licence from the Trent Fishery Board. The proceedings were taken under the same sections of the Salmon Fishery Act 1865 as in the present case, and the limits of the Trent Fishery District were duly defined by a certificate which was set out in the case, and which stated the inland boundaries of the watershed. The justices found as a fact that the pond was within the prescribed superficial limits or area of the Trent Fishery Board, and that the place was within the river Trent and its tributaries.

Then par. 7 of the case stated the facts as follows: "The Lumsdale ponds, in one of which the said alleged offence was committed, are three in number, and are not formed under any Act of Parliament, nor used commercially for a water supply, and are fed by a smaller brook known in its earlier part as the Bentley Brook, which has its source on the moors some three miles above the highest of the Lumsdale ponds, and flows into the top or first of the Lumsdale ponds. From there it is usually called the Lums Brook, and it flows over the stone embankment some 10ft. in height and forms a brook course again, which flows into the second Lumsdale pond, from which it flows down an embankment some 10ft. in height (above which there is a shuttle which can be opened and shut at will), and forms a brook course once more into the third and last Lumsdale pond, from which it flows down an embankment some 20ft. in depth, and thence, after about two miles, into the river Derwent, which flows into the river Trent."

Then in par. 10 of the case the justices said: "The question of law for us to decide was whether the Lumsdale ponds were tributaries of the river Trent, or whether they came within the description of an 'artificial reservoir,' and were governed by the cases cited above, and a licence to fish for trout therein was not required, and we, having heard of the said cases, and particularly of the case of *Harbottle* v. *Terry* (*ubi sup.*), held that the Lumsdale ponds were 'artificial reservoirs,' and dismissed the case."

Willis Bund for the appellant. — The justices refused to convict on the authority of *Stead* v. *Nicholas* (*ubi sup.*) and other cases, holding that these pools were reservoirs. There have been a series of cases, of which *Stead* v. *Nicholas* (*ubi sup*) is the last, which have decided that when a dam is put across a stream and the water is diverted from the stream for certain purposes, it is no longer a tributary, but no case has decided that when a dam is put across and not a drop of water is diverted it ceases to be a tributary. The water still finds its way into the channel running over the three dams, and it is submitted that the pond is a tributary. [Lord ALVERSTONE, C.J.—Why was it held not to be a tributary?] Because this court decided in *Stead* v. *Nicholas* (*ubi sup.*) that where a dam was put across a stream and the water was all diverted from the stream for domestic use it ceased to be a tributary. The pond in this case was really an embanked tributary, and the point has been practically decided in *Harbottle* v. *Terry* (*ubi sup.*) where Stephen, J. in his judgment puts this very case. He says (10 Q. B. Div., at p. 137): "In ordinary language a 'tributary' is a stream running into another stream. . . . The question what is or is not a tributary must depend upon the particular distinguishing circumstances of each case. For instance, where a stream running down a valley was dammed up at various points so as to form a series of pools by swelling out the current of the stream, which pursued its ordinary course after passing through the pools, I should say that the pools would be tributaries of the stream." In that case the water in the reservoir was held not to be a tributary, and the reason for the decision was that the water was all diverted to a town, and it could not then be said to be a tributary. [Lord ALVERSTONE, C.J.—The pond in this case is really a dammed-up tributary.] Yes, and the fact of putting in a dam when no water is extracted does not make it cease to be a tributary.

The respondent did not appear.

Lord ALVERSTONE, C.J.—We think that the appellant has made out his case. The water in this case flowed in its natural channel, the only alteration being that the damming up of the brook had enlarged the channel into what are called ponds, but, the water still going down the same channel and ultimately issuing out of this old channel into the Trent, the damming up of the water in the brook did not prevent the water so dammed up from being a tributary within the meaning of the Act. The *ratio decidendi* of the cases to which reference has been made—certainly in the last one, and I believe in the other two—was that there was a diversion of the water after the damming up, so that it ceased to be a tributary, and flowed in some other direction. I think that the case must go back to the justices with a direction to convict.

WILLS and CHANNELL, JJ. concurred.

Appeal allowed. Case remitted with a direction to convict.

in those cases was that when the water is taken away from the stream in that way it ceases to be a tributary. In *Cook* v. *Clarebrough* (unreported) certain weirs were put across a brook at three places, thus forming three pools or ponds in the brook, and the water of the brook continued to flow in the same channel as before, running over the weirs in sucession, and this court held that the ponds in the brook were a tributary of the river, and that a person fishing in the ponds without a licence could be convicted. That case is similar to and governs the present case. Here the dam was really a part of the mill race, and as it could not be suggested that the mill race itself would not be a tributary, so it cannot be said that the dam is not a tributary.

Israel Davis for the respondent.—The justices were right in dismissing the information. The word "tributary" is an ambiguous term, but, applying the test laid down in the cases of *Harbottle* v. *Terry* (*ubi sup.*) and *Stead* v. *Nicholas* (*ubi sup.*), this dam or pond is not a tributary. In the unreported case, which has been referred to, of *Cook* v. *Clarebrough*, the river flowed straight through the three dams, there being no diversion of the water at all, and it was held that each dam was a tributary. That is a totally different case from the present, where there was a diversion of the water and the impounding of it in this pond for the commercial purpose of driving the mill, and the fact that this pond was only a few feet from the river can make no difference. The respondent relies on *Harbottle* v. *Terry* (*ubi sup.*), and the observations of the judges in that case. There the dam was held not to be a tributary, and it was a stronger case for a conviction than the present, because in that case the dam was across the stream itself. There, and also here, the water was used for a special commercial purpose, there for supplying the town with water and here for driving a mill. During the argument of that case, Field, J. pointed out that the water was impounded in the reservoir for a commercial purpose, and that the question was whether, whilst in that position, it was a tributary, and he expressed the view that if that was a tributary then water taken from a reservoir, used for public purposes and returned to the stream through the drains of a town, would be a tributary, and that a private artificial pond in a park supplied with water taken from a stream and returned to it would also be a tributary. The water in this dam was temporarily stationary and not running, and in that condition it was not a tributary, though it might become one again when it began to flow, and Field, J. in his judgment says that a tributary "must be something in the nature of a stream," so that whilst the water was held up at a distance from the river it is not a tributary. This was really an artificial pond on private ground, and not a natural pond. *Stead* v. *Nicholas* (*ubi sup.*) supports the same view. The judges in that case, apparently with regret, held that the Act did not extend to reservoirs, and they negatived the suggestion that the pond, although within the geographical limits, was within the legal jurisdiction or limits of the fishery board. He referred to

George v. *Carpenter*, 68 L. T. Rep. 714; (1893) 1 Q. B. 505.

Lord Alverstone, C.J.—If we read the finding in this case, it is quite clear that the learned magistrates have mistaken the application of *Stead* v. *Nicholas* (*ubi sup.*) and *Harbottle* v. *Terry* (*ubi sup.*). There is a finding in the case in these words: "When the level of the water in the mill race is reduced below the level of the water in the dam, the water in the latter returns to the mill race, and thence either passes over the mill wheel and through the mill cloughs direct into the river, or continues to flow down an extension of the mill race, giving water power to other mills, and so eventually all the water returns to the river some half a mile or so below Storr's Bridge mill dam. There is a pipe in the dam bottom, marked D on the plan, by which the water in the dam may be emptied into the river." I do not at all rely upon that last part of the finding, because the casual power to return the water into the river would, of course, not of necessity make the dam a tributary. In this case, as my brother Darling has pointed out, the mill dam and the mill race must be put in the same category. In both of them what counsel for the respondent calls the test in these cases must be applied. The water is going to be used for commercial purposes—namely, for driving a mill. There is, in my opinion, no analogy between the case of taking water from the stream for the commercial purpose of driving a mill and the water then going on in the same channel, and the case of the diversion of water into a reservoir, from which reservoir the water is taken for the water supply of a town, or is taken to be used for different purposes, where the water does not return as river water to its original channel. The case which counsel for the appellant has called our attention to, of *Cook* v. *Clarebrough* (*ubi sup.*), is really in point. The only distinction that could be urged by counsel for the respondent is that here the effect of the dam is to send the water into what may be called a temporary excrescence from the river, instead of damming it up in its actual original bed. In my judgment there is no distinction in principle, and I think that this case should go back with a direction to the magistrates to convict.

Ridley, J.—I agree.

Darling, J.—I am of the same opinion, and on this ground. Counsel for the respondent really could not contend, and did not contend, that the mill race itself would not be a tributary of this stream, out of which it issues, and to which it very quickly returns; and it appears to me that this three-cornered thing which is called a dam, which counsel for the respondent calls a pond, is really nothing but a bay—a portion of the mill race itself. The water in it is absolutely free to run into and out of the mill race; it must always be at exactly the same level as the mill race, and I regard it as nothing but a portion of the mill race itself. As no one can contend that the mill race is not a tributary of this stream, so the portion of it in question in this case—the mill dam—is also a tributary, or a portion of a tributary, which comes to the same thing.

Appeal allowed. Case remitted to the magistrates with a direction to convict.

Solicitors: for appellant, *Steavenson* and *Couldwell*, for *J. E. Jones*, York; for respondent, *Halse, Trustram*, and *Co.*, for *A. Muir Wilson*, Sheffield.

Thursday, March 8, 1906.

(Before RIDLEY and DARLING, JJ.)

SUCKLING (app.) *v.* PARKER (resp.). (*a*)

Adulteration of food—Sale of article injuriously affected by abstraction—Purchase for analysis—Division into three parts—Third portion retained by purchaser incapable of analysis by Inland Revenue Department—Condition precedent to conviction—Sale of Food and Drugs Acts 1875 (38 *&* 39 *Vict. c.* 63), *ss.* 9, 14, 21, 22; *and* 1899 (62 *&* 63 *Vict. c.* 51), *s.* 21.

In a prosecution under sect. 9 *of the Sale of Food and Drugs Act* 1875, *for selling an article of food which has been injuriously affected by the abstraction of a part of it, it is not absolutely necessary to a conviction that an analysis of the third portion of the sample which has been retained by the purchaser for future comparison, as required by sect.* 14 *of the Act, should be produced at the trial, even though the seller has requested that that portion should be sent to the Inland Revenue authorities for analysis. If the third portion has been properly taken and properly marked and sealed up or fastened in such a manner as its nature will permit, and if, without any want of care or any default on the part of the purchaser, that portion becomes incapable of analysis through natural decomposition or fermentation, the seller may nevertheless be convicted, although upon his request the third portion has been sent to the Inland Revenue Commissioners for analysis, but owing to its condition it has been found incapable of a satisfactory analysis.*

CASE stated by the metropolitan police magistrate sitting at Marylebone Police-court.

On the 14th April 1905 a complaint was preferred by Thomas Parker (the respondent) at the police-court against Alfred Suckling (the appellant) under sect. 9 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), charging the appellant with having, on the 9th April 1905, sold an article of food—to wit, milk—which was injuriously affected in its quality, substance, or nature by being altered by there being 12 per cent. less than the proper proportion of butter fat without making disclosure of the alteration to the respondent, and with having been previously convicted under the same statute on the 17th Jan. 1897, the 3rd June 1897, and the 5th Dec. 1902.

The complaint was heard by the magistrate on the 26th May and the 9th June 1905, when he determined the complaint and convicted the appellant.

The following facts were proved before the magistrate:—

The appellant was a milkman carrying on business at Kensal Rise, and on Sunday morning, the 9th April 1905, he received a consignment of milk at Willesden Junction Station. The consignment consisted of fifty-one churns, ten of which were marked "separated milk," and contained milk from which the cream had been removed, and the remainder of which contained "new milk"—that is to say, milk from which the cream had not been removed.

The appellant was seen by a railway porter at the station to take milk from one churn and put it into another, but the porter was unable to identify any particular churns as those whose contents were so mixed, and he admitted in cross-examination that he could not say that separated and new milk were mixed together that morning, or that any milk was taken out of either of the ten churns containing separated milk.

Between ten and eleven o'clock on the same morning a pint of the milk was purchased by a Mrs. Wilkins from a man in the appellant's employment, named Broad, in Walterton-road, within the borough of Paddington.

Such milk was then given to the respondent, who informed Broad that he was an inspector under the Food and Drugs Act, and that the pint of milk had been purchased for analysis, and that it was his intention to have the same analysed by the public analyst.

The respondent thereupon, in accordance with the provisions of the Act, divided the milk into three parts, each of which parts he poured into a separate bottle. He then placed in each of the bottles a cork, and upon each cork the respondent placed a seal, and upon each of the bottles he also placed a mark.

The respondent delivered one of the bottles to Broad and retained the other two bottles, one of which he subsequently sent for analysis, the other of which he retained.

At the hearing of the complaint on the 26th May 1905 the certificate of the public analyst was produced to the magistrate by the respondent, and such certificate showed that the sample submitted to the analyst was deficient in butter fat to the extent of 12 per cent.

The appellant did not require that the analyst should be called as a witness.

The appellant's solicitor called for the production of the third sample, which was not then in court, but was subsequently produced.

Upon that sample being produced it appeared that the cork had been partly forced out of the bottle owing to the fermentation of the milk, and part of the contents of the bottle had escaped. The cork had not been secured in the bottle by string or other ligature.

The appellant's solicitor thereupon contended that the sample had not been sealed, or fastened up, or retained in accordance with the provisions of sect. 14 of the Sale of Food and Drugs Act 1875, and that no conviction could therefore follow.

The magistrate overruled the objection, and, at the request of the appellant, the bottle was duly sent to the Commissioners of Inland Revenue for analysis, and the case was adjourned for their report.

At the adjourned hearing of the complaint on the 9th June 1905, a letter from the commissioners was produced in which it was stated that an examination of the bottle showed that the cork was loose and portions of fat and dried milk were adhering to the outside of the bottle and the paper wrapper, and that under those circumstances a satisfactory examination of the milk was not possible, and that the analysis could not therefore be carried out by the department. A copy of this letter was attached to this case.

The appellant's solicitor thereupon contended that when (as in this case) a request had been made for the analysis of the third sample, such analysis was a condition precedent that must be fulfilled before the magistrate could convict.

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

The appellant did not give or tender any evidence, and the magistrate was satisfied and found as facts that the milk sold by Broad as aforesaid was milk from which a portion of the cream had been removed, and that such milk had been sold as new milk—that is to say, as milk from which no cream had been removed without disclosure being made of the abstraction. He accordingly convicted the appellant of the offence.

After the conviction the magistate was informed that the appellant had been three times convicted for similar offences.

The appellant's solicitor having declined to admit any previous conviction, an officer of the court produced the register of the court kept in accordance with the provisions of sect. 22 of the Summary Jurisdiction Act 1879. Such register contained entries of three previous convictions of a person named Alfred Suckling for offences against the Sale of Food and Drugs Act 1875, and the respondent stated that he had been present at each of the convictions, and that the appellant was the person who had been convicted on each occasion.

The magistrate found the appellant guilty of the offence charged after a previous conviction for a similar offence, and inflicted upon him the higher penalty provided for persons guilty of a second or subsequent offence—namely, a fine of 40*l.* and 10*l.* 10*s.* costs.

The questions for the opinion of the court were: (1) Was the magistrate right in convicting the appellant of the offence notwithstanding the absence of analysis by the Commissioners of Inland Revenue? (2) Was the fact that the bottle containing the sample retained by the inspector and produced at the hearing had not been so sealed or fastened up as to prevent the cork being forced out and part of the contents of the bottle escaping fatal to a conviction?

The letter from the Commissioners of Inland Revenue, referred to in the case, was as follows:

Government Laboratory, Clement's-inn-passage, Strand, London, W.C., 27th May 1905.—Sir,—The sample of milk "No. 22, Borough of Paddington," referred to in your letter of the 26th inst., has been delivered here, together with the original wrapper of the bottle. An examination of the bottle shows, however, that the cork is loose and portions of fat and dried milk are adhering to the outside of the bottle and the paper wrapper. Under these circumstances a satisfactory examination of the milk is not possible, and the analysis cannot therefore be carried out by this department. The bottle and wrapper, and also the fee, are returned by your messenger.—(Signed) C. H. BURY.—The Chief Clerk, Marylebone Police Court.

The Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63) provides:

Sect. 9. No person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration, under a penalty in each case not exceeding twenty pounds.

Sect. 14. The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts to be then and there separated, and each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent. He shall afterwards retain one of the said parts for future comparison, and submit the third part, if he deems it right to have the article analysed, to the analyst.

Sect. 21. At the hearing of the information in such proceeding the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst shall be called as a witness, and the parts of the articles retained by the person who purchased the article shall be produced; and the defendant may, if he think fit, tender himself and his wife to be examined on his behalf, and he or she shall, if he so desire, be examined accordingly.

Sect. 22. The justices before whom any complaint may be made, or the court before whom any appeal may be heard, under this Act may, upon the request of either party in their discretion, cause any article of food or drug to be sent to the Commissioners of Inland Revenue, who shall thereupon direct the chemical officers of their department at Somerset House to make the analysis, and give a certificate to such justices of the result of the analysis; and the expense of such analysis shall be paid by the complainant or the defendant as the justices may by order direct.

The Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51) provides:

Sect. 21. The justices or court referred to in section twenty-two of the Sale of Food and Drugs Act 1875 shall on the request of either party under that section cause an article of food or drug to be sent to the Commissioners of Inland Revenue for analysis, and may, if they think fit, do so without any such request.

Clarke Hall for the appellant.—Sect. 14 of the Act of 1875 shows what is to be done with the three samples, and it is with respect to what is described as the third sample that the present question arises. Sect. 21 of the Act of 1875 says that the parts of the article retained by the person purchasing—that is, retained under sect. 14—"shall be produced" at the hearing of the information; and sect. 22 says that the justices may, on the request of either party, cause any article of food or drug to be sent to Somerset House for the purpose of analysis, and the Commissioners of Inland Revenue shall thereupon direct their officers to make an analysis and give a certificate to the justices of the result of their analysis. Under this section it was discretionary for the justices to send the article to the Commissioners of Inland Revenue for analysis; but this section was amended by sect. 21 of the Sale of Food and Drugs Act 1899 which made it obligatory upon the justices, upon the request of either party, to send the article to the Commissioners of Inland Revenue for analysis. In the present case a request had been made by the appellant for an analysis of the third sample by the Commissioners of Inland Revenue, but the result of that analysis was not produced at the hearing. The provisions contained in sects. 14, 21, and 22 of the Act of 1875 are conditions precedent which must be fulfilled before a conviction can take place. The Act says that the third portion must be retained and must be capable of being submitted to analysis at Somerset House; but that has not been the case here. In the case of *Hutchison* v. *Stevenson* (4 F. Just. Cas. 69) decided in 1902 by the Court of Justiciary in Scotland, it was held that where the third sample, which was a bottle of milk as in the present case, had been acci-

dentally lost by the bursting of the bottle, there could not be a conviction. The court (the Lord Justice-Clerk, Lord M'Laren, and Lord Stormonth-Darling) held that the objection that the third sample could not be produced in court was fatal to the conviction, although the bursting of the bottle was accidental. The Lord Justice Clerk said (at p. 72): "Now, the Act expressly enacts that this third portion is to be produced at the trial, and the object and purpose of that is plainly to show that there is still a sealed sample of the milk which had been purchased, so that this sealed sample may be appealed to if any doubt or difficulty should be raised either by the prosecution or by the accused as to what had been done with the other samples. The statute further enacts that if the accused so desires it he is entitled to have this third sample sent to Somerset House for analysis by the Government analyst there, so that his analysis may be produced in evidence at the trial. That in this case became impossible, because the third sample which was retained by the purchaser had ceased to exist before the trial. The prosecutor contended that although this sample had ceased to exist he, nevertheless, was entitled to a conviction if he could prove by competent evidence that the milk was not of the quality which the purchaser was entitled to get. I cannot agree with that contention." That applies precisely to this case; and in *Lowery* v. *Hallard* (22 Times L. Rep. 186) the court held that although it was not necessary that, each of the three parts should be exactly equal, it was necessary that each of the three parts should be sufficient to afford an analysis. In this case these conditions precedent have not been complied with, and the conviction ought to be quashed.

Bethune (*R. Cunningham Glen* with him) for the respondent.—The objection taken is a technical one and is met by the fact that in this case the respondent has technically complied with all the requirements of the Act. The appellant never took any objection to the analysis and has never said that it was wrong. He could under sect. 21 have questioned the correctness of the analyst's certificate and have required the analyst to be called, but he did not do so; and the fact that the third sample was not sent sooner to Somerset House was the appellant's own fault. The object of the Act is clear that there should be an opportunity of testing the analysis, and if a defendant questions the result of the analysis, then he is to have an opportunity of doing so; but the defendant in this case cannot take advantage of his own delay in postponing the request for an analysis until it is too late. In the Scotch case of *Hutchison* v. *Stevenson* (*ubi sup.*) the court seem to have thought that the Act required the third sample to be sent to Somerset House for analysis. That, however, is not so, as all the section dealing with that point (sect. 21 of the Act of 1899) says is that the justices shall cause "an article of food or drug" to be sent to the Commissioners of Inland Revenue for analysis. The portion of the article sent to the commissioners, therefore, need not be the third portion retained by the purchaser. This court therefore ought not to follow that case. In the findings of the case the magistrate has found that, apart from any question of analysis, this was milk from which the cream had been abstracted. The respondent has strictly complied with all the requirements of the Act, and it would be a strong thing to say that the defendant ought to escape conviction simply because, through no fault of the purchaser but in consequence of something inherent in the nature of the article, the third sample could not be analysed.

Clarke Hall in reply.

RIDLEY, J.—In this case the appellant has been convicted under sect. 9 of the Sale of Food and Drugs Act 1875. The main point that is now raised on his behalf is that there was not produced and sent to Somerset House in a state fit for analysis the third part which had been taken and retained by the purchaser as required by sect. 14 of that Act. That section requires that the article is to be divided into three parts to be then and there separated, and that each part is to be marked and sealed or fastened up in such manner as its nature will permit, and that the purchaser shall, if required so to do, deliver one of the parts to the seller or his agent. Then the purchaser is afterwards to retain one of the parts for future comparison, and he is to submit the third part, if he deems it right to have the article analysed, to the analyst. In this particular instance that was complied with, subject to the observations that I shall make further on. In the result, when the case was before the magistrate, it turned out that although the sample sent to the analyst had been analysed, and, it was admitted, had been produced, yet the other part which had been retained and kept in his possession by the respondent, was in such a condition that it could not be analysed at Somerset House. The facts were these: Upon the sample being produced it appeared that the cork had been partly forced out of the bottle owing to the fermentation of the milk, and part of the contents of the bottle had escaped, owing to the cork not having been secured in the bottle. It was, however, submitted to the authorities at Somerset House, and in the letter which relates to the subject they said that the sample had been delivered with the original wrapper, and that an examination of the bottle showed that the cork had become loose and that portions of fat and dried milk were adhering to the outside of the bottle and paper wrapper. Then the letter went on to say that in those circumstances a satisfactory examination of the milk was not possible and that the analysis could not be carried out by the department. The magistrate convicted the appellant, and the point now taken on behalf of the appellant is that the Act requires not only the production of the third part which is left in the custody of the inspector, but also that it should be sent to Somerset House and analysed. In support of that contention the case of *Hutchison* v. *Stevenson* (*ubi sup.*), which was decided in 1902 by the Court of Justiciary in Scotland has been quoted. In that case, which was a similar case to the present, it appeared that upon the samples being called for the respondent stated that the bottle containing the sample in question had burst some days before, and therefore it was not produced at all. The court said that it was a condition precedent to the conviction in the case which had been obtained that the sample should be produced. It appears to me that, so far as that goes, that does follow from sect. 21 of the

Act of 1875, which states that the parts of the articles retained by the person who purchased the article shall be produced, but in this instance what has happened is, not that the sample was not produced, but that it was produced but found not to be in a sufficiently competent state to furnish an analysis and to be in such a condition that the authorities at Somerset House could not make a report upon it. In the reasoning of the judgment in *Hutchison* v. *Stevenson* (*ubi sup.*), it does appear that the court did not take the distinction which is commending itself to this court in the present case; because, for instance, in the judgment of the Lord Justice-Clerk this sentence appears: "The statute further enacts that if the accused so desires it he is entitled to have this third sample sent to Somerset House for analysis by the Government analyst there, so that his analysis may be produced in evidence at the trial. That, in this case, became impossible, because the third sample which was retained by the purchaser had ceased to exist before the trial." That is true here; it had not ceased to exist, but it had got into such a condition that it could not be examined at Somerset House. In that case the third sample was not even produced; in this case it has been produced. I think that the probability is that this point which it was necessary to raise in this case was not present to the mind of the learned judge who gave that decision. It does, however, seem to me, upon looking at this Act, that although, as I have said, sect. 21 says that this part of the article shall be produced, there is nowhere a provision which says that the analysis of it made at Somerset House shall be produced at the trial before the justices before they can proceed to a conviction. There is, indeed, in sect. 21 of the Sale of Food and Drugs Act 1899 a provision that the justices or court referred to in sect. 22 of the Act of 1875 shall, on the request of either party under that section, cause the article of food to be sent to the Commissioners of Inland Revenue for analysis, and may, if they think fit, do so without any such request; but I do not find that that section says it is to be the third sample which is to be so sent to the commissioners. That seems to be an additional provision put in for the protection of the person who has sold the article. With that I agree, but the section does not say that it is to be that third part the production of which is required by sect. 21 of the earlier Act of 1875. It is argued on behalf of the appellant that it is so, because of the concluding paragraph of sect. 14 of the Act of 1875, which says: "He shall afterwards retain one of the said parts for future comparison, and submit the third part, if he deems it right to have the article analysed, to the analyst." That contention of the appellant does not seem to me to follow from that provision. The section does not say there that the third part which is to be retained in the purchaser's possession is to be in any way identified. It does not identify that third part in such a way so that one can say that when sect. 21 of the Act of 1899 refers to an article of food or a drug being sent to the Commissioners of Inland Revenue, it necessarily refers to that third portion. Even if the section did refer to that third portion, it does not seem to me to follow that in the event which has happened in this case—namely, that upon its production it was found impossible to have it analysed at Somerset House—that occurrence, assuming it to have taken place without the negligence of the respondent in this case, and not having been caused by him, should necessarily avoid all the steps which had been properly taken in the proceedings. It is contended that it would be a strong thing to say that, if all that has been done has been done properly, and without default of other persons, the third portion of the article has got spoilt owing to its natural decomposition or fermentation, therefore the person, who ought upon the merits to be convicted, should escape. On the other hand, it is said that if there be some statutory provision or some condition precedent to the conviction, we ought clearly to see that it has been complied with. In order to show that that is the case, further authority has been referred to by counsel for the appellant —namely, the case of *Lowery* v. *Hallard* (*ubi sup.*), to which I myself was a party; but in that case we were only dealing with the outside of the sample—if I may use that expression—that is, the taking of it; and what was intended to be conveyed by the court was that when the samples were taken, although the parts were not necessarily to be taken in mathematically equal proportions, they were to be taken in proportions which enabled an analysis of each sample so taken to be made. I do not see how that case bears upon this question, which is, What is to be the result in the event which has subsequently happened in this case, by natural or partly natural causes it may be, of one of the samples becoming unavailable? In this particular case, if that were the only point I should think that this conviction ought to stand; but it does not appear satisfactorily upon the evidence as to how it came about that this sample did fail. In my opinion it will be necessary that the magistrate should go into this matter and see by whose default it happened and how it came about that this sample was not available. The evidence appears to be satisfactory so far as stating that all three samples were literally corked up, and were corked up in the same way, and it may be that they were sufficiently corked up, or it may be, on the other hand, that they were not. I think it is necessary for us to know before we affirm this conviction, or come to the opposite conclusion, whether it is a fact that there was anything wanting in the care that was taken by the respondent in corking up this portion, or whether the failure was not from any want of care on his part. In sect. 14 the words are "to be marked and sealed or fastened up in such a manner as its nature will permit." If that has not been done, and has not been properly carried out in this case, then it follows that what I have said as to the conviction not being affirmed would only apply because something which is a condition precedent has not been observed. The case is similar to the case of *Lowery* v. *Hallard* (*ubi sup*), in which we decided that the samples must be fairly equal so that an analysis of each of them can be made. Therefore we should require to know in this case whether the samples have been properly sealed or fastened up in such a manner as the nature of the article will permit. If that is the case in this instance, then I think that the result will follow, without prejudice to the future hearing, that the conviction ought to be

affirmed, but if it should turn out that that has not been done, then I think the contrary result would follow. It is, therefore, desirable that the case should be remitted to the magistrate for further statement upon that point, and to find whether that provision in sect. 14 has been properly complied with in this case. If he finds that it has been properly complied with he may still think it proper to state a case, and he had better send it back.

DARLING, J.—I am of the same opinion. I think the magistrate ought to state exactly in the case upon the evidence what the officer did who took the sample, and whether the stuff got out of the bottle because it was insecurely fastened, or whether it got out through the natural decomposition or fermentation of the milk.

Case remitted accordingly.

Solicitors for the appellant, *W. T. Ricketts* and *Son.*

Solicitor for the respondent, *John H. Hortin.*

March 8 *and* 9, 1906.

(Before RIDLEY and DARLING, JJ.)

LONDON AND SOUTH-WESTERN RAILWAY COMPANY (apps.) *v.* HILLS (resp.). (*a*)

Public health—By-law—Existing water-closets—Repairs—Notice not given to authority—Public Health (London) Act 1891 (54 *&* 55 *Vict. c.* 76), *s.* 39.

By a by-law made in pursuance of sect. 39 *of the Public Health (London) Act* 1891: "*Every person who shall intend to construct any water-closet . . . or to fit or fix in or in connection with any water-closet . . . any apparatus or any trap or soil pipe, shall, before executing any such works, give notice in writing to the clerk of the sanitary authority.*"

Held, that this by-law applied to a water-closet constructed before the making of the by-law.

CASE stated on a complaint preferred by the respondent against the appellants for unlawfully fitting or fixing in connection with certain water-closets an apparatus or trap without first giving notice of their intention to do so to the sanitary authority, contrary to the by-laws of the London County Council made under sect. 39 (1) of the Public Health (London) Act 1891.

By sect. 39 of the Public Health (London) Act 1891 it is provided as follows:

(1) The county council shall make by-laws with respect to water-closets, earth-closets, privies, ashpits, cesspools, and receptacles for dung, and the proper accessories thereof in connection with buildings whether constructed before or after the passing of this Act. (2) Every sanitary authority shall make by-laws with respect to the keeping of water-closets supplied with sufficient water for their effective action. (3) It shall be the duty of every sanitary authority to observe and enforce the by-laws under this section, and any directions given by the sanitary authority under this Act shall be in accordance with the said by-laws and so far as they are not so in accordance shall be void.

At the hearing of the complaint the following facts were admitted or proved in evidence:—

Certain by-laws purporting to be made under sect. 39 (1) of the Public Health (London) Act 1891 were, in June 1893 duly made by the London County Council and confirmed by the Local Government Board.

By by-law 5 of the by-laws it is provided as follows:

A person who shall newly fit or fix any apparatus in connection with any existing water-closet shall, as regards such apparatus and its connection with any soil pipe or drain, comply with such of the requirements of the foregoing by-laws as would be applicable to the apparatus so fitted or fixed if the water-closet were being newly constructed.

By by-law 14 of the by-laws it is provided as follows:

Every person who shall intend to construct any water-closet, earth-closet, or privy, or to fit or fix in or in connection with any water-closet, earth-closet, or privy any apparatus or any trap or soil pipe, shall, before executing any such works, give notice in writing to the clerk of the sanitary authority.

Earlsfield Station is a station on the appellants' system of railways which was erected in or about the year 1884, and is within the district of which the council of the metropolitan borough of Wandsworth are the sanitary authority.

When the station premises were erected, certain water-closets were constructed thereat, and the appellants in or about Feb. 1905, when painting and repairing their station premises, finding that the pans and traps of two of the water-closets required renewal owing to the ordinary wear and tear thereof, removed the same, and refitted or fixed two new pans and traps in connection with the water-closets.

In carrying out the work the appellants complied with by-law 3 of the by-laws, which relates to the furnishing and fixing of water-closets.

It was contended on behalf of the appellants that by-law 14 of the by-laws did not apply to such a case of renewal or repair of the apparatus of an existing closet as that above referred to, and that, reading the by-law as a whole, by-law 14 applied only where a person intends to construct a new water-closet, or to fit or fix in connection with such a water-closet any apparatus, trap, or soil pipe, and had no application to the newly fitting and fixing of any apparatus in connection with any existing water-closet, and that the true effect of by-law 5 of the by-laws was to exclude such a case from the operation of by-law 14 requiring the giving of notice before executing any work.

It was contended on behalf of the respondents that by-law 14 applied to every case where a person intended to fit or fix in connection with any water-closet any apparatus, or any trap, or soil pipe.

The magistrate was of opinion that the contention of the respondent was good in law, and accordingly convicted the appellants.

Avory, K.C. and *Courthope-Munroe* for the appellants.

S. Mayer for the respondent.

RIDLEY, J.—In this case the appeal is against the decision of the magistrate, who has convicted the appellants under by-law 14 made by the London County Council under the Public Health Act (London) 1891. The facts, shortly stated, are that when Earlsfield Station premises were erected certain water-closets were constructed thereat, and

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

that the appellants in or about Feb. 1905, when painting and repairing the station premises, finding that the pans and traps of two of the water-closets required renewal owing to the ordinary wear and tear thereof, removed the same and refitted or fixed two new pans and traps in connection with the water-closets, and that in carrying out the work the appellants complied with by-law 3 of the by-laws. What they have been convicted of is not having given notice to the authorities before proceeding to make these alterations, and the question is whether by-law 14 applies to a case like the present, where the water-closet to which the new apparatus has to be fixed was an old water-closet, or whether it only applied to a new construction of a water-closet. Now, the question is a little bit difficult to decide upon these by-laws, which are a little conflicting, if I may say so, in appearance at all events, and have given me a little trouble to make them out. I think I clearly understand the effect of the first three by-laws. The 1st by-law contains the word "hereafter," by which it may be distinguished from all the others. It says: "Every person who shall hereafter construct a water-closet or earth-closet in connection with a building, shall construct" it in a particular way. That is, as has been stated, clearly dealing with water-closets to be put up in connection with buildings which may be erected hereafter. The 2nd by-law does not contain the word "hereafter," but it makes a general provision that persons who construct water-closets in connection with buildings shall make them with special provisions as to windows and open spaces connected therewith. The third provides that they are to be made with certain apparatus, pipes, and so forth. Now, I think that these first three by-laws apply only to new water-closets—water-closets to be constructed in the future. That seems necessarily to follow from the 5th by-law. The 4th by-law appears to have been repealed. The 5th by-law says: "A person who shall newly fit or fix any apparatus in connection with any existing water-closet shall, as regards such apparatus and its connection with any soil pipe or drain, comply with such of the requirements of the foregoing by-laws as would be applicable to the apparatus so fitted or fixed if the water-closet were being newly constructed." Therefore in respect of an existing water-closet you must, in putting new apparatus in connection with it, repairs and so on, in places in which new parts or pieces of apparatus are required, so far as possible comply with the requirements made as to new water-closets. Now, the magistrate has found that the appellants had complied, so far as that by-law is concerned, so far as they could with the requirements of the previous by-laws, but the 14th by-law is the one upon which this question arises, and which is certainly somewhat ambiguous. I think one might, without doing great violence to the letter, construe it either way: "Every person who shall intend to construct any water-closet, earth-closet, or privy, or to fit or fix in or in connection with any water-closet earth-closet, or privy any apparatus or any trap or soil pipe, shall, before executing any works, give notice in writing to the clerk of the sanitary authority." Now, you may read that as meaning any water-closet, placing emphasis on the word "any"—any water-closet new or old, earth-closet or privy, or to fit or fix in or in connection with any water-closet old or new; or you may say that it should be read: "Every person who shall intend to construct any water-closet, or to fit or fix in or in connection with any such water-closet." Mr. Avory contends that the word "such" ought to be read in them, and that, when the rule refers to a person fixing in connection with any water-closet any trap or soil pipe or other apparatus, it only means persons who are doing it with respect to new water-closets, "any such water-closet" as appears to be dealt with in the 1st clause. I think, in order to read the words in the latter sense, the word "such" ought to be there. Whilst it is true that "every person who shall intend to construct any water-closet, earth-closet, or privy" are words which seem to make it necessary that it shall be a new one, when you come to the latter words "or to fit or fix in or in connection with any water-closet" that is more probably to be read as including both new and old. There is no reason why it should not. The question simply is, Is it or is it not probable that the intention was that when an apparatus is to be fitted to an old water-closet there should be a notice sent to the local authority? I can understand the argument raised by Mr. Avory as to the great inconvenience that might exist and be caused if the smallest alteration required in the way of repairs could not be done without sending notice to the local authority's inspector, a thing which would be of no benefit to the occupier, and which would simply increase the labour of the local authority for nothing; but, on the other hand, if one can see a reasonable way in which to construe the by-law which yet could not be productive of such inconvenience, I think that perhaps it ought to have the preference. Now, "apparatus" is a word, perhaps, of technical meaning. I think that we must trust people to construe it properly. I do believe that if the handle is out of repair the apparatus is wrong. I do not think that a broken chain would be sufficient. You would simply get a new chain. On the other hand, if you get a piece of the trap which has to be put in order, in order to make the thing sanitary, or the pan, or the apparatus which pulls up or puts into its place the pan, or the soil pipe, or the ventilation pipe, if they are so far out of order that they are insanitary, I think it is not unreasonable to say that it was intended that the local authority should have notice before that work is done in order to see that it is properly done for future use. It comes to this, therefore, in my view. I know there is this objection to it, that, whilst the words "every person who shall intend to construct any water-closet" in the first line of by-law 14 mean a new water-closet, when you come to the same words in the second line they refer to fitting the apparatus in connection with one that existed before. I am aware of that, but I think, upon the whole, this is the better construction, and one must trust to those who have to administer these rules to act reasonably in the carrying of them out. I think, for the reasons I have given, that is a better construction of this by-law.

DARLING, J.—The question is whether by-law 14 applies to old water-closets as well as to new ones, and I have come to the conclusion

that when it says, "Every person who shall intend to construct any water-closet, earth-closet, or privy, or to fit or fix in or in connection with any water-closet, earth-closet, or privy apparatus," it applies to water-closets existing as well as to new ones which are being made. That being so, the by-law would apply to this case unless it is an unreasonable by-law. This is a case of new pans and new traps being put, and the magistrate has held that the by-law applies to that. It does not follow that if the by-law were bad in part it would be bad altogether, and I think, so far as it applies to things of this kind—the pans and traps—it is not an unreasonable by-law when it enacts, if you want to put in a new pan or new trap to an existing water-closet, you shall give the sanitary authority notice of what you are doing. I think it would be unreasonable if it were held to apply to the doing of any little trifling thing to the apparatus of a water-closet, and, if it were held to apply to the doing of such trifles as that, then, because it would be unreasonable, it would be a bad by-law. If it were held to apply so that whenever anybody wanted to put up a new handle or a new piece of chain or anything of that kind he had to give notice to the sanitary authority, the natural result would be that people would allow their water-closets to get into an insanitary state rather than be at the trouble of giving any notice at all, and, as soon as the court saw that would be the result of the construction of the by-law, the court would say the by-law was in itself unreasonable, because it was capable of bringing about such a state of things—that is to say, producing insanitary conditions when it was meant to produce sanitary ones. So far as it applies to those particular matters which the magistrate has dealt with, I see nothing unreasonable in the by-law, and to that extent I think that it is a good one, and therefore this conviction must be affirmed.

Appeal dismissed.

Solicitors: *Sam Bircham*; *W. W. Young, Son, and Ward.*

Saturday, March 10, 1906.

(Before RIDLEY and DARLING, JJ.)

ROGERS (app.) *v.* BARLOW AND SON (resps.). (*a*)

Factory and workshop—Employing child in mealtimes—Dismissal of information—Factory and Workshop Act 1901 (1 *Edw.* 7, *c.* 22), *s.* 141.

A child was employed in a factory where the mealtime was from 5.30 *to* 6 *p.m. Work was stopped for the day at* 5.30, *and the child was employed after that time in wiping the spindles of a machine in a room where the under-manager and several overlookers were present. Notices were exhibited calling attention to the provisions of the Factory Acts against working in mealtimes. The justices dismissed an information against the masters for employing a child in mealtime, on the ground that they had used every possible means to carry out the provisions of the Factory and Workshop Act* 1901.

Held, that it could not be said that the masters had used due diligence to enforce the Act within sect. 141.

Quære, *whether the information could have been dismissed within sect.* 16 *of the Summary Jurisdiction Act* 1879.

CASE stated on an information preferred by the appellant against the respondents under the Factory and Workshop Act 1901 for that, they being the occupiers of a certain factory, on the 14th June 1905 a child named Florence Hargreaves was employed in the factory during part of the time allowed for meals therein.

Upon the hearing of the information the following facts were proved or admitted:—

The appellant is one of His Majesty's inspectors of factories. The respondents are cotton manufacturers, and were at all material times the occupiers of a cotton-weaving factory, the same being a factory within the meaning of the Factory and Workshop Act 1901.

On the 14th June 1905 Florence Hargreaves was in the employment of the respondents at the factory, and was a child within the meaning of the Factory and Workshop Act 1901.

An abstract of the Act was duly affixed in the factory, and specified the period of employment and the times allowed for meals, one of the times allowed for meals being from 5.30 to 6 p.m., and notices were also affixed in the factory calling the attention of the operatives to its provisions against women, young persons, and children working during meal times.

On the day in question the machinery in the shed or weaving-room in which the child was employed as a weaver's assistant was stopped for the day at or about 5.30 p.m.

At 5.35 p.m. on that day the child was in the shed and was engaged in cleaning or wiping a spindle forming part of one of the looms. Each loom has two spindles, and the child was an assistant or tenter at four looms.

It is necessary for the proper and safe working of a loom that the spindles should be regularly cleaned or wiped, and this can only be done when the loom is not in motion.

During the working of the loom a kind of mucus, being a mixture of oil and dirt, accumulates on the spindles, which, if not removed, solidifies and forms an obstruction to the working of the loom,

A spindle consists of a rod of steel 18in. long and $\frac{1}{4}$in. in diameter.

The under-manager of the factory and several overlookers, known as "tacklers," were in the room at the time in question. The appellant entered the room at 5.34 p.m., and, after he had entered, some of the persons in charge summoned the persons there employed to quit the room, as was their practice, after the lapse of from five to ten minutes from the engine stopping, by loudly knocking with an iron implement upon one or more of the looms and shouting.

It was contended by the appellant that the respondents had committed an offence under sect. 33 of the Factory and Workshop Act 1901, inasmuch as a child was employed in the factory during part of a time allowed for meals, and he cited *Prior* v. *Slaithwaite Spinning Company* (78 L. T. Rep. 532; (1898) 1 Q. B. 881).

It was contended on behalf of the respondents: (1) That it was the practice in all well-regulated cotton-weaving factories to clean or wipe the loom

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

spindles after the engine had been stopped for the day, and in the time allowed for the mealtime; (2) that, even if a technical offence had been committed, the matter was so trivial that the justices ought, in their discretion, to dismiss the information; but (3) that, the respondents having taken all reasonable steps to prevent such work being done during mealtimes, the child was not at the time in question employed within the meaning of the Act; and (4) that the prosecution was contrary to the spirit of the Act, and an abuse of its provisions.

The justices were of opinion that the respondents had used every possible means to carry out the provisions of the Factory and Workshop Act 1901 in the matter, and they dismissed the information.

S. A. T. Rowlatt for the appellant.

Hartley for the respondents.

RIDLEY, J.—No doubt it is necessary to consider one of the points raised by this case—namely, the question whether it was of a trivial nature or not; but I think that upon the point upon which the justices based their decision there can be no doubt that they were wrong. It would appear that this child, Florence Hargreaves, was wiping the spindle, which formed part of the loom at which she worked, at 5.35 p.m. on the day in question. That was in the mealtime, because the mealtime was from 5.30 to 6 p.m., and I think it is of little consequence that that was the hour of closing altogether. Still, 5.30 to 6 p.m. was a mealtime, and she was therefore cleaning or wiping a part of the machinery within mealtime, which is clearly within sect. 152 of the Factory and Workshop Act of 1901, and so an offence was committed under an Act of Parliament. Now, the justices, in dismissing the summons, have come to this conclusion; they say: "We were of opinion that the respondents had used every possible means to carry out the provisions of the Factory and Workshop Act 1901 in the matter in question, and we dismissed the information." But that finding is based upon the other facts which are stated in the case, and it comes to this, that "the under-manager of the said factory" (I am now reading from the case) "and several overlookers, known as 'tacklers,' were in the said room at the time in question. The appellant entered the said room at 5.34 p.m., and, after he had entered, some of the said persons in charge summoned the persons there employed to quit the room, as was their practice, after the lapse of from five to ten minutes from the engine stopping, by loudly knocking with an iron implement upon one or more of the looms and shouting." I do not see how it is possible, upon that state of facts, to say that the respondents, within sect. 141, had used due diligence to enforce the execution of the Act. It was not legal that the spindle should be cleaned during mealtime, and it was perfectly possible to have the machine stopped for a sufficient interval before the mealtime to enable the spindle to be wiped. I assume it was necessary for the proper conduct of the work that the spindles should be wiped before the machines were left standing for any time, but when the machines were allowed to run to the last minute, and when it was known that the spindles must be cleaned before any time elapsed, I do not see how it is possible to say that the occupier of the factory had used due diligence to enforce the Act when it might have been enforced in so simple a method. The contention which was put before the justices seems to me also to be inconsistent with their finding: "It was contended on behalf of the respondents that it was the practice in all well-regulated cotton-weaving factories to clean or wipe the loom spindles after the engine had stopped for the day, and in the time allowed for the mealtime." I do not know whether the reasons of the justices were based upon that contention, but, if that be the fact in all well-regulated cotton-weaving factories, I must say that it is contrary to the Act of Parliament. It is not legal that the hands should be allowed in mealtimes to clean or wipe the spindles, which are part of the machinery. I therefore think that this decision cannot be supported. The other question is one of more difficulty. I do not wish to say that this was altogether a trivial matter in the face of Mr. Rowlatt's argument, but what I put to him was very fair—that no one could say that this child, or any child, would be much worse for putting off, until she wiped the spindles, the time when she had her food. But I do not think that you can exactly deal with the case upon that basis. I do agree that, sitting here in this court, we ought to remember that, although we only hear one instance of that which is alleged against the factory occupiers, it may be that there is a system prevailing, and that we ought therefore to pay attention to Mr. Rowlatt's contention, and say that if there is a breach of the Act of Parliament there ought to be a conviction. That is my view of the case. I understand that my brother Darling agrees. It has been open to consideration whether we ought not to send the case back to the justices to consider whether under the section this is not a trivial offence, but I think there is a breach of the Act of Parliament, and, although there may be only a nominal fine, still there ought to be that fine. We ought to see that the law is observed. I further think that the only reason that the summons was dismissed by the justices was that they thought the respondents had used every possible means to carry out the provisions of the Factory and Workshop Act, and we ought to infer from that that the matter was not trivial, or shey would have said so. I think we ought to tend the case back with a direction that there should be a conviction.

DARLING, J.—I am of the same opinion. It has been admitted that there was a technical offence here. From the moment that was admitted, the justices might have done one of two things: they might have imposed a nominal fine, or they might have taken advantage of sect. 16 of the Summary Jurisdiction Act. They did neither. They affected to decide this case upon a ground which was not open to them when it was admitted that there was a technical offence. What they found did not comply with the Act of Parliament. Whether in more of these cases they will avail themselves of sect. 16 of the Summary Jurisdiction Act, of course I do not know.

Case remitted to the justices.

Solicitors: *Treasury Solicitor; Rawle, Johnston, and Co.*, for *Carter* and *Crellin*, Blackburn.

April 3 *and* 6, 1906.

(Before Lord Alverstone, C.J., Darling and Bray, JJ.)

Mayor, &c., of Westminster (apps.) *v.* Gordon Hotels Limited (resps.). (*a*)

Metropolis — House refuse — Removal of—Trade refuse — Refuse of hotels — Public Health (London) Act 1891 (54 *&* 55 *Vict. c.* 76), *ss.* 30, 141.

Ashes from the grates, sawdust from the kitchen floors, empty sauce bottles and tins from the kitchen, straw cases for bottles, tea leaves, waste paper, egg shells, lemon peel, dust from rooms and staircases, small quantities of broken crockery and glass, being the refuse of an hotel, is "house refuse" within the meaning of sects. 30 *and* 141 *of the Public Health (London) Act* 1891, *and not "trade refuse."*

Case stated on an information preferred by the respondents against the appellants for that the appellants, at certain premises known as the Hôtel Métropole, in the city of Westminster, being the sanitary authority for the said city, did unlawfully fail without reasonable cause to comply with sect. 30 of the Public Health (London) Act 1891—that is to say, the house refuse not having been removed from the premises at the ordinary period, and the respondents, the occupiers of the premises, having on the 5th April 1905 served on the appellants a written notice requiring the removal of such refuse, that the appellants did not comply with such notice within forty-eight hours after such service, contrary to the statute.

The following facts (*inter alia*) were admitted or proved at the hearing of the information:—

Up to the 27th Feb. 1905 the appellants had been in the habit of removing daily all refuse from the hotel.

On or about the 27th Feb. 1905 the appellants, having previously taken legal advice, and acting in the belief that the refuse which they had been in the habit of removing as aforesaid was wholly or partly trade refuse, gave notice in writing to the respondents that on and after the 1st April 1905 they would not remove "trade refuse" from the hotel except in pursuance of sect. 33 of the Public Health (London) Act 1891—that was to say, upon being required to do so by the respondents—and that they would make a charge of 10*s.* a load or portion of a load of trade refuse removed by them.

The refuse which the appellants' servants refused to remove and which the appellants did not remove or cause to be removed from the respondents' hotel consisted of the following items: Ashes from the grates, sawdust strewn on the kitchen floors for the sake of cleanliness, empty sauce bottles and preserve tins, being waste and empty bottles and tins of the sauces and various comestibles used in the kitchen, straw packing cases for bottles, tea leaves, waste paper, egg shells, lemon peel, the general dust from the rooms and staircases, and from time to time small quantities of broken crockery ware and glass, which latter formed no appreciable proportion of the whole refuse.

It was contended on behalf of the appellants that all the refuse of the hotel, the substantial constituents of which have been enumerated above, was not "house refuse," but was "trade refuse" within the meaning of the Public Health (London) Act 1891, on the ground that it arose from the carrying on of a trade or business—viz., that of hotel keeping—and that, in determining the question whether refuse is "house refuse" or "trade refuse" regard was to be had not to its nature only, but to its source and the manner in which it was produced; that, even if it should be held that the appellants were wrong as to contention, the facts set forth above constituted "reasonable cause," within the meaning of sect. 30 (2) of the Act, for not complying with the section, and that therefore no offence had been committed by the appellants; and that it was the duty of the appellants under the Act to remove free of charge insanitary "house refuse" only, and that part at least of the refuse from the hotel was trade refuse and not "house refuse," and that part of the refuse, even if it was "house refuse," was not insanitary, and that there was no obligation laid by the Act upon the appellants to sort or divide up the refuse, and that therefore the appellants were entitled to refuse to remove any of the refuse, and the offence complained of had not been committed by them.

On behalf of the respondents it was (*inter alia*) contended that, whether or not the refuse in question was house refuse, it was the duty of the appellants to remove it upon being required by the respondents, and that, if they disputed its being house refuse, it was for them to have had the dispute determined under sect. 33 of the Act; that the refuse being of the same character and description as that which the appellants were required to remove free of charge from every large dwelling-house in their district, although admittedly greater in quantity, was house refuse within the meaning of the Act, and not "trade refuse"; that the onus was upon the appellants of showing that they had reasonable cause for their refusal to comply with the notice of the 5th April 1905; that the mere belief, however *bonâ fide*, that the refuse was trade refuse was not a reasonable cause within the meaning of sect. 30 (2) of the Act of 1891; and that the appellants had under the circumstances hereinbefore stated failed to remove the refuse in question without reasonable cause.

The magistrate found as facts that the appellants had failed to remove or cause to be removed from the respondents' hotel, within forty-eight hours after service upon them by the respondents of a written notice requiring its removal, the refuse described above; that such refuse was all refuse of the same character and description as that which is removed by the sanitary authority from every large dwelling-house, greater in quantity, no doubt, but in character and description the same as that which results from the ordinary domestic uses and purposes of any large private house or mansion; and that it was ordinary domestic refuse resulting from and incidental to the supply of warmth, food, and other refreshment to the guests who had come to the respondents' hotel. He further found as a fact that, if sanitary considerations were to be taken as one of the tests, the refuse was, with the exception, perhaps, of part of the paper, all the refuse of a kind which on sanitary grounds and in the interest of the health of the

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

inhabitants ought not to be allowed to remain at the respondents' hotel. The magistrate was therefore of opinion that the refuse which the appellants had failed to remove as aforesaid was "house refuse" within the meaning of that expression in sect. 30 of the Public Health (London) Act 1891, and he held that the appellants had not shown reasonable cause for their failure to comply with the respondents' notice requiring the removal of such refuse. He therefore convicted the appellants.

There was also a complaint by the appellants setting forth that a dispute or difference of opinion within the meaning of sect. 33 (2) of the Public Health (London) Act had arisen between the respondents and the appellants as to what is to be considered as "trade refuse," and on this complaint the magistrate decided that the matter in dispute was not "trade refuse."

By sect. 30 of the Public Health (London) Act 1891 it is provided as follows:

(1) It shall be the duty of every sanitary authority (*a*) to secure the due removal at proper periods of house refuse from premises and the due cleansing out and emptying at proper periods of ashpits and of earth-closets, privies, and cesspools (if any) in their district, and the giving of sufficient notice of the times appointed for such removal, cleansing out, and emptying; and (*b*) where the house refuse is not removed from any premises in the district at the ordinary period, or any ashpit, earth-closet, privy, or cesspool in or under any building in the district is not cleaned out or emptied at the ordinary period and the occupier of the premises serves on the authority a written notice requiring the removal of such refuse or the cleansing out and emptying of the ashpit, earth-closet, privy, or cesspool, as the case may be, to comply with such notice within forty-eight hours after that service exclusive of Sundays and public holidays. (2) If a sanitary authority fail without reasonable cause to comply with this section they shall be liable to a fine not exceeding 20*l*.

By sect. 141 of the said Act it is (*inter alia*) provided as follows:

The expression "house refuse" means ashes, cinders, breeze, rubbish, night soil, and filth, but does not include "trade refuse." The expression "trade refuse" means the refuse of any trade, manufacture, or business, or of any building materials.

Macmorran, K.C. and *Courthope-Munroe* for the appellants.—This refuse was trade refuse, and not house refuse. There have been numerous decisions on the question, but the balance of authority is in our favour. In *Gay* v. *Cadby* (36 L. T. Rep. 410; 2 C. P. Div. 391) it was held that ashes arising from coals burnt in the furnace of a steam engine used for the purpose of sawing and lifting timber and other materials for carrying on the business of a pianoforte manufacturer were "refuse of a trade, business, or manufacture" within the Metropolis Management Act 1855. That case was discussed in *St. Martin's Vestry* v. *Gordon* (64 L. T. Rep. 243; (1891) 1 Q. B. 61), where it was held that the clinkers from the boilers of an hotel were not trade refuse within the same statute. In *London and Provincial Laundry Company* v. *Willesden Local Board* (67 L. T. Rep. 449; (1892) 2 Q. B. 271) clinkers from the boilers of a steam laundry used to generate steam for the purpose principally of heating the water used in the business, but also for the purpose of warming the laundry, were held not to be "house refuse" within the Public Health Act 1875. They also referred to

Holborn Union v. *Shoreditch Vestry*, 35 L. T. Rep. 400; 2 Q. B. Div. 145;
Collins v. *Paddington Vestry*, 5 Q. B. Div. 368;
Reg. v. *Bridge*, 62 L. T. Rep. 297; 17 Cox C. C. 66; 24 Q. B. Div. 609;
St. Margaret's Vestry v. *Queen Anne Mansions*, 57 J. P. 277.

This refuse is the refuse of a trade or business—namely, the trade or business of hotel proprietors.

Danckwerts, K.C. and *R. Cunningham Glen* for the respondents.—This refuse was house refuse, and the case of *St. Martin's Vestry* v. *Gordon* (*sup.*) is in our favour. They referred to

Lyndon v. *Standbridge*, 2 H. & N. 45.

The refuse must be the refuse of the trade or business, and, even although a business may be carried on in the premises, the refuse may still be house refuse, as in this case. They referred to

South-West Suburban Water Company v. *St. Marylebone Guardians*, (1904) 2 K. B. 174.

Lord Alverstone, C.J. — This special case raises a point which certainly to me is one of very considerable difficulty. The question is whether certain refuse, which is specified particularly in the case is refuse which the city of Westminster is bound to remove without any payment under the provisions of the Public Health (London) Act 1891. It is unnecessary to refer in detail to what the refuse is, beyond stating that it is the ordinary refuse of a very large hotel. The learned magistrate, so far as it is necessary to deal with the question of fact, holding that the refuse is to be removed without extra payment, has found "that such refuse was all refuse of the same character and description as that which is removed by the sanitary authority from every large private dwelling-house, greater in quantity, no doubt, but in character and description the same as that which results from ordinary domestic uses or purposes of any large private house or mansion; and that it was ordinary domestic refuse incidental to the supply of warmth, food, and other refreshment to the guests who had come to the respondents' said hotel." That, no doubt, is very large in quantity, it is evident, when one remembers that this case is stated with reference to one of the very large hotels which of recent years has sprung up in London. Now, the question depends upon the construction which we are to put upon the sections of the Public Health (London) Act 1891. Sect. 30 provides: "It shall be the duty of every sanitary authority to secure the due removal at proper periods of house refuse from premises." Then in sect. 33 there is a provision as to trade refuse, and a provision as to payment, the amount to be assessed, if necessary, at a petty sessional court, in respect of the removal of the refuse. Then the interpretation clause states that "the expression 'house refuse' means ashes, cinders, breeze, rubbish, night soil, and filth, but does not include trade refuse, and the expression 'trade refuse' means the refuse of any trade, manufacture, or business, or of any building materials." There is added a further definition with regard to street refuse which it is not necessary to examine in detail. It was a new

subdivision which was included for the first time separately in the Act of 1891, although it had been referred to in the earlier Acts in another way. There was also the interpretation of the word "house," but I think, for the reasons stated by Mr. Macmorran in the course of his argument, we must construe the expression "house refuse" without considering the separate definition of the word "house." I do not think the separate definition of the word "house" has any bearing on this case. Now, apart from authority, I do not hesitate to say the case would have given me more difficulty than it does now, but, looking at the facts, and taking this Act by itself, I have come to the conclusion, on the construction of the Act, that this is house refuse. Of course the line must be drawn somewhere, and it is easy to put cases where the bulk of the refuse is produced by trade, as in the case of *Gay* v. *Cadby*, to which I will refer later on. But I cannot help thinking that, having regard to the previous decision, this statute meant to draw a distinction between refuse such as is ordinarily produced in houses and refuse which is produced by trades. I have said it is difficult to draw the line. I am not at all sure in my own mind on which side of the line the case of an ordinary restaurant would fall. By an ordinary restaurant I mean a restaurant in which there is no one living, but in which people simply come in considerable numbers to take their meal in the middle of the day or the evening, the business producing a considerable amount of refuse. But in this particular case I think the true view is to regard an hotel as a collection, for this purpose only, of a number of dwellings producing the same kind of refuse as would be produced, as the magistrate has stated, in a large private mansion, or a house where boarders were taken in, but not altering in kind or character the actual refuse itself. For a time I thought that a good deal might be said in favour of the view that Mr. Macmorran urged, that, if a vestry or a corporation desire to take away the refuse without payment, they ought to keep the ashes, cinders, and that kind of refuse distinct from the refuse more directly produced by the preparation of food for the inmates of the hotel. But on consideration I think that is a great deal too fine. I think the broader view and the more correct view to take is that, when you get that which is in kind the same as is produced under ordinary circumstances as house refuse, we ought not to draw the distinction or force upon the householder or the person who produces the refuse the burden of distinguishing it or separating it unless we can clearly see that it ought to be regarded as trade refuse. I think, after the advantage of the very valuable assistance we have received from the arguments of Mr. Macmorran and Mr. Danckwerts, that that is the conclusion I should come to upon the face of the Act; but I think that that view is to a certain extent strengthened by the antecedent legislation and the cases upon it. I quite agree with Mr. Danckwerts that when we see any Act which is a consolidation Act different rules of construction are to a certain extent applied. This was a consolidating and amending Act, and, as has often been said, you must look at the language. Had the language been sufficient to establish a different view, I do not think this previous legislation and the cases would have had very much to do with it. As they stand, I think they do afford a guide which rather strengthens my view. The matter was previously dealt with, and cases were previously decided upon the construction of other Acts—for instance, 18 & 19 Viet. c. 120. That, by sect. 125, to put it shortly, put upon the local authority the duty of collecting, free of cost, dirt, ashes, rubbish, ice, snow, and filth from the houses and streets and drains, and forced the occupier to permit the local authority to remove the soil, dirt, ashes, and filth from his house. There was no definition of house refuse or of trade refuse, but indirectly the question was raised by sect. 128, which said that in case the scavenger was required to remove refuse of any trade, manufacture, or, business, or of any building materials, then there should be a settlement as to price. Of course, it is not necessary to comment on the introduction of the words "building materials" there. It is obvious that was where there were cases of alterations to houses and buildings being carried on. Now, that section has given rise to more than one decision, and in one case, which is of particular assistance to us, the question was to a large extent the same. True, there was no definition of "house refuse," and in *Gay* v. *Cadby* Lord Lindley (then Lindley, J.) and Grove, J. decided that ashes arising from coal burnt in the furnaces of a steam engine carried on in the business of pianoforte manufacturers are refuse of trade. But for the criticism of that case in the subsequent case, I should have thought that that was still a correct decision. I doubt very much whether it can be held to stand to its full extent in the face of the Court of Appeal judgment. But, at any rate, it does not help us very much on this question, though it does decide that ashes may under some circumstances be refuse of trade, if the case is still law. But the case which has a very direct bearing on this matter is the case which was discussed in the Court of Appeal, in which *Gay* v. *Cadby* was considerably criticised and discussed. It is a case of *St. Martin's Vestry* v. *Gordon*, in respect of this very same hotel. That was certainly a very strong case indeed extending the view of refuse which was not trade refuse; I cannot say it was house refuse, because in one sense that was not the question under the Act as the Act then stood. That was the question as to whether the clinkers produced in the furnaces of the boilers belonging to an hotel and used to generate steam for supplying power for electric light and for warming and cooking were refuse of trade, so that the local authority should be paid to remove it. So far as the question of engines for electric lighting are concerned, as I pointed out in the course of the argument, certainly a very strong argument could be used against that being house refuse; because, although there are houses in which they produce their own electric light, yet, on the other hand, a great number of houses who use electric light take the electric light from a central station, and certainly did so in 1890. Be that as it may, the then Master of the Rolls (Lord Esher) decided distinctly in a judgment, the reasoning of which really applies directly in this case, that the very large amount of ashes produced by the working of the engines and furnaces for the purpose of the hotel were not to be regarded as trade refuse, and therefore did not fall within the definition of

"trade refuse" in sect. 128, or, in other words, it seems to me, came within the class of stuff which the vestry were bound to take away for nothing. It is quite true that in giving judgment in that case Lindley, L.J. thought that *Gay* v. *Cadby* (*sup.*) was right. The Master of the Rolls (Lord Esher) does not seem to have agreed with him, nor does Lopes, L.J. It is not necessary for us to say what is the true view with regard to *Gay* v. *Cadby*, but that decision is certainly a very strong decision in favour of Mr. Danckwerts' contention. I think that if the distinction which we are pressed to draw by Mr. Macmorran is to be drawn—namely, taking the case of *Vestry of St. Martin's* v. *Gordon Hotels Company* to be good law—that the definition clause in the Act of 1891 is to be construed so as to impose upon the carrier on of such an undertaking as this the duty of separating so much of the refuse from the bulk as is trade refuse although the common aggregation is the same sort of refuse as that created by houses, it cannot be properly drawn by this court. I think, therefore, for these reasons, that which the vestry declined to take away except for payment was house refuse within the interpretation clause of the Public Health (London) Act 1891, and that therefore the decision should be in favour of the hotel company. I am glad to know that there is a second appeal with regard to that contended to be trade refuse under the latter section, so that the matter can receive further consideration, because, although in the first case, being a criminal proceeding, no appeal can be brought, exactly the same question arises in the second case as to which an appeal can be brought. Therefore, if it is desired, we shall, of course, grant leave of appeal in order that the case may be further considered.

Darling, J.—I am of the same opinion. I think the case is an exceedingly difficult one, and I think it is so because it was practically impossible for the Act of Parliament to give a precise definition of what stuff would be house refuse and what stuff would be trade refuse, and they did not try to do so. The material which the hotel company in this case say the corporation authorities ought to have removed is described in the case, which my Lord has just read, and it is obvious from that (indeed, it is found) that this stuff which the sanitary authority would not take away was quite undistinguishable in its origin and in its appearance and constitution from what would be the ordinary rubbish of any large house or series of houses under one roof. I think, therefore, it is house refuse in this sense: that it is the kind of thing that the ordinary use of the house for the purpose of living in it, sleeping in it, eating in it, and inhabiting it as a house is commonly inhabited must necessarily produce. That there was more of it than from an ordinary house is simply due to the fact that this house was much larger, and in fact was a series of compartments; but in character it seems to me it is properly described as "house refuse," because it is produced by the use of a house in the way in which a house is ordinarily used—that is, for living in and eating in. Now, trade refuse, to my mind, is something different from that; but in what it differs I do not think you can exactly say, because some trades differ so between themselves. In some trades, in course of manufacturing an article there is necessarily refuse, like when you make the stuff from which you afterwards make aniline dyes, and when you make many things there is a refuse, which is sometimes valuable and sometimes not, resulting from your separating something from something else and keeping half of it and throwing away the rest. But there are many other trades where the refuse differs in a different sort of way. I do not think the Legislature meant to give a definition; but I think it enough to say, to my mind, that trade refuse must be refuse which is produced in the doing of something different from the simple occupation of a house as a house is ordinarily occupied, and that house refuse is not converted into trade refuse by the simple fact that people who own the house, and buy the food and the coal for the fires for the purpose of carrying on the house, are running the house as an hotel. It is difficult, perhaps, to give any very scientific reason why it should be so. I can only say I think the Legislature meant to distinguish between these two things, and that they could not have used words absolutely unmistakable, and that the words they have used, to my mind, result in this definition to which I have tried to give effect.

Bray, J.—The case is, no doubt, a difficult one, but I have arrived at the same conclusion as my Lord and my brother Darling. I think it is necessary to make some observations on the case of *St. Martin's Vestry* v. *Gordon*, because in one point of view that is a strong authority in favour of the contention of the Gordon Hotels here. In another point of view it is really, when looked at, not an authority at all. The court was dealing there with a different statute, and, in my opinion, it is very dangerous to take a case which gives a certain construction to a particular statute, and then, looking at the statute, you have to deal with in the particular case, you find there is a small difference, and you draw the inference that no different construction was intended. That is very dangerous, and the danger of doing it and applying it in this case appears very clearly from Lord Esher's judgment. Lord Esher, at p. 64 of (1891) 1 Q. B., says this, after referring to sect. 125: "Now, it cannot be denied that what the vestry were required to remove in this case were ashes, and therefore were within the terms of the section, unless there be some subsequent provision which limits the effect of those terms. We are bound to give full effect to the ordinary meaning of the words unless we find something in another part of the Act which compels us to limit such meaning." Then, again, dealing with the trade section—sect. 128—he says: "It is obvious, as it seems to me, that it cannot apply to matters which the vestry are bound to remove"—that is, under sect. 125—"whether required to do so or not. . . . I think the section contemplates different matters from those mentioned in sect. 125." In other words, he says: "I must construe sect. 125 first, unless I can see that it is limited by sect. 128." Now, that reasoning does not apply to this statute. The words have been altered, and the definition of "house refuse" is this. It means ashes, cinders, breeze, rubbish, night soil, and filth, but does not include trade refuse. So that trade refuse is expressly

excluded, and you have to consider rather what is the meaning of "trade refuse" before you arrive at the meaning of "house refuse"; whereas in the previous statute you had to look at what the meaning of "house refuse" was in order to see what the meaning of "trade refuse" was, because "trade refuse" must be something different from "house refuse." Therefore it is necessary to consider this statute independently of the previous statute. I look at it from that point of view, and I take the definition of trade refuse. It means "the refuse of any trade, manufacture, or business, or of any building materials." Now, Mr. Macmorran's argument, as I understand it, is this: that that means refuse which comes into being or arises from the consequence of a trade or business carried on. I do not think it has that meaning. Those are not the words. They might have been used, but they were not used. They are different from the words of the statute. I do not think that is the natural meaning of the words of the statute, and I think (as was pointed out in the *St. Martin's* case) it would lead to all sorts of absurdities. For instance, take the merchant's office. It might be said that it is necessary to warm the rooms in order to carry on the business there, and the ashes arise from the carrying on of the business. Then you would have to go to a solicitor's office, and what would it be there? You would have to take the boarding-house keeper or even the lodging-house keeper, and why should not the ashes of the grate there be refuse? Then you would come to the difficulties of the shop, as to which the living part might be house refuse, and the ashes from the grates of the shop might be trade refuse; therefore I do not think we can adopt that construction of the Act. That is to some extent the construction which was put upon it by Lord Lindley. I agree with the definition that Lord Esher gives, not because I adopt his reasoning, but because I take the words. He says: "The expression used is altogether new. It is 'refuse of a trade, manufacture, or business.' It is not 'dirt, ashes, rubbish, &c., caused by any trade, manufacture, or business'; nor is it 'any refuse the result of any trade, manufacture, or business.' I think that 'refuse of a trade, manufacture, or business,' is a known business term, and means something different from the things which are contemplated by the preceding sections." I adopt that, and, having arrived at that conclusion, it is not very difficult to arrive at what the result in this case should be, because it is almost impossible to say that, if that be the true construction of this statute, as it is held to be the true construction of the Metropolis Management Act 1855, it can hardly be that the cinders from the furnaces of the engines which were used to supply the electric light and the different machinery in the hotel should be house refuse, and yet the ashes of the grates, the peelings of the potatoes, and the remains of the crockery should not be house refuse, but trade refuse. So that, once arrived at the construction of the statute, I think the case of *Vestry of St. Martin's* v. *Gordon* (*sup.*) is altogether conclusive and binding on us. But again I say, independently of that decision, I should come to the same conclusion. I think that the definition related rather to the nature than to the origin of the refuse. It is found by the magistrate that in all respects this is of exactly the same nature as the original refuse from a house; therefore the nature is the same. Is an hotel a house? It is quite clear it is a house, not because of the definition in the Act, but because it is in fact a house. In structure it is a house, in its use it is a house, and it is used for the purpose of providing rooms for people to dwell in, and places where they can dine and food which they can eat. It is therefore, in my opinion, a house, and, owing to these reasons, I come to the conclusion that this is house refuse, and I therefore agree that the decision of the magistrate must stand.

Solicitors: *Allen* and *Son*; *Stanley Woodhouse* and *Hedderwick*.

Tuesday, April 10, 1906.

(Before RIDLEY, DARLING, and A. T. LAWRENCE, JJ.)

TANNER (app.) *v.* DYBALL (resp.). (*a*)

Margarine—"Marvo"—Sale of butter substitute otherwise than as margarine—Margarine Act 1887 (50 *&* 51 *Vict. c.* 29), *s.* 3.

The respondent went into the appellant's shop and asked for half a pound of "Marvo," and was served with a substance from a box labelled "Margarine," which substance, before being handed to the respondent, was wrapped in paper on which was printed in ½in. letters "Margarine." Inside the package was found a slip on which was printed: "Marvo (registered by Act of Parliament). Without this slip none is genuine"; and behind the counter was a notice: "Notice.—'Marvo,' the new butter substitute, equal in flavour to the finest dairy butter. To comply with the provisions of the Food and Drugs Act is sold as 'Margarine.'"

Held, the appellant had not sold a substance prepared in imitation of butter under a name other than margarine, within sect. 3 *of the Margarine Act* 1887.

CASE stated on an information preferred by the respondent against the appellant for selling a substance prepared in imitation of butter under a name other than the name of margarine—namely, under the name of "Marvo."

Upon the hearing of the information the following facts were proved or admitted:—

On the 31st July 1905 the respondent went into the appellant's shop and asked for ½lb. of "Marvo," and was served by the appellant by taking a substance from a box on a shelf in view of the respondent, which the respondent saw was labelled "Margarine" in letters 1½in. square.

The substance before being handed to the respondent was wrapped in a white piece of paper on which was printed on the outside in letters ½in. long "Margarine." No other printed matter appeared on the wrapper, and the word "Margarine" was clearly visible to the respondent.

The substance so wrapped was handed to the respondent, for which he paid 4½*d.*

The respondent complied with sect. 14 of the Act of 1875, and sent a portion of the substance to the public analyst, who certified that the sample contained 100 per cent. of margarine.

(*a*) Reported by W. DE B. HERBERT, Esq. Barrister-at-Law.

On opening the parcel, the respondent found attached to the substance a small label on which was printed "Marvo (registered by Act of Parliament). Without this slip none is genuine." This label was not visible to the respondent until he opened the parcel.

Behind the counter, in full view of the respondent, in a conspicuous position, was a cardboard placard or notice which bore the words following: "Notice.—'Marvo,' the new butter substitute, equal in flavour to the finest dairy butter. To comply with the provisions of the Food and Drugs Act is sold as 'Margarine.'"

The respondent's attention was not called to the notice before the purchase was completed.

Margarine is sold retail in prices ranging from 4*d.* to 10*d.* per pound.

The respondent knew he was purchasing a butter substitute.

It was contended by counsel on behalf of the appellant that sect. 3 of the Margarine Act is only a definition section, and does not create an offence; that sects. 3 and 6 must be read together to find out what the offence is; and that if the provisions of sect. 6 were observed, as in this case, no offence had been committed. The case of *Burton* v. *Mattinson* (86 L. T. Rep. 77) was referred to.

It was further contended that the sale of the substance was in fact, having regard to the label and the wrapper, a sale of it under the name of margarine. The case of *The World's Tea Company* v. *Gardner* (59 J. P. 358) was referred to.

It was further contended that the notice exhibited as set out above was a sufficient declaration to the respondent that the substance was sold under the name of margarine. The case of *Sandys* v. *Small* (39 L. T. Rep. 118; 3 Q. B. Div. 449) was referred to.

The magistrate was of opinion that sect. 3 of the Margarine Act 1887 created an offence; that there was a sale of this substance in fact under a name other than the name of margarine; and that the notice did not plainly state that "Marvo" was margarine. It began by saying that "Marvo" is a new butter substitute, and he considered that the effect of putting in the words "new butter substitute" was to convey to the mind of the purchaser that he was getting something new and different to margarine, and that it was only in order to comply with the Sale of Food and Drugs Act that it was called margarine.

He therefore convicted the appellant.

Avory, K.C. and *Ricardo* for the appellant.

Colam for the respondent.

RIDLEY, J.—We are agreed in this case that the conviction cannot be supported. I think the learned magistrate took rather too narrow a view of these two sections—sects. 3 and 6. What he has found is that upon the facts the appellant on the 31st July 1905 did unlawfully sell a substance prepared in imitation of butter under a name other than the name of margarine—viz., under the name of "Marvo"—contrary to the form of the statute. Upon the facts it appears to me that this is what happened: The respondent went into the shop and asked for ½lb. of "Marvo"; he was served by a substance being taken from a box which had "Margarine" upon it in accordance with the Act of Parliament. When the parcel was opened, the respondent found attached to the substance a small label which was marked "'Marvo' (registered by Act of Parliament). Without this slip none is genuine." In the shop there had been put up behind the counter: "Notice.—'Marvo,' the new butter substitute, equal in flavour to the finest dairy butter. To comply with the provisions of the Food and Drugs Act is sold as 'Margarine.'" Upon that the magistrate finds that the effect of putting the words "new butter substitute" in the notice was to convey to the mind of the purchaser that he was getting something new and different to margarine, and that it was only in order to comply with the Sale of Food and Drugs Act that it was called margarine. I think it is open for us to review that finding, which is not purely a finding upon the question of fact, but a finding upon the construction of the words, and it appears to me that he has not read the words in the sense which they properly bear. By saying "'Marvo,' the new butter substitute, equal in flavour to the very finest dairy butter," you say that it is in point of fact margarine; you cannot avoid that inference from the words, because that inference is placed upon them by the Act of Parliament itself. Then the notice goes on, "I call it margarine to comply with the words of the Act of Parliament," but, although he puts that in, it does not follow that it was only in order to comply with the Sale of Food and Drugs Act that he did so. It was in point of fact margarine, and in point of fact, although it was margarine, he had given it this name of "Marvo," which is the fashion of the present day in order to attract people to that particular sort of margarine. I think under the circumstances it is much too strong a construction to put upon the Act of Parliament to say that in this case the sale had been the sale of "Marvo," and not the sale of margarine. I think that the proper inference is that it was sold as margarine. All the incidents of the sale which took place in the shop are attached to the sale of margarine, except the inquiry of the purchaser, which was for "Marvo." There is the "Marvo" label up in the shop, but it was bought, or at least accepted, as margarine. It was given to him as margarine, and he so took it. Under these circumstances I think it is rather a strong finding to say that it was sold under the name of "Marvo," because, although the name of "Marvo" was introduced, that is obviously, to my mind, only a sort of margarine, and the "Marvo" offered to the purchaser is margarine. Now, if this "Marvo" had not been a new butter substitute, and therefore a sort of margarine as it is found to be, and stated to be in the case, but had been something else and sold as margarine, then, indeed, I suppose it is clear that there would have been a breach of the statute, because he would have been selling as margarine something which was not in point of fact a new butter substitute at all; but, so long as a new butter substitute merely has a fancy name attached to it, and is in itself a sort of margarine, I cannot see that the dealer violates the Act of Parliament by adding that fancy name to the margarine, so long as he does sell it as margarine, which it appears to me was done in the present case. For these reasons it appears to me that the conviction must be quashed.

DARLING, J.—I am of the same opinion. There is really, to my mind, no such thing as margarine

except by Act of Parliament. By Act of Parliament every butter substitute is margarine, and you must sell it as margarine. Now, it appears to me that what this vendor did here was this: He offered this stuff to the customer and said: "This is 'Marvo.' That tells you nothing at all. It is a butter substitute. Now, because I have told you it is a butter substitute, I must give it a name, and I must sell it under that name, and I do, and I tell you that because it is a butter substitute it is margarine. I sell it to you as margarine in order to comply with the Act of Parliament, but, if it were otherwise, when I told you margarine, I should not tell you more than when I told you it is 'Marvo'; but when I tell you it is margarine then you know, or you should know, that it is not butter, that it may be eaten as butter, that it is a butter substitute, and that, although margarine means neither more nor less than 'Marvo.' 'Marvo' has no statutory meaning and margarine has, so I tell you it is margarine. Now you know what it is I am selling."

A. T. LAWRENCE, J.—I am of the same opinion. It seems to me that the magistrate has thought that the sale of margarine as "Marvo margarine" was an offence, but I cannot say that the Act says that it is an offence. I do not think the Act is aimed against the improvements in margarine; it is aimed, I think, at the protection of the purity of butter. In this case when the man asked for "Marvo" it is true he only got ordinary margarine, apparently no better margarine than he could have got by calling it margarine; but that is not an offence that this Act aims at. He followed precisely the provisions of sect. 6 in every word, and the purchaser really did not see, the case says, this notice until after he bought it; so, if he did not see it until then, I do not think the notice is misleading. I do not think the notice was wrong because it was sold as margarine in order to comply with the Act. The papers in which it was wrapped were marked "Margarine," and the stuff itself from which the part served was taken was marked "Margarine." It seems to me that the purchaser knew that he was buying margarine, and must have known it, and I do not think that the particular matter the magistrate finds he was deceived in, if he means he was deceived, was anything in connection with which the statute aims at. *Appeal allowed.*

Solicitors: *Neve, Beck,* and *Kirby*; *W. B. Ricketts.*

Tuesday, April 10, 1906.

(Before RIDLEY, DARLING, and A. T. LAWRENCE, JJ.)

PHILPOTT (app.) *v.* ALLRIGHT (resp.). (*a*.)

Market—Toll—By-law—Hawking—Manufacturer of mineral waters calling on customers.

By a by-law of the borough of D., "every person or persons who shall hawk or expose about the town for sale" certain articles should pay a toll.

The respondent, who was in the employ of a manufacturer of mineral waters at R., brought into the borough of D. a van laden with mineral waters. He called at the houses and shops of regular customers to sell and deliver to them any mineral waters they might require. The goods were not cried in the streets, and no effort was made to attract casual customers.

Held (dissentiente *Darling J.*), *that the respondent had not hawked or exposed about the town for sale the mineral waters, within the meaning of the by-law.*

CASE stated on a complaint preferred by the appellant against the respondent for that he, in the borough of Deal, with a four-wheeled waggon did hawk certain mineral waters for sale for which he was liable to pay a toll, and that he refused to pay such toll.

The respondent, who resides at Ramsgate and is in the employ of a manufacturer of mineral waters there, was in a public street in the borough of Deal in charge of a waggon laden with various kinds of mineral waters.

He stopped outside a public-house and went in and asked the landlord if he wanted any "minerals" that day, and the landlord said he did not. The respondent then said, "What about lemons?" meaning lemonade, and the landlord replied, "No, not to-day; but give me a look in to-morrow if you are in the town." The landlord had been a regular customer of the respondent for ten years. The respondent then left the public-house, and the appellant asked for a toll, which he refused to pay.

The practice of the respondent was to bring into the borough of Deal from Ramsgate a waggon loaded with various kinds of mineral waters, and to call at the houses or shops of customers and to sell and deliver to them from his waggon whatever mineral waters they might require. The respondent did not make any effort "to expose about the town for sale" the mineral waters, but carried them in an ordinary open four-wheeled van.

They were not cried in the streets, and no effort was made by the respondent to attract casual customers. The respondent stated in cross-examination that he would not refuse to sell or deliver from the waggon mineral waters to any person then asking for the same and whether previously a customer or not, except that he would not compete with his ordinary customers by selling retail to private customers. As a rule, the mineral waters in the waggon had not been ordered in advance. There was no evidence of any sale except to the landlord of the public-house above mentioned.

The respondent contended that the case was covered by *White* v. *Mayor of Yeovil* (61 L. J. 213, M. C.) and *District Council of Newton-in-Makerfield* v. *Lyon* (81 L. T. Rep. 756).

The appellant contended that those cases solely turned on the meaning of "expose for sale," and that the essential idea of "hawk for sale" is a carrying about from place to place of goods with a view to sale, and did not necessarily include any exposure whatever.

The justices dismissed the complaint solely on the ground that the facts were substantially similar to the two decisions set out above.

By the by-laws and regulations for the borough of Deal as to markets and tolls, it is provided: "That every person or persons who shall hawk or expose about the town for sale" any of the articles mentioned in the schedule or table of tolls should pay such tolls, and every person who refused to

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

pay such tolls should forfeit and pay the sum of 20*s.*, and in the schedule a toll was prescribed for every waggon in which any articles not enumerated in the first schedule (which would include mineral waters) should be hawked about for sale.

Thorn Drury for the appellant.—The respondent hawked and exposed about the town for sale. The cases relied on by the justices are not in point. He referred to

White v. *Mayor of Yeovil*, 61 L. J. 213, M. C.;
District Council of Newton-in-Makerfield v. *Lyon*, 81 L. T. Rep. 756;
Hawkers Act 1888 (51 & 52 Vict. c. 33), s. 2;
O'Dea v. *Crowhurst*, 80 L. T. Rep 491;
Holland v. *Hall*, 86 L. T. Rep. 355.

Avory, K.C. and *A. Neilson* for the respondent.—The offence charged is under the by-law and not under the Hawkers Act. If that statute applied, so would the exemption to manufacturers contained in it. *District Council of Newton-in-Makerfield* v. *Lyon* (*sup.*) is absolutely in point, and the justices were quite right here.

A. T. LAWRENCE, J.—I am of opinion that the justices were right in holding that no offence had been committed. The exact application of the two cases they have cited is not, perhaps, as close as it was treated by them as being, but I think the substance of the question is whether this man did hawk or expose for sale. It does not seem to me that he did. I do not think we are assisted in the least by the definition in the Hawkers Act. It is clear that he was not a hawker within the meaning of the Hawkers Act, and what you have to go back to is the by-law to see whether he did hawk or expose about the town for sale any of the articles or commodities mentioned in the schedule. I have not dealt with the articles mentioned in the schedule, and I quite agree with Mr. Drury that the word "or" is a disjunctive word, but I think in the by-law the word "hawk" has a meaning which is more than the words in the definition clauses of the Hawkers Act. It means carrying about for sale—offering for sale as you carry them about; it means taking some step which is similar to the idea conveyed by the words "expose for sale." It may not be identical with it, but it is the same course of action. No one would understand that a man was a hawker who took a thing about the town and did not either expose it for sale or cry it, or take some steps which indicated that he had got the thing for sale and was ready to sell to any person who would buy. Therefore, in substance, this man was doing that which was like a tradesman going to his customers asking of them whether they want a supply on that particular day. I think in substance the justices were quite right in saying this man is not within the by-law, and the cases cited were sufficiently near to guide them to that conclusion.

DARLING, J.—I am sorry I do not come to the same conclusion. It seems to me that if this man had been proceeded against under the Hawkers Act of 1888, if that case *O'Dea* v. *Crowhurst* is rightly decided (and I do not see my way to say I have altered my mind about it), he would have required a licence. If he had been proceeded against under that Act, I think he would have required a licence as a hawker, if it had not been for the exemption which Mr. Avory called attention to in sect. 3, sub-s. 3, which exempts him because he was selling to dealers, and also which exempts him because he was acting on behalf of the manufacturers; otherwise he would have been a hawker. But those exemptions do not come into these by-laws, and, as I think he would have been a hawker but for that, he is a hawker without the particular exemption. Therefore one has to look, not at the Act at all, but at the by-law itself. What does the by-law say? "That every person who shall hawk or expose about the town for sale any of the articles mentioned," and so on, shall be liable. I think he did hawk these within the old meaning of the word. I do not agree with Mr. Avory that "hawk" means exactly the same thing as "expose about the town for sale." I think "expose about the town for sale" means one thing and "hawk" another. I think if a man goes about with things not exposed, carries them about and offers to sell them to persons, that he is a hawker. It is perfectly obvious that some of the people who were called hawkers of old time long ago did not expose things; they concealed that they had got them. There is in the dictionary this passage, quoted from Marvell in 1676: "The little emissaries hawk about from London to Westminster with their breeches stiff with the copies, and will sell them to anyone." They were copies of books which it was thought very inexpedient to have sold at all. Those people did not go about saying, "We have got copies of seditious things to sell"; they went about very secretly. There, an author like Marvell says they were hawking the things about. If I had to apply the words of this by-law, I should say: "Yes, you did hawk these about the town, and the fact that you did not expose them does not matter. Nor did those people expose what they were carrying about. You shall be convicted under the branch of the by-law which forbids hawking, although you get off under the ground which forbids 'exposing for sale.'" The magistrates seem to me to have dealt with it on the assumption that the decision which the court is going to give is the right one, and that therefore the two cases turning upon what is exposing for sale fit the case. I cannot myself see my way to agree with the judgment of the court, and I have felt bound, therefore, to say so.

RIDLEY, J.—I am sorry the court has not agreed on this point. I find myself, with great respect to my brother Darling, in agreement with my brother Lawrence. I think the question does not arise under the Hawkers Act at all. Indeed, it is rather causing a confusion in the argument that it should have been introduced. Under that Act there is a definition of hawking for the purposes of revenue, and it states that a hawker is a person who goes about with a horse, while a pedlar is a person who goes about without a horse. No one can say that that is a definition of a hawker. A hawker may walk. He does not require a horse. A hawker is a person who goes about selling goods to the public, endeavouring to attract attention to his wares by crying them or exposing them for sale. My brother Darling puts it in this way: He says the Hawkers Act is what you must start from. The decision to which he was a party in *O'Dea* v. *Crowhurst* shows that in a case like the present the man in question is properly described as a hawker. In that case, as a matter of fact, the exemptions of sect. 3, sub-

sect. 3, did not apply, and therefore the penalty was incurred, but in this case, if you were to treat it in that fashion, they would have applied. The respondent is prosecuted under a by-law and not for the purpose of revenue, and is not to be entitled to the exemption which the revenue would have given him. It seems to me, with great respect, to be a confusion. You are under the one or the other. If you are under the by-law, you are not under the statute. The statute is not material at all, except for the purpose of determining, Does that particular person require a licence, and, if he does require a licence, is there anything in the way in which he is doing business which entitles him to exemption? I think the by-law is the matter with which we have to concern ourselves to-day. I should like to say, as to the case of *O'Dea* v. *Crowhurst*, to which I was not a party, I do not feel quite certain whether I should have come to the same conclusion myself; I would not like to say. I am not an assenting party to that decision, which, after all, was under an Act and not under this by-law, but I observe the court in that case was under the disadvantage of not hearing any counsel for the respondent, but only heard the one side, and I somewhat doubt whether, if the case had been argued on the other side, there might not have been some different opinion raised in court. However that may be, I think it is a case which governs us. Neither do I think the case of *Holland* v. *Hall* governs us. That also was a question under the Hawkers Act 1888, and the question was raised under an information on which the hawker had been convicted of selling without a licence. The circumstances were rather peculiar, and certainly widely different from the present one. It was a case in which the respondent had been sent out by his employers, who made sewing machines, with instructions to call at certain places, as the people there were likely to give him orders. Under the circumstances the court thought, though apparently with some difficulty, at all events on the part of the Lord Chief Justice, that he was going about from place to place carrying goods to sell. All I need say about that is that it does not apply to a by-law which says every person who shall hawk or expose about the town for sale any articles—and that is the offence that has been committed. I do not think that it is very easy to give a full and complete definition of the word "hawker," and I will not endeavour to do it more than I have done already, but I do not myself see why the offence of selling was to be different from that of exposing about the town for sale. I think if you cry goods in the street you would be a hawker, certainly. If he endeavours to attract the public in the street, the public who are not customers of his, or who may have accidentally been customers of his or not, if he goes about trying to sell his goods, he is a hawker. I think the case of *District Council of Newton-in-Makerfield* v. *Lyon* is, as Mr. Avory says, undistinguishable from the present if you once get as far as this point, that the conviction is upon the by-law and not upon the statute, for in that case a toll was appointed for every cart used by any person for exposing or in which should be exposed for sale any article, commodity, or thing, and it appears that in the circumstances the case is almost exactly the same as the present. The plaintiff's toll collector saw the defendant's son with a cart loaded with boxes of aerated waters of different kinds take a box of aerated waters into a Mrs. Kirkman's shop. A toll of 9*d.* was demanded and refused. The defendant only called on his regular customers generally to supply goods ordered, but in this case the goods had not been ordered. He then drove to another shop. He had been in the habit of going round with his mineral water carts for the last seven years, and so forth. Bigham J. and Phillimore J. came to the conclusion that in that case he had not been exposing the articles for sale. Bigham J. says: "In my opinion, this user of that cart was not an exposure for sale of goods within the Act. The delivery of these goods was not an exposure at all. They were taken in the cart to be ready for delivery if wanted. It is sufficient for this case to say that the facts found do not amount to an exposure for sale." In my opinion that is the case which governs the present one. Although I regret to find myself differing from my brother Darling, I think the magistrates' decision is right.

Appeal dismissed.

Solicitors: *A. T. Hare and Co.*, for *F. W. Hardman*, Deal; *William Webb* and *Sons*.

Tuesday, April 10, 1906.

(Before Ridley, Darling, and A. T. Lawrence, JJ.)

Wakefield and District Light Railways Company (apps.) v. Wakefield Corporation (resps.). (*a*)

Rating—Light railway—Liability to be assessed in one fourth part of net annual value—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *s.* 211 (1) (*b*)—*Light Railways Act* 1896 (59 *&* 60 *Vict. c.* 48).

A light railway constructed under orders made by the Light Railway Commissioners in pursuance of the powers conferred by the Light Railways Act 1896, *which is laid along the public streets, is within sect.* 211 (*b*) *of the Public Health Act* 1875, *and so is only assessable to the general district rate in the proportion of one fourth part only of its net annual value.*

Case stated on a complaint preferred by the respondents against the appellants for that they being a company duly rated by a rate in the nature of a general district rate which had been lawfully demanded had not paid the same, and had refused to do so.

At the hearing of the complaint it was proved or admitted that the rate was duly made and demanded, and that the appellants were therein rated in respect of certain light railways described in the rate as lines of rails.

These rails were laid in certain enumerated public streets, and they were assessed at their full annual value.

The appellants had tendered the respondents a sum calculated on one fourth part only of the net annual value, but this was refused.

It was admitted the appellants were in occupation of the lines of rails and the land occupied thereby.

The light railway was authorised by the Wakefield and District Light Railway Order 1901 and

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

the Wakefield and District Light Railway (Extensions) Order 1902, made by the Light Railway Commissioners in pursuance of the powers conferred on them by the Light Railways Act 1896, and the streets and roads along which it ran were highways dedicated to the public and repairable by the inhabitants at large, and were vested in the respondents as urban authority. The traffic was worked by electricity on what is commonly called the overhead system, and the vehicles were used for the conveyance of passengers and parcels, and the public were entitled to be conveyed on payment of the rates and charges authorised.

It was contended for the respondents that the appellants were liable to pay on the full net annual value, and that the land on which the lines were laid was not land used only as a railway, and that the railway was not a railway constructed under the powers of an Act of Parliament for public conveyance within the meaning of sect. 211 (1) (*b*) of the Public Health Act 1875.

It was contended on behalf of the appellants that the lines of rails, and the land occupied thereby, were used as a railway constructed under the powers of certain Acts of Parliament for public conveyance within the meaning of sect. 211 (1) (*b*) of the Public Health Act 1875, because they were constructed and were used only under the Wakefield and District Light Railway Order 1901 and the Wakefield and District Light Railway (Extensions) Order 1902, which orders were to be deemed special Acts by virtue of sect. 12 (2) of the Light Railways Act 1896 for the purposes of the general enactments relating to railways, and that, therefore, the appellants ought to be assessed in respect of the said lines of rails and the land occupied thereby in the proportion of one fourth part only of the net annual value thereof.

The justices were of opinion that the land occupied by the lines of rails was not land used only as a railway, and that the railway was not constructed under the powers of an Act of Parliament within sect. 211 (1) (*b*), and they made an order for the payment of the rate in full.

By the Public Health Act 1875, it is enacted by sect. 211:

(1) General district rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor, and shall be assessed on the full net annual value of such property, ascertained by the valuation list for the time being in force, or, if there is none, by the rate for the relief of the poor made next before the making of the assessment under this Act, subject to the following exceptions, regulations, and conditions: (*a*) . . . (*b*) The owner of any tithes, or of any tithe commutation rentcharge, or the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market gardens or nursery grounds, and the occupier of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one fourth only of such net annual value thereof.

Ryde (*Danckwerts*, K.C. with him) for the appellants.—The question here is whether this light railway is a railway within sect. 211 (1) (*b*) of the Public Health Act 1875. It was constructed under an order—the Wakefield and District Light Railway Order 1901—made by the Light Railway Commissioners under the Light Railways Act 1896. By sect. 2 of that order, the expression "principal Act" means the Light Railways Act 1896, and then sect. 3 is: "Subject to the provisions of this order, the following enactments," that is to say, certain parts of "the Companies Clauses Consolidation Act 1845, the Companies Clauses Act 1863, as amended by subsequent Acts, the Lands Clauses Acts, as varied by the principal Act, and sects. 6, 7, 24, 89, 90, 103, 104, 105, 108 to 113, both included, 144, 162, and 163 of the Railways Clauses Consolidation Act 1845 are hereby incorporated with this order, and sects. 5 and 6 of the Regulation of Railways Act 1889 are hereby applied to the railway and the undertaking." A tramway made under the Tramway Acts never incorporates any of those regulations of the Railway Acts, or any of the Railway Clauses Acts. Sect. 17 is: "Nothing in this order, or in any by-law made under this order, shall take away or abridge the right of the public to pass along or across every part of any road along or across which the railway is laid with carriages not having flange wheels, or wheels only suitable to run on the rails of the railway," so that the public right of way over the surface of the rails is not taken away; but by sect. 49 the exclusive user of the rails as railway rails is given to the company, although, by sect. 16, "Notwithstanding anything in this order contained, the company shall not acquire or be deemed to acquire any right other than that of user of any road along or across which they lay the railway." By sect. 49: "If any person (except by agreement with the company or otherwise as by this order provided) uses the railway or any portion thereof with carriages having flange wheels or other wheels suitable only to run on the rails of the railway, such person shall for every such offence be liable to a penalty." For the purposes of this case I assume, as I am bound to assume, that the word "only" qualifies the words "railway constructed under the powers of any Act of Parliament for public conveyance," and I say that this light railway is a railway used only under the powers of an Act of Parliament. This light railway was constructed under the powers of an Act of Parliament—namely, the Light Railways Act 1896. Sect. 12 provides: "The Clauses Acts, as defined by the Act, and the enactments mentioned in the second schedule to this Act, shall not apply to a light railway authorised under this Act, except so far as they are incorporated or applied by the order authorising the railway," and sect. 28 gives the definition of Clauses Acts—viz.: "The expression 'Clauses Acts' means the Lands Clauses Act, the Railway Clauses Consolidation Act 1845, and the Railway Clauses Act 1863, and the Companies Clauses Acts 1845 to 1889." Then sect. 12, sub-sect. 2, is: "Subject to the foregoing provisions of this Act, and to any special provisions contained in the order authorising the railway, the general enactments relating to railways shall apply to a light railway under this Act in like manner as they apply to any other railway; and for the purposes of those enactments, and of the Clauses Acts so far as they are incorporated or applied by the order authorising the railway, the light railway

company shall be deemed a railway company, and the order under this Act a special Act, and any provisions thereof a special enactment. Provided that a light railway shall not be deemed to be a railway within the meaning of the Railway Passenger Duty Act 1842, and that no duties shall hereafter be levied in respect of passengers conveyed on a light railway constructed under this Act in respect of the conveyance of such passengers upon such railway." The general enactments relating to railways include (*inter alia*) the general enactments of sect. 211 of the Public Health Act 1875, which says that an urban district council may make a rate upon a railway. It does not say in terms that they make a rate upon a railway as such, but it says they may make a rate on that property included in the poor rate which includes a railway. I say sect. 211 is a general enactment relating to railways, and it is to apply to light railways made under the Act like any other railway. So, even assuming against me for the moment that this is a light railway not made under a statute, in construing other enactments it must be treated as though it were made under the Act, because the order becomes equivalent to a special Act. Therefore, I say this light railway, made under the Light Railways Orders which I have referred your Lordships to, is a light railway made under a special Act of Parliament. It is made for public conveyance, and, being so made, the general enactments, wherever you find them, relating to railways apply to this light railway as if it were any ordinary railway, and as if it were an ordinary railway made under a special Act of Parliament. He referred to

Pimlico Tramway Company v. *Greenwich Union*, L. Rep. 9 Q. B. 9;
Swansea Improvement Tramway Company v. *Swansea Urban Sanitary Authority*, 66 L. T. Rep. 119; (1892) 1 Q. B. 357;
Yorkshire Electric Tramways v. *Ellis*, 92 L. T. Rep. 202; (1905) 1 K. B. 396;
Blackpool and Fleetwood Tramway Company v. *Thornton Urban District Council* (unreported).

A tramway made under an Act of Parliament is quite different from a light railway made under the Light Railways Act 1896.

Clavell Salter (*W. W. Mackenzie* with him) for the respondents.—The justices were right on both the points that they have decided. No doubt a light railway is quite different in origin to a tramway. It is also quite different from the origin of a railway. They have three quite distinct origins. A light railway is equally different as regards its origin and procedure the one from the other. The modern light railway comes into existence as a special thing under special procedure created *ad hoc*. The land is not in any real and substantial sense of the word, as a matter of law and fact, used only as a light railway. The land is the soil of the highway, and it is used in fact by all those who go along it. It is used, and rightly used, by the appellants. The only sense in which their user exceeds the ordinary user of the public is that they are the only people who are entitled to use flange wheels, which fit into the lines which they put down; but any vehicle whose wheels are the same gauge will run along on these small lines. The question is not whether the appellants use the land only as a railway. He referred to

Swansea Improvement Tramway Company v. *Swansea Urban Sanitary Authority* (*sup.*);
Blackpool and Fleetwood Tramway Company v. *Thornton Urban District Council* (*sup.*).

This light railway—that is to say, what one would ordinarily call a tramway running through the streets of this town—is not a railway constructed under the powers of an Act of Parliament. It is constructed for public conveyance, because I think the words "for public conveyance" relate to construction; but it is not constructed under any Act of Parliament within the meaning of those words. What is meant is the authority of an Act of Parliament passed for the purpose of giving those powers. Neither sect. 211 nor the words "or as a railway constructed under any Act of Parliament for public conveyance," nor the whole Act of 1875 can properly be said to come under the expression "general enactments relating to railways," as used in sect. 12 of the Light Railways Act 1896.

Ridley, J.—In the case that has been brought before us there is one difficult point which has given me some little trouble as to how it should be decided. As to the other point, I do not think we have had quite so much difficulty. The question arises in this way. There is a light railway which one may describe as the Wakefield and District Light Railway, the rating of which came before the Mayor and Corporation of Wakefield under the provisions of sect. 211 of the Public Health Act 1875. It was held in the court below that they, the light railway, occupied the lines of railway not as land used only as a railway, and that, therefore, this railway was not constructed under the words used in sub-sect. (*b*) of sect. 211 in such a way as to be entitled to be rated only in the proportion of one fourth. The question we have now to decide is whether that decision was right or not. The magistrates decided that the land occupied was not land used only as a railway, and that the railways were not railways constructed under the powers of an Act of Parliament for public conveyance within the meaning of that section. It is true, I think, as was argued by Mr. Clavell Salter, that tramways are different both from light railways and from fully constituted railways. There can be no doubt, I think, following the judgment of Wills, J. in the case of *Swansea Improvement Tramways Company* v. *Swansea Urban Sanitary Authority*, that tramways are well known, both by their origin and by their nature, to be something essentially different from railways, and that the legislation of 1875—that means the Public Health Act of 1875—where railways are spoken of, cannot possibly be supposed to include tramways. In that case Wills, J. declines to define a railway or tramway, and I think I shall follow his example; but when we have to draw a distinction between a light railway, as this one was, and a fully constituted ordinary railway, as it was not, the difficulty raised is somewhat more substantial. The words of the sub-section are: "The occupier of any land used . . . only as a railway constructed under the powers of any Act of Parliament for public conveyance," and I read in the word "only," following in doing so the decision I have just

quoted, which it was conceded by Mr. Ryde was a necessary consequence of that decision. Therefore, we have to ask ourselves, first, Was this land used only as a railway constructed under the powers of any Act of Parliament for public conveyance? I suppose those words were drawn with reference to the usual railway as known, the fully constituted railway, where the land between the fences is bought and is owned by the railway company, and they fit on to that state of facts without any difficulty. But in this case the light railway that we have to deal with, this particular light railway at all events, is in no respect that I can make out distinguishable from a tramway so far as its outward circumstances are concerned; it passes along a highway, a street; other persons have a right to pass to and fro along it; cabs and vehicles, carts and foot passengers alike can cross to and fro upon it without being charged with being trespassers. The only thing in respect of which the occupiers, the light railway company, are assessable to the rate is the metal which they place on the highway, and, possibly, even a narrower and a smaller thing still—namely, the slit or opening in the railway to which they have the exclusive right, for other persons may pass to and fro along the metals so long as they do not use the slit itself, and it is no trespass or wrong if you find a vehicle using the metals merely in consequence of the breadth of the vehicle being identical with the gauge of the railway. Under those circumstances, is the land used by this railway used only for that purpose? I had considerable doubt whether, considering the difference in the rights which the public exercise in the one case and in the other, this railway ought not to be classed along with a tramway, because, as I have said, the circumstances to the open eye are similar, but I think upon the whole Mr. Ryde does stand on sound ground when he says: "I am not rated for the space between the railway; I am rated only for the metals. I have a right to that, and that is the only thing for which I am rated: there I have the exclusive right, and that is used only for the railway." I have already expressed the difficulty that I have felt, but I think upon the whole the right decision is to say that, allowing as I do for the difference that exists between a fully constituted railway and a railway of this character, still they are alike in this respect, that what they have got and what they do use is used for themselves only. Now, of course, what I have been saying would not apply to the case of some light railways, because there may be cases in which in a country district, or extending beyond the limits of a borough like Wakefield, they reach a part of the country where the owner of the land between the metals is no less than a properly constituted railway, but I think on that point there is no doubt Mr. Ryde is in the right. On the other point I have not had so much difficulty. The question that arises on that is, Was it a railway constructed under the powers of an Act of Parliament for public conveyance? Now, in the first instance, it was not directly so, because it was made under an order under the Light Railways Act, an order made in 1901, but I think when you look at the provisions of sect. 12 of the Light Railways Act 1896, which has been quoted by Mr. Ryde, that he gets over that difficulty. It is a section which is dealing with the question how far existing legislation relating to railways is to be applied to light railways, and it says that the Clauses Acts, as defined by this Act, shall not apply to any light railway, except so far as they are incorporated by the order. Then it says: "Subject to the foregoing provisions of this Act, and to any special provisions contained in the order authorising the railway, the general enactments relating to railways shall apply to a light railway under this Act in like manner as they apply to any other railway, and for the purposes of those enactments and of the Clauses Acts, so far as they are incorporated or applied by the order authorising the railway, the light railway company shall be deemed a railway company, and the order under this Act a special Act, and any provision thereof a special enactment." It seems to me, therefore, that that says you are to treat this light railway, although not made directly under the Act, as though it were made under the special Act, and that the order under the Act is to be called a special Act, and that any provision of it is to be called a special enactment. That gets over the difficulty which I have mentioned, that it is not directly made under an Act of Parliament and only indirectly. The Act of Parliament seems to say you are to treat it as though it were made under a special enactment. But, then, what about the phrase "the general enactments relating to railways," for it says those general enactments relating to railways shall apply to a light railway under this Act in the like manner as they apply to any other railway. If this sect. 211 of the Public Health Act 1875 is a general enactment relating to railways, it seems to me that this point also must be decided in favour of Mr. Ryde. I understand Mr. Salter to meet that, which it was necessary that he should meet, by saying the enactments to be found in the schedule are in the main—in fact, all of them, I think—enactments which have regard to the conduct and management of railways, such as gates, level crossings, gauge, signals, rates, cheap trains, and so forth, and he says it is in that subject-matter only, and to that subject-matter only, that this section applies. I do not think that is a very sound argument, although it is the fact that that is the application, I believe, of the Acts in the schedule, for there ought to have been in the sub-section itself something else, "general enactments relating to the conduct and management of railways," whereas the words "conduct and management" are left out; and I think, using the natural sense of the words, that this sect. 211 is an enactment relating to railways. I do not see in what other way it can be described. The word "enactment" is not the same as the word "Act." Act means the whole Act, I think, but an enactment is the Act or a part of it, and a particular section or part of an Act of Parliament may be an enactment. In this case I think this is a general enactment relating to railways, therefore I think it must apply to a light railway, and I think also that the light railway must be deemed to have been constructed under a special Act, although only constructed under an order. For these reasons I think, although I have hesitated on one of these points, that the decision is wrong, and that the railway is entitled to this exemption.

DARLING, J.—I am of the same opinion. I think the case is a difficult one upon both points. I do not propose to say anything about the second point, but only upon that which arises upon the construction of the Public Health Act 1875, s. 211. Now as to that, my view is this. The appellants may use the roads in question as all other persons may, and they would not be rateable. They are rateable because, unlike others, they have the exclusive use of some land on which they have been permitted to lay down a railway and the necessary appurtenances of a railway. That railway they alone may use as a railway; all other persons are forbidden so to use it. Therefore all that land for which the appellants are rateable, all that thing, whatever it may be, for which they are rateable, is used only as a railway. Where the posts stand, all other use, except use by the appellants, would be a trespass. It is true that people may cross the line of rail and even with their carts may run along upon it, though not in the same way that the appellants may, because they may not use a flanged wheel to keep the cart upon the rails, but this kind of use by others of a railway happens, although in a less degree, at any level crossing upon such a railway as the North-Western, for instance; and if you were to add all those level crossings together it would be found that they made up a very considerable portion of the whole length of the line. That railway, of course, has this exemption, and yet upon those crossings there is the use by other persons traversing (they are not bound to traverse at a right angle; they may go obliquely) the railway; persons other than the railway company itself. Beyond that I should say, if you are to read this word "only" as meaning only used by the railway company itself, there is another matter which might have some bearing upon it. I believe, as to these railways which undoubtedly have the exemption, many of the old railway Acts—I mean when railways were first started and people did not know what the traffic on a railway would develop into—empowered people to use their own engines on the railway and their own carriages, and it was rather contemplated that people would travel about on the railways just as they now travel about in motor-cars upon the old roads; yet the thing was used only as a railway, although not only by the corporation to whom the line belonged. For these reasons it appears to me that this light railway is entitled to the exemption conferred upon railways by sect. 211 of the Public Health Act 1875.

A. T. LAWRENCE, J.—I am of the same opinion. I think that the exemption in sect. 211 applies. I do not think it is a plain case at all, but, as far as I can see, that is the right way to use these words "used only as a railway constructed under the powers of an Act of Parliament for public conveyance." When you look at the property which is rated in the rate-book, it is described as buildings, plant, &c., lines of rail. Now, are those property which is used only as a railway? It seems to me that they are. It is quite true that persons pass over them in the exercise of their rights of way over the highway, but that does not prevent their being used only in their character of railway by the company. It is that exclusive user which the company possesses that makes that rateable at all. The company have just the same right as every other inhabitant or King's subject has to pass over these rails, but for their exclusive user without paying any rate, but having that exclusive right they have to pay rates. It seems to me impossible to say on the one hand that they have an exclusive right which makes them rateable, and that they are not the only persons who use that rateable hereditament. I think they are the only persons who have the exclusive use of that rateable hereditament. With reference to the next question, as to whether the line was constructed under the powers of an Act of Parliament for public conveyance, it seems to me that the construction contended for by the appellants of sect. 12 of the Light Railways Act 1896 does have the effect of making this order an Act of Parliament and of making this structure a railway made under the powers of an Act of Parliament, and that within the meaning of that section this sect. 211 is a general enactment relating to railways. I am sure if the clause, instead of being an exemption, had been a clause imposing a higher rate upon railways, it would have been impossible to say that it was not a general enactment relating to railways. Therefore, for these reasons, I think the arguments addressed to us by Mr. Ryde were correct.

Appeal allowed.

Solicitors: *Ashurst, Morris, Crisp,* and *Co.*; *Sharpe, Parker,* and *Co.*, for *Greenhalgh*, Town Clerk, Wakefield.

Wednesday, Jan. 17, 1906.

(Before Lord ALVERSTONE, C.J., RIDLEY and DARLING, JJ.)

RUST (app.) *v.* CHURCHWARDENS AND OVERSEERS OF ST. BOTOLPH, BISHOPSGATE (resps.). (*a*)

Summary jurisdiction—Case stated by justices—Notice of appeal—Case delivered to respondent, but no notice of appeal given—Indorsement on case of acceptance of service—Condition precedent—Jurisdiction to hear appeal—Summary Jurisdiction Act 1857 (20 *&* 21 *Vict. c.* 43), *s.* 2.

By sect. 2 *of the Summary Jurisdiction Act* 1857 *either party, if dissatisfied with the determination of the justices, may apply for a case, and such party shall within three days after receiving the case, transmit the same to the court, "first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party."*

An appellant duly delivered a copy of the case to the respondents' solicitors, but he did not with such copy give notice in writing of such appeal, and the respondents' solicitors indorsed upon the case that they accepted service thereof on behalf of the respondents.

Held, that the giving of the notice of appeal was a condition precedent to the right of the appellant to have his appeal heard, and that the court had no jurisdiction to hear the appeal, notwithstanding that the case had been duly delivered to the respondents' solicitors, and that a statement had been indorsed thereon by the respondents' solicitors that they accepted service of the case on behalf of the respondents.

(*a*) Reported by W. W. OAR, Esq., Barrister-at-Law.

Preliminary objection taken to the hearing of an appeal upon a case stated by justices under the Summary Jurisdiction Acts, upon the ground that no notice in writing of such appeal was given by the appellant to the respondents, with a copy of the case stated, as required by sect. 2 of the Summary Jurisdiction Act 1857.

The case was stated by two of the aldermen of the city of London, being two justices of the peace in and for the city of London, sitting at the Guildhall Justice Room and being a court of summary jurisdiction, pursuant to the Summary Jurisdiction Act 1879, upon the questions of law which arose before them, "the appellant having duly entered into a recognisance to prosecute the appeal." The questions of law raised by the case were as to the liability of the appellant to certain poor rates.

The appellant duly served a copy of the case upon the respondents' solicitors, but he did not give any notice in writing of such appeal with the copy of the case or at all. On the 10th Aug. 1905 the respondents' solicitors indorsed on the case a statement that they accepted service of the case on behalf of the respondents. The indorsement was written on the margin of the first page of the case, and was as follows:

We accept service hereof on behalf of the respondents this 10th day of August 1905—Clapham, Fitch, and Co., 15, Devonshire-square, E.C.

The Summary Jurisdiction Act 1857 (20 & 21 Vict. c. 43) provides:

Sect. 2. After the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way, . . . either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices, to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon, of one of the Superior Courts of law, to be named by the party applying; and such party, hereinafter called "the appellant," shall within three days after receiving such case, transmit the same to the court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given hereinafter called the respondent.

Danckwerts, K.C. (*Sylvain Mayer* with him) for the respondents.—There is a preliminary objection to the appeal being heard. Sect. 2 of the Summary Jurisdiction Act 1857 (20 & 21 Vict. c. 43) requires the appellant, within three days after receiving the case, to transmit the same to the court, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceedings." In this case, although the case was delivered to the respondents' solicitors, no notice in writing of such appeal was given. The giving of such notice is a condition precedent to the jurisdiction of the court to hear this appeal, and it is not sufficient merely to deliver a copy of the case to the respondents. In *Woodhouse* v. *Wood* (1 L. T. Rep. 59; 29 L. J. 149, M. C.) it was held that the giving of the notice in writing with a copy of the case to the respondent was a condition precedent to the right of the appellant to have the case heard by the court. Crompton, J. there says (29 L. J. at p. 150, M. C.): "But here it must be considered that the words"—that is, the words of sect. 2—"make the giving notice a condition precedent"; and Blackburn, J. says: "The court has no jurisdiction to hear the appeal, except by this Act of Parliament; and the 2nd section gives that jurisdiction, and uses the words 'first giving notice,' &c. If the legislature intended to say that the giving such notice should be a condition precedent to our hearing the appeal, I see no other words which could have been used. The legislature must be considered to have made it a condition precedent." So, in *Morgan* v. *Edwards* (5 H. & N. 415), it was held that these provisions in sect. 2 were conditions precedent, and that an objection based upon their omission could not be waived. [He was stopped.]

Macmorran, K.C. (*Lincoln Reed* with him) for the appellant.—The objection is a purely technical one. In the present instance a copy of the case was duly delivered by the appellant to the respondents' solicitors, and they indorsed their acceptance of the service of the case on behalf of the respondents on the case itself, and, in addition, it is stated in the beginning of the case, that the justices stated the case "the appellant having duly entered into a recognisance to prosecute the appeal," so that no formality was wanting except the giving of the notice, and in fact the delivery of the copy of the case itself is equivalent to giving notice of the appellant's intention to go on with the appeal. If there is no case which requires the court to hold that there is no jurisdiction here—and it is submitted that in these circumstances there is none—then the court ought not to extend this technical objection beyond what is necessary. While the case of *Morgan* v. *Edwards* (*ubi sup.*) may be accepted, it does not absolutely conclude the present case, because in that case not only was there an omission to serve the notice in writing of the appeal, but there was also an omission to serve a copy of the case itself. There is no case which shows that where the appellant has delivered his case to the respondent and the respondent has accepted service of it, the omission to give the notice is fatal. [Lord Alverstone, C.J.—There is nothing to show that when the appellant delivered his case there was an intention on his part to go on with the appeal, and the statute says expressly that when he delivers his case he must give notice in writing of his intention to appeal. If anything could be shown which amounted to a statement that the appellant was going on with the appeal, then the court might be inclined to help the appellant, but I see nothing to that effect.] The delivery of the case and the indorsement thereon of the acceptance of service is sufficient to entitle the appellant to have the case heard. [*Danckwerts*, K.C.—The case decided by the Court of Queen's Bench in Ireland in 1871, of *Little* v. *Donnelly* (Ir. Rep. 5 C. L. 1), is exactly in point, as in that case a copy of the case was served upon the respondent, but there was no written notice of appeal, and the court held that the omission to give the notice of appeal was fatal, although the case had been delivered.] [Ridley, J.—There is also the case of *Guardians of South Dublin Union* v. *Jones* (12 L Rep. Ir. 358), where it was held that the giving of the notice to the respondent was a condition precedent to the jurisdiction to hear the appeal.] None of the cases is in point except the case of

Little v. *Donnelly* (*ubi sup.*), which is in point, and if the court follow that case, then the objection must prevail. The necessity of giving notice of appeal is for the benefit of the person to whom it is given, and the general rule is that such a notice may be waived. The court can say, first, that the notice of appeal here was sufficient; secondly, that even if it is not sufficient, the objection can, if required, be waived; and, thirdly, that in the event of the court dismissing the appeal upon that ground it ought to be without costs, as was done by Lord Russell, C.J. and Wright, J. in *Hill* v. *Wright* (60 J. P. 312), where Lord Russell, C.J. said that it was with reluctance that he felt compelled to give effect to the objection.

Danckwerts. K.C. in reply.—The decision in *Woodhouse* v. *Wood* (*ubi sup.*) is absolutely clear that the notice must be given, and that the omission to give it is fatal; and the Irish case of *Little* v. *Donnelly* (*ubi sup.*) is conclusive of the present case. The two Irish cases were argued altogether on the absence of the notice. As to the question of waiver, all the cases show that these are statutory conditions precedent and cannot be waived. Then as to the costs, the court has power to give costs on dismissing the appeal upon this ground, although the ground is that the court has no jurisdiction to hear the appeal: (*Great Northern and London and North-Western Joint Committee* v. *Inett*, 2 Q. B. Div. 284). The respondents are therefore entitled to their costs.

Lord ALVERSTONE, C.J.—I have the same feeling as the late Lord Chief Justice, Lord Russell, C.J. expressed in the case which has been referred to of *Hill* v. *Wright* (*ubi sup.*), and I give effect to this preliminary objection with reluctance; but I consider the practice is too rootedly fixed to enable us to overrule it. It is a statutory condition that when a case is stated under sect. 2 of the Summary Jurisdiction Act of 1857 there shall be given a notice in writing of such appeal, with a copy of the case so stated. Effect has been given to that condition in more than one case, in which the absence of the "notice in writing" has been referred to as being the ground on which the appeal could not be entertained. I do not take the Irish case of *Little* v. *Donnelly* (*ubi sup.*), which has been referred to in support of this objection as an authority binding upon us, but I take it only as a case which really points out what I think the other cases on this subject indicate—namely, that there are two statutory conditions prescribed in sect. 2 as conditions to be performed by persons appealing under that section, and it has been thought in the interests of justice and the uniformity of business that persons must obey those conditions before they are entitled to have their appeal heard. Counsel for the appellant in this case, in opposing this preliminary objection, naturally and ingeniously says that we ought to read what was indorsed on this case as amounting to a notice of appeal. I cannot read it so. The case is stated under the terms of the recognisance which we know must have been given either when the application was made or when the case was taken out. Therefore, there is nothing on the face of the case to show that the appellant is going on with it at all. If it could be said that the mere acceptance of the case by the other party was a waiver different conditions would have arisen. In my opinion, without frittering down the practice, which, however strong it may seem, is a statutory practice which has prevailed for thirty or forty years, we cannot entertain this appeal. I think, however, in giving effect to this objection we should give no costs.

RIDLEY, J.—I agree. I think we have no option in the matter.

DARLING, J.—I agree.

Preliminary objection upheld, and appeal dismissed upon that ground, but without costs. (*a*)

Solicitor for the appellant, *T. Lamartine Yates.*

Solicitors for the respondents, *Clapham, Fitch, and Co.*

Wednesday, Feb. 14, 1906.

(Before Lord ALVERSTONE, C.J., RIDLEY and DARLING, JJ.)

TOZELAND *v.* GUARDIANS OF WEST HAM UNION. (*b*)

Poor law—Pauper in workhouse—Pauper ordered to do certain work—Injury to pauper through negligence of servant of guardians—Right of pauper to sue guardians—Common employment.

A pauper inmate of a workhouse was told by the labour master to assist in certain work that was being done for the extension of the electric lighting from one building of the workhouse to another. While engaged on a scaffold erected under the supervision of the engineer for affixing the electric wires to a wall the scaffold gave way, and the pauper fell and was injured. The scaffold was improperly and negligently constructed, and it was found as a fact that it was negligence to put the pauper to work on it. The engineer was in the permanent employment of the guardians, and was responsible for the construction of the scaffold.

In an action by the pauper against the guardians, judgment was given against the pauper on the ground that the doctrine of common employment applied and prevented the pauper from recovering.

Held, that the doctrine of common employment did not apply, as the pauper, when ordered to do the work had not the option of refusing to do it, but was bound to do it, and there was no such consent on his part to do the work as would make that doctrine applicable; and, further, that the work was not part of the administrative duties of the guardians, but was work for the negligent carrying out of which they were liable; and that therefore the guardians were liable to the pauper for the negligence of their servant.

APPEAL by the plaintiff from Bow County Court.

(*a*) The decision in this case was followed on the 4th April by the Divisional Court (Lord Alverstone, C.J., Darling and Bray, JJ.) in the case of *Eustace* v. *Cook and Co. Limited*, where the same objection was taken and upheld, but costs were allowed.

(*b*) Reported by W. W. ORR, Esq., Barrister-at-Law.

The action was brought by the plaintiff, a pauper in the West Ham Union, against the guardians of the West Ham Union to recover 100*l.* by way of damages for personal injuries sustained by him whilst at work for the guardians at their infirmary, on the 28th Sept. 1904, in consequence of his being put to work on a defective and dangerous scaffolding.

The action was brought not under the Employers' Liability Act, but at common law.

The facts were as follows:—

The plaintiff was a man about fifty-seven years of age; he had been for nearly thirty years a cigar-box maker. He was compelled to enter the West Ham Union on the 19th July 1904 owing to want of employment in his trade. He was first put to breaking stones; then he was sent to the defendants' infirmary near Leytonstone, and on the 9th Sept. he was put to working in the garden.

On the day of the accident, the 28th Sept., the assistant electrical engineer was engaged in extending the electric installation from the lecture-room of the infirmary to another room, and for this purpose it was necessary to carry electric wires from the lecture-room across a wall outside at a height of about 10ft. from the ground for a length of about 15ft. These wires were encased in a ¾in. lead pipe, which was to be affixed to the wall with hooks, and for the purpose of fixing the pipe to the wall at the above height, a scaffold was erected as follows: On the left-hand side there was a fifteen-rung ladder leaning against an iron girder, and on the right-hand side a step-ladder leaning against the wall or window ledge, and a scaffold board, some 10ft. long and 9in. wide, was laid from the top step of the step-ladder through a rung of the ladder opposite. The ladder and step-ladder were opposite to each other, and were not tied in any way. The scaffold board was about 6ft. from the ground.

The assistant electrical engineer to the infirmary, named Byers, asked the labour master for an assistant labourer to help him on the scaffold in putting up and fastening the lead pipe against the wall, and the plaintiff, who was then an inmate of the union, was told by the labour master to assist him, and he did so. The plaintiff and Byers were standing on the plank with their faces to the wall; they were engaged in driving a pipe hook into the wall, and the plaintiff was holding the pipe against the wall whilst the other was driving the hook in. Whilst they were so engaged the scaffold collapsed outwards from the wall and both fell to the ground, and the plaintiff received injuries so severe that his right leg had afterwards to be amputated. The plaintiff had had no experience as a builder, and he was not paid for the work he was doing.

The assistant engineer Byers said in his evidence that the work was carried out under the orders of the chief engineer, who came and saw the staging up, and that he (Byers) was responsible for the staging. He also said that if the plaintiff were told by a superior to do the work and he did not do it he would report him.

The chief electrical engineer, named Baird, admitted in cross-examination that he was the person responsible in the case, and he said that if a man pushed against the wall there was nothing to prevent the staging coming down.

Both the chief engineer and the assistant engineer were in the permanent employment of the defendants.

The learned County Court judge, in a considered judgment delivered on the 25th May 1905, said that the case raised a question which apparently had not been decided, as to the exact rights and position of a pauper at the time he is being fed and maintained by the guardians; that a pauper must have some civil rights; that he could not put the case higher than that of master and servant, and he therefore assumed that the defendants were liable to the plaintiff in the same way that any ordinary master would be liable to his servant. He found as a fact that it was negligence to put the plaintiff to work on the platform on which he was put to work; that it was an insecure platform upon which to ask a man accustomed to platforms (such as an experienced painter or house decorator) to work, but to put a man on it who had no experience of such work was most improper.

Mr. Baird saw him on the platform and accepted the responsibility for it; therefore he found that the negligence was his negligence.

But even upon the above assumption and the above findings the plaintiff must get over the doctrine of common employment.

Counsel contended that Mr. Baird was not in the position of a fellow-servant with the plaintiff, but the cases were too strong against him upon that point.

The County Court judge therefore gave judgment for the defendants without costs; and he assessed the damages at 100*l.* if it should be held that the plaintiff was entitled to recover.

The plaintiff appealed upon the ground that the learned judge was wrong in law in ruling that the plaintiff was in common employment with Mr. Baird, the engineer.

Robert Wallace, K.C. (*Abinger* and *A. Campbell* with him) for the plaintiff.—The only ground on which the County Court judge found against the plaintiff was on the doctrine of common employment, that he was in common employment with the official whose negligence caused the accident. For the doctrine of common employment to apply, a person must voluntarily enter into the contract to do the particular work. It cannot be said that the plaintiff on being told by the labour master to do this particular work was doing the work voluntarily. Upon being told to do this work he was bound to do it, and was liable to punishment and imprisonment if he refused to do it. By sect. 5 of 55 Geo. 3, c. 137 (the Poor Relief Act 1815), if a pauper refused to do the work which he was told to do, he was liable to imprisonment with hard labour for a term not exceeding twenty-one days. That was amended by sect. 58 of 7 & 8 Vict. c. 101 (the Poor Law Amendment Act 1844), which extended the imprisonment to a term not exceeding forty-two days. By sect. 7 (4) of 34 & 35 Vict. c. 108 (the Pauper Inmates Discharge and Regulation Act 1871), "any pauper who refuses or neglects, whilst an inmate of any casual ward, workhouse, or asylum, to do the work or observe the regulations prescribed, shall be deemed an idle and disorderly person within the meaning of sect. 3 of 5 Geo. 4, c. 83"—the Vagrancy Act 1824, under which section of the Vagrancy Act

he would be liable to one month's imprisonment with hard labour. Therefore if the plaintiff had refused to obey the order of the labour master when he was told to do this work, he would have been liable to imprisonment with hard labour for one month. He was not a volunteer, and he was not in the position of a servant voluntarily contracting with a master to do certain work and run all the risks incident to that work. The basis of the doctrine of common employment is that the servant is a free and voluntary agent, and that he is free to enter into the contract to do the work or to refuse to enter into that contract. The earliest case in which the general principle was discussed was *Priestley* v. *Fowler* (3 M. & W. 1), and then in *Smith* v. *Steele* (32 L. T. Rep. 195; L. Rep. 10 Q. B. 125) it was held that an action would lie by a pilot against shipowners (his employers) for injuries caused to him whilst acting as pilot on board their vessel, by the negligence of their servants, and upon the ground that there was no implied contract that the pilot should take upon himself the risk of injury from fellow-servants, inasmuch as he was not a free agent to enter into such a contract. By the Merchant Shipping Act the shipowners were bound under a penalty to employ a pilot, and the pilot was subject to a penalty if he refused to take charge of the ship. The considered judgment of the court was delivered by Blackburn, J., who said, speaking of the pilot: "He cannot, therefore, make any special bargain to receive larger pay in consideration of his taking this risk upon him. An ordinary servant has (at least theoretically), as Lord Cairns points out, the power of choosing whether he will enter into the employment of a master. . . . The pilot has no such choice; he must conduct the ship on the terms fixed by the statutes which regulate pilotage." The language of Lord Cairns is taken from his judgment in *Wilson* v. *Merry* (19 L. T. Rep. 30; L. Rep. 1 H. L. (Sc.) 326). The reasoning of the judgment in *Smith* v. *Steele* (*ubi sup.*) applies absolutely to this case. The compulsion is the basis of the whole principle, and is inconsistent with free contract. All the cases where the doctrine of common employment has been applied are cases of bargain between master and servant, and they are all based on the ground that the servant was free to make a bargain to do the work, and that he has made a bargain between himself and his master. In *Smith* v. *Steele* (*ubi sup.*) the pilot could not make a bargain, and therefore the court held that the principle did not apply.

Avory, K.C. (*Stephen Lynch* with him) for the defendants.—The County Court judge was right in the result, and he was right in putting the case in the way most favourable to the plaintiff—namely, that he was a servant; because if he was not a servant he would be a mere volunteer, and if assisting in the work as a mere volunteer he would have no right of action, an instance of which class of cases is *Potter* v. *Faulkner* (5 L. T. Rep. 455; 1 B. & S. 800). If the plaintiff is not a volunteer and not a servant, then it is difficult to see what position he occupies that would give him a right of action, or put him in a better position than if he were a servant or a volunteer. If he is a volunteer he cannot sustain the action; but admitting that for this purpose he is a servant, he clearly comes within the doctrine of common employment. The case of *Smith* v. *Steele* (*ubi sup.*), in which the pilot was held to be capable of maintaining the action, is distinguishable from the present case. In that case the pilot had no choice as to whether he should enter into the service or not, because he was bound by statute to take charge of the vessel, and was liable to a penalty if he refused to do so; and at the end of his judgment Blackburn, J. puts it on the ground that "an ordinary servant has, as Lord Cairns points out, the power of choosing whether he will enter into the employment of a master who does not agree to act personally in the management of his business." The pilot recovered in that case because he had no power of choosing. In the present case, although, no doubt, the plaintiff was bound while in the workhouse to do the work he was ordered to do, yet he was not bound to go into the workhouse, and he need not have gone into the workhouse. His going into the workhouse was a voluntary act on his part, as no pauper is liable to a penalty for not going into the workhouse. As soon as he goes into the workhouse he puts himself voluntarily into the position of having voluntarily entered into the employment and undertaken the risk incident to the employment. That distinguishes his case from the case of the pilot in *Smith* v. *Steele* (*ubi sup.*), as the pilot was bound to place himself in the position of undertaking the work. If the pauper in this case had been compelled under a penalty to go into the workhouse in the first instance, then the cases would have been similar. The mere fact that a person, who has voluntarily entered into an employment, or who has—as the plaintiff in this case—voluntarily placed himself in the same position, has been ordered to do a particular class of work which he is bound to do is no answer to the doctrine of common employment applying. In the next place, the work that was being done in this case, the fitting up of electric wires for lighting, was part of the administrative duties of the guardians, and for any negligent omission in carrying out those duties the guardians are not liable:

Brennan v. *Guardians of Limerick Union*, 2 L. Rep. Ir. 42.

The guardians are a public body, carrying out public duties, and it would be against public policy to render them liable in such an action as the present. It is not disputed that the guardians may be liable to a person outside the workhouse if they have committed a wrongful act, as in *Levingston* v. *Guardians of Lurgan Union* (Ir. Rep. 2 C. L. 202), where they were held liable for injury caused to the plaintiff by making a sewer and discharging the sewage into a stream, of the water of which he had the use. It is expressly said by the court in *Brennan's* case (*ubi sup.*) that their decision did not conflict with the decision in *Levingston's* case, as in that case the action was for a wrong committed by the guardians. *Brennan's* case (*ubi sup.*), though not conclusive, is in point, and it shows that the pauper cannot sue for mere negligence. The plaintiff therefore shows no cause of action upon any ground.

Robert Wallace, K.C., in reply, was stopped as to the question of common employment. *Brennan's* case (*ubi sup.*) is based entirely on the fact that the guardians are not liable for a negligent

omission in carrying out their administrative duties in the administration of the poor law; but it has never been suggested that for wrongful acts of commission, such as the present, the guardians are not liable to persons outside the workhouse. The case of *Levingston* v. *Guardians of Lurgan Union* (*ubi sup.*) shows that; and if, in respect of negligent acts done outside their ministerial acts, they are liable to persons outside the workhouse, there is no reason why they should not be liable to a pauper in the workhouse, and the judgment of Lord Campbell in *Southampton and Itchin Bridge Company* v. *Southampton Local Board* (8 E. & B. 801, at pp. 812-13) shows that an action for negligence may be maintained against them.

Lord ALVERSTONE, C.J.—Upon the main question which the learned County Court judge decided, I have not felt any doubt. He held that the doctrine of common employment was an answer to the plaintiff's claim. Putting it shortly, he said: "I have assumed that the plaintiff was a servant of the defendants, giving his services for his board and lodging." Then he proceeded to say that this was the basis of a contract by a servant who gave his services in exchange for board and lodging, and that the doctrine of common employment was therefore an answer. With great respect to the learned judge, I cannot take that view. It seems to me that, if that was the only question in the case, he overlooked the broad consideration which lies at the root of the doctrine of common employment—namely, that the servant has the option of entering into the contract of employment or refusing the employment. In this case it is conceded as common ground that what the plaintiff was doing at the time and place in question was labour which he was compelled to do by virtue of the Acts relating to workhouses, and if he had refused to do this work he would have been subject to penalties and punishments. I need not refer to any of the three Acts which have been cited, beyond mentioning them—namely, 55 Geo 3, c. 137, s. 5; 7 & 8 Vict. c. 101, s. 58; and 34 & 35 Vict. c. 108, s. 7—because they are all of them enactments which subject a pauper to penalties or punishments if he does not do the work which he is ordered to do. Now, quite feeling that we ought to apply the principle of common employment as long as it remains law, in all cases where it has not been taken away by some statutory enactment and where the facts justify its application, it is essential to see what was the basis of the doctrine of common employment. I shall have to call attention to some passages in the cases in which it has been most discussed. In *Priestley* v. *Fowler* (3 M. & W., at the end of p. 6) Lord Abinger, C.B., giving the judgment of the court, said: "The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master." Alderson, B., in *Hutchinson* v. *York, Newcastle, and Berwick Railway Company*, in delivering the considered judgment of the court, said (5 Ex., at p. 352): "The principle is that a servant, when he engages to serve a master, undertakes as between him and his master to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant." In *Wilson* v. *Merry* (19 L. T. Rep. 30, at p. 33; L. Rep. 1 H. L. (Sc.) 326, at p. 332), decided by the House of Lords, Lord Cairns, L.C. said: "At all events, a servant may choose for himself between serving a master who does and a master who does not attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so." Therefore all the leading cases which have dealt with this doctrine base it upon what I may call the consent of the servant to enter into the particular employment. I quite agree with counsel for the defendants that it would not be at all inconsistent with that view if it were established that a servant consented to enter into employment which may include all sorts of different jobs, what he called "miscellaneous employment." That, I do not deny, might be an instance in which the doctrine of common employment would apply. But I think that there must be something in the nature of voluntrary contract, or voluntary entry by the servant into the bargain, knowing that he will have to run certain risks, and that it is not a case of what is, in effect, performing work by compulsion of law. The case of *Smith* v. *Steele* (*ubi sup.*) is an illustration, and I agree that the passages which have been cited for the plaintiff re-enunciate the principle of the power of choosing the employment as being the basis of the doctrine. But it must not be forgotten, with regard to the case of *Smith* v. *Steele* (*ubi sup.*), that, in the case of the pilot, the particular pilot in question was bound to go and perform the services required of him. That was not a case of what I may call general compulsion, but it was a case of a particular compulsion, the pilot, whose turn it was, being bound to go and perform the services for the ship. Therefore, while it does illustrate, I do not think it does more than illustrate the plaintiff's contention. Counsel for the defendants, when pressed with that difficulty, met it boldly by saying that the plaintiff went willingly to do the work; that he need not have gone to the workhouse unless he had liked; and that he went on the terms that he must give his labour in exchange for sustenance. The language of one of the Acts which have been referred to shows some foundation for the doctrine that the principle upon which the Act is founded was that the pauper, while in the workhouse, did work in exchange for the sustenance which he got. There was a section read in which words are used which give some colour to that contention. But I cannot go as far as assenting to that view. In the first place, the pauper does not know when he goes into the workhouse what work he may have to do. He may have work involving one risk, or work involving another risk. In my opinion, it would be an extension of the doctrine of common employment to say that a man who goes into a workhouse because he is starving is undertaking to enter into a contract to do whatever work he may be called upon to do, upon the basis of being a servant, who could refuse to do the work. The option or the choice of the servant must, in my opinion, be an option with

reference to the work, and I cannot think that the compulsion of great hunger which drives him into the workhouse can be so disregarded that it can be said that a man goes into the workhouse voluntarily in the same way as a servant does who chooses his employment. Therefore on the main question I have not had much difficulty. But, to my mind, the other question raised for the defendants presents much more serious difficulties, though I think it is probable that I feel those difficulties more than my learned brothers do. But I have felt and still feel some difficulty, though I think that the balance of reasoning leads me to the conclusion that the guardians are responsible. It is difficult, when we are dealing with public bodies who work by agents and who appoint officers to do certain things, to apply to them the ordinary doctrine of principal and agent. There are certain cases in which it clearly ought to be applied, and there are certain cases in which, as it seems to me, it clearly ought not to be applied. The real difficulty is with regard to the question within which class does this case fall. The case in which it ought to be applied is a case of which *Levingston* v. *Guardians of Lurgan Union* (Ir. Rep. 2 C. L. 202), where the guardians were making a sewer, is an illustration; and there are cases to be found in the English reports, such as *Southampton and Itchin Bridge Company* v. *Southampton Local Board* (8 E. & B. 801), which illustrate the same principle. It has decided that if a public body, such as guardians, boards of health, and so on, are themselves doing work and are doing that work in connection with their duties, and doing it, of course, by agents, they are liable for the ordinary consequences of negligence. *Levingston* v. *Guardians of Lurgan Union* (*ubi sup.*) is an illustration of that class of cases. On the other hand, there are to be found cases in our books which concur with the ruling in *Brennan* v. *Guardians of Limerick Union* (2 L. Rep. Ir. 42), namely, that if the act complained of arises from the neglect by a subordinate of instructions given to him—assuming that a proper person has been appointed—an action will not or might not lie against public bodies in the position of guardians in respect of that breach of duty. If this was to be regarded as a mere breach by the labour master of his duties as labour master, or of the instructions of the guardians to him as labour master, I should have very great doubt indeed as to whether or not this action could be maintained. The difficulty to my mind is to see within which class this case falls. I understand the facts to be these: The guardians had decided to extend the electric lighting in the workhouse, and by their servants they were doing the work. They had no contractor or sub-contractor, but were doing the work themselves. As a part of the work there was a platform put up, and pipes had to be held up against the wall. Then by the direction of the labour master the plaintiff was told to go and assist in that work; therefore there was no improper act or breach of rule on the part of the labour master. The plaintiff need not have been sent for the purpose of doing the work, except for the purpose of finding him work as a pauper. Then the accident arose from the negligence of the other *employé*, who had so improperly constructed the scaffolding that it was negligent, in the ordinary sense of the word, to allow a man to go upon it. That seems to me to fall within the class of cases in which the guardians, having work to do as guardians, are doing it in such a way as that under ordinary circumstances persons to whom they owe any duty would have a right of action against them. In other words, if I am right in the view I have taken on the first part of the case, unless counsel for the defendants can succeed on the doctrine of common employment or some kindred doctrine, the action can be maintained. I therefore, but not without some considerable hesitation, come to the conclusion that this action lies against the guardians. The only other thing I wish to say in reference to the argument for the defendants is that I must not be thought to agree to the argument that the distinction between a servant and a volunteer is an exhaustive definition or distinction. It seems to me that there may be cases of servants who are entitled to recover notwithstanding that the doctrine of common employment applies to some other persons, and there are cases of volunteers who may be entitled to recover even although certain other volunteers, as in the case cited, cannot recover on the ground that they simply interfere in the particular job in which they have no interest, and over which they have no control. On the whole, I think that this appeal must be allowed, and that judgment must be entered for the plaintiff for the sum of 100*l*.

RIDLEY, J.—I agree with my Lord on all points. In my opinion, this is not a case to which the doctrine of common employment applies. It is a case in which the plaintiff was subject to orders. He was ordered to do work, in the course of doing which he met with the accident complained of. In *Priestley* v. *Fowler* (*ubi sup.*), which is the beginning of the cases on this subject, it is noticeable that there are phrases used in the judgment which seem to lay great stress on the question of whether or not the servant has undertaken of his own free will the risks of the employment. I think that the passage read by the Lord Chief Justice from the judgment of Lord Abinger in that case (3 M. & W., at the end of p. 6) is the root of the principle, following which the courts have held that a servant takes the risks upon himself of the negligence of his fellow-servants in the course of the employment, and there are a good many other cases on the same subject. One is that of *Hutchinson* v. *York, Newcastle, and Berwick Railway Company* (*ubi sup.*), which has been already referred to. From the passage in the judgment of Alderson, B. in that case (5 Ex., at p. 352), which has been read by the Lord Chief Justice, it must, I think, be understood that the case with which the court was there dealing was that of a servant who could engage to serve a master or who could refuse to do so. When we come to consider the matter, that appears to be very good and sound reasoning. A man with his eyes open, and knowing probably as well as the master himself what are the risks attendant on the employment which he is undertaking, deliberately says that he will undertake the employment. In such a case the courts have held that the servant takes upon himself the risk of any negligence on the part of a fellow-servant. But putting the case in the other way, as I think it has been rightly put, here the pauper had no option. He could not refuse

to obey the order of the labour master of the workhouse, who ordered him to take a part in this work. It was not open to the pauper to say that he knew what the risks of the employment were, and that he declined to take those risks upon himself. If that is so, and if it was not open to him to refuse, then it seems to me that the argument upon which reliance is placed for the defendants falls to the ground. He could not have refused the risks which were placed before him; he had not the option. In my opinion, therefore, there is very little doubt that in a case like the present the doctrine of common employment does not apply. Then counsel for the defendants met that point by saying that the plaintiff was a volunteer. In one sense, indeed, he was a volunteer, and that is in the sense that it was by his own act that he went into the workhouse; but he was not a volunteer to work, and I think that the consent, which is a necessary part of the doctrine of common employment in order that it should apply, must be a consent to do that work. It must be a consent to the employment, and it does not seem to me to be logical to say that a sufficient consent is found, to enable us to apply that doctrine, merely from the fact that at an antecedent period, by an act for which the plaintiff was responsible, he found himself landed in the workhouse. That does not seem to me to be good reasoning, and, although I admire the ingenuity of the defendants' argument in that respect, I cannot accept the application of it to this case. Then there is a third point on which I also agree with the Lord Chief Justice. Counsel for the defendants contended that it was not right, and that it was against public policy, that the guardians of the poor should be liable in an action like the present for negligence. There are, no doubt, certain limits which must be observed as to the liability of all public officers, guardians, local boards, and so forth, who have a public duty intrusted to them for performance. But I think that a general rule may be found to be laid down in the cases, of which one of the most important is the case of *Southampton and Itchin Bridge Company* v. *Southampton Local Board* (*ubi sup.*), with regard to the question as to where such public bodies are liable for negligence. The case of *Brennan* v. *Guardians of Limerick Union* (*ubi sup.*), which was cited by counsel for the defendants in support of his contention, does not absolutely apply, but it goes in the direction of the proposition for which he was contending, although he fairly conceded that it was not conclusive on the point. If I could see that in the reasoning of the court and in the common sense of the matter that decision ought to be extended to a case like the present, and that the court in their decision intended that it should be so extended, then I should be very willing to follow it; but it appears to me to be otherwise. In *Brennan* v. *Guardians of Limerick Union* (*ubi sup.*) the action was brought against the guardians in respect of negligence in attendance on a patient in a fever hospital, and the court said that the guardians of the union were not liable. What was the reasoning of the court in saying that? In the first place, the court there said: "The plaintiff relied principally on *Levingston* v. *Guardians of Lurgan Union* (*ubi sup.*), but our decision does not conflict with that authority; if it did, we should give way and follow it. The action there was for a wrong committed by the guardians in making a sewer from the workhouse premises into the plaintiff's stream and polluting it." That seems to me to be more in the nature of a claim for a nuisance than of one for negligence, but in those circumstances it was held that the guardians were liable for the wrong committed, and that the action lay against them for such an act, although it was done in their corporate capacity. But when the case had to be decided, as in *Brennan* v. *Guardians of Limerick Union* (*ubi sup.*), as to the liability of the guardians for not providing proper attendance for the patient, then the rule was laid down by Fitzgerald, J., who delivered the considered judgment of the court in the following terms (2 L. Rep. Ir., at p. 48): "The guardians are but a subordinate administrative body, acting as unpaid public trustees in taking order for the relief of the destitute poor. I incline to the opinion that an action does not lie against them in their corporate capacity for a supposed neglect of their administrative duty in not providing adequate relief." If this had been a case in which the guardians had directly been guilty of a breach of duty in not providing adequate relief of the poor, we should have had an authority in that case which we most probably should have had to follow. But this case seems to me to be much more akin to *Levingston* v. *Guardians of Lurgan Union* (*ubi sup.*), with which the decision in the other case does not conflict, than it is to the case of *Brennan* v. *Guardians of Limerick Union* (*ubi sup.*). This is a case of negligence, although not one of nuisance, and it is a case in which there seems to be no reason of public policy why the guardians should not be held liable for negligence, and in fact there is very considerable reason why they should be held liable. Finding as I do that this case is much more akin to *Levingston* v. *Guardians of Lurgan Union* than it is to the case of *Brennan* v. *Guardians of Limerick Union*, I must agree on that point also with the judgment already given. I think, therefore, that the judgment must be for the appellant.

DARLING, J.—I am of the same opinion. To deal first with the question whether guardians such as these guardians of the poor can be made liable for negligence, I think there is very considerable difficulty. It is because I am somewhat pressed by that difficulty that I think it necessary to say a few words. I feel all the difficulty that my Lord himself felt upon the question, and I come to the same conclusion to which he has come. It appears to me that the rule is to be ascertained by looking at these words of the judgment of the court in *Levingston* v. *Guardians of Lurgan Union* (*ubi sup.*), where Whiteside, C.J. says (Ir. Rep. 2 C. L., at p. 219): "Upon the ultimate decisions in these two cases, *Mersey Docks Trustees* v. *Gibbs* (14 L. T. Rep. 677; L. Rep. 1 H. L. 93) and *Coe* v. *Wise* (14 L. T. Rep. 891; L. Rep. 1 Q. B. 711), it must, I think, be now taken as established, first, that unless the provisions of the Legislature, by express enactment or necessary implication, otherwise determine, an action for such a wrong as that which is the subject of the present suit lies against a corporation or public trustees acting gratuitously for public purposes; secondly, that they are not exempted by the Legislature from this liability, because the legislative provi-

sions which regulate them do not provide funds out of which the damages recovered in an action against them can be paid." That, it is true, was a case where the guardians had made a sewer which amounted to an injury to the plaintiff in that action. Then came the case of *Brennan* v. *Guardians of Limerick Union* (*ubi sup.*), in which the judgment of the court was delivered by Fitzgerald, J. He went on to say (2 L. Rep. Ir., at p. 48): "The reasons I have expressed are sufficient to sustain our judgment, and are concurred in by my brethren. But I desire further to state my own impression that on other and wider grounds the action is not maintainable." So that apparently the grounds afterwards added by Fitzgerald, J. did not altogether commend themselves to the other members of the court, and it is those grounds which he mentions—as I particularly wish to point out—which form the strongest part of the argument against the present plaintiff upon this point. Fitzgerald, J. goes on to give examples: "If the present action can be maintained, why should not an action lie against the guardians at suit of each pauper for every supposed neglect of administrative duty causing to the individual any real or fancied grievance—for example, for supplying food insufficient in quantity or inferior in quality, or insufficient or inferior clothing or bedding, defective sanitary arrangements, or any other of the various neglects or omissions by which inmates of a workhouse may be prejudicially affected? If the real or supposed omissions of guardians are to be thus redressed it would be difficult, if not impracticable, to administer the laws for relief of the destitute poor." It is to be noticed there that Fitzgerald, J., in all the instances that he puts, does not put one instance of anything but omission—omission to perform certain statutory duties. In the part of his judgment in which the other judges of the court agree, he says: "We are of opinion that the plaint is bad in substance, in not stating any duty which the statute law imposed on the defendants; and, on the contrary, alleging a duty which the law did not impose on them, and resting the supposed right of action on a breach of that duty." He goes on to state: "Their duty was to take order for the relief of the poor according to the orders, general or special, of the Poor Law Commissioners." Then the judgment distinctly says that the action might as properly be brought against the commissioners as against the guardians. Looking at the case now before us, can anyone say that this is an action which might as properly be brought against the commissioners as against the guardians? It does not seem to me to be possible to say that. This is not a complaint that the doing of a thing imposed upon the guardians by statute or by the Poor Law Commissioners at all led to this injury. What they were doing was putting electric light in the workhouse; they were at liberty to employ a contractor to do the whole work, but, instead of doing that, they used the inmates for the purpose. I think it was quite proper that they should do so. They have the power to order the inmates to do certain forms of labour which they (the guardians) may select. They ordered this inmate to assist a person who was engaged in putting in the electric light. In the doing of that work that other person who was being assisted by the pauper (the plaintiff) did something which the County Court judge finds was negligent, and that that negligence caused the injury to the pauper. It seems to me that that case is quite distinguishable from *Brennan's* case (*ubi sup.*), and is much nearer to the *Lurgan* case (*ubi sup.*), where it was held that an action would lie. Although with very considerable hesitation and doubt, which I do not say have been altogether removed, I think that this action lies against the guardians. Then comes the question upon which the learned County Court judge gave judgment for the defendants. He held that this pauper was a fellow-workman of the man who was negligent, and was therefore subject to the doctrine of common employment and was disabled from bringing this action. In my opinion, the learned judge was not right in that, and I think so for a reason somewhat different from what the other members of the court have given; at all events for a reason which I shall express differently. In my view, the doctrine of common employment is based on the question of a contract between the servant and the employer. The servant was held to have been in a position to choose whether he would run the risk or not, and it was said, and this was the foundation of the argument, that the doctrine *Volenti non fit injuria* applies. But a pauper cannot choose. He cannot choose what sort of labour the guardians may put him to do. At the most, when he is ordered by them to do some particular task, he can say "my poverty, but not my will, consents." And in that way the doctrine *Volenti non fit injuria* cannot possibly be applied to a pauper engaged upon a workhouse task. It appears to me, therefore, that the very foundation of the doctrine of common employment fails. In my view, there is no common employment, and there is no contract between him and the guardians at all. If that is so, there is only one way of getting out of the difficulty. Counsel for the defendants said that he entered the workhouse willingly. That amounts almost to the setting up of the doctrine of the *contrat social* which was often explained by Rousseau and his contemporaries. That was a doctrine that all the rights, all the obligations, and all the disabilities of all the inhabitants of the world were regulated by an implied contract, and that all of them were parties. If that were so, no doubt there would be a contract between the pauper and the guardians, and between this pauper and all the other paupers and the guardians. That doctrine, however, has now for a very long time been discredited, and nobody believes that that is the basis of society. In my opinion, in the absence of a real and actual contract between these guardians and this pauper, which contract, as it seems to me, did not exist in this case, the doctrine of common employment cannot be said to have any kind of application whatever. Therefore I think that this appeal must be allowed.

Appeal allowed. Judgment for the appellant for 100*l.*, *with costs. Leave to appeal.*

Solicitors for the plaintiff, *Philbrick* and *Co.*, for *Haynes, Robinson*, and *Co*, Bow.

Solicitors for the defendants, *Hillearys.*

Monday, April 2, 1906.

(Before Lord ALVERSTONE, C.J., DARLING and BRAY, JJ.)

GIEBLER (app.) *v.* MANNING (resp.). (*a*)

Public health (London)—Unsound meat, prosecution for having on premises—Right of any person to prosecute—Information by sanitary inspector "on behalf of" sanitary authority—No previous authority given—Public Health (London) Act 1891 (54 & 55 *Vict. c.* 76), *ss.* 47, *sub.-s.* 2, 107, 123.

A private individual can lay an information under sect. 47, *sub-s.* 2, *of the Public Health (London) Act* 1891 *against a person for having on his premises unsound meat intended for the food of man. If the information is laid by a sanitary inspector and purports to be laid by him "on behalf of" the borough council, the information is properly laid by the inspector, although in fact he had no authority from the borough council for taking the proceedings, as in such case the words "on behalf of" the borough council may, on the authority of* Allman *v.* Hardcastle (89 *L. T. Rep.* 553), *be rejected as surplusage.*

CASE stated on an information preferred by the respondent, a sanitary inspector appointed by the Fulham Borough Council, under the Public Health (London) Act 1891, s. 47, alleging that on the 23rd March 1905 the appellant did deposit for the purpose of sale or of preparation for sale, or had in his possession or on his premises for that purpose, at No. 596, King's-road, Fulham, certain articles of food intended for the food of man—to wit, 5lb. of meat, which was on the 23rd March 1905 lawfully seized by the respondent, the meat appearing to him at the time of the seizure to be unsound, unwholesome, and unfit for the food of man, and that the meat was in due course of law adjudged by the magistrate to be unsound, unwholesome, and unfit for the food of man, and ordered by him to be destroyed.

It appeared on the face of the summons, and the facts were, that the information was laid by, and the summons issued to, the respondent expressly on behalf of the Fulham Borough Council.

The facts proved or admitted before the magistrate were as follows:

The appellant was a pork and beef butcher, and carried on business at No. 596, King's-road, Fulham. The respondent was a sanitary inspector of Fulham Borough Council. On the 23rd March 1905, about noon, the respondent visited the appellant's premises. He went downstairs into the basement. He found on a bench in the boiling house several pieces of meat trimmings weighing about 3lb. On examining them he found that the trimmings were bad, decomposing, and unfit for food. The respondent also found a large bone with a little meat on it weighing about 2lb.; putrefaction had set in in the bone; the meat also was bad and stank.

In the boiling house there was a sausage meat chopping machine; the machine was not being worked. Sausage making was finished for that day. The appellant, after the respondent had been in the basement some three or four minutes, left the shop and joined the respondent in the basement. The appellant admitted that the bone smelt and he informed the respondent that it had just been brought down from the shop and ought to have been taken through to the back of the premises. The appellant stated that he intended to put the trimmings into brine for a day and if good after that period of time they would be used for making saveloys. The appellant alleged that he was of opinion that the trimmings were good at the time of seizure.

The respondent seized the meat at 12.15 p.m. On the same day at 2.30 p.m. the meat was brought before the magistrate at the West London Police-court. The medical officer of health for the Fulham Borough Council examined the meat at the court and was of opinion that it was unfit for food. The magistrate condemned the meat and ordered that it should be destroyed, and the summons in this case was granted by him during the same afternoon to the respondent on behalf of the borough council. The respondent thereupon informed the clerk (who was also the solicitor) to the council of all the facts aforesaid, and handed the summons over to him. From this point the latter took the matter into his own hands and appeared for the council on the hearing of the summons. So far every step had been taken in strict accordance with the invariable course of business and method of procedure adopted by the sanitary authority in similar cases under the 47th section.

But the respondent, before applying for the summons, did not report the facts to the Fulham Borough Council, or any committee appointed by them. He had never received any express authority by resolution or in writing, general or special, from the council or any such committee, authorising him to make complaints or take proceedings on their behalf.

On the 11th May 1905, when the appellant appeared before the magistrate in answer to the summons, the magistrate was satisfied that the appellant had been guilty of the offence alleged therein. It was, however, contended on behalf of the appellant that the summons was bad in form in that it included more than one offence. The magistrate thought that the summons as drawn disclosed only one offence, and that all difficulty, if any existed, could easily be removed by amendment, whereupon the objection, as the magistrate understood, was not pressed.

It was also contended on behalf of the appellant that under and by virtue of the provisions contained in sect. 107, sub-sect. 3, of the Act, for the purposes of and as a condition precedent to a prosecution on behalf of a sanitary authority by a sanitary inspector under sect. 47 of the Act it was necessary that the inspector should report the alleged offence against the provisions of the Act to the sanitary authority by whom he was appointed; that the authority should consider such report, and that the authority should direct or authorise their inspector to apply for a summons and act as prosecutor against the alleged offender under the Act. No such report was made by the respondent, nor did the Fulham Borough Council or any committee thereof expressly direct or authorise the respondent to make the complaint and take the proceedings herein.

The magistrate was of opinion that the reports required by the section—sect. 107 (3)—were con-

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law

fined to (*a*) nuisances discovered by the inspectors themselves under sect. 1 and numerous other sections; (*b*) inquiries by them into complaints of nuisances and offences against the statute and the statutory by-laws made by private individuals under (among others) sect. 3 and 21. Of necessity, and as stated in evidence at the hearing, these two classes of reports are always made, and as a fact consequent process is always applied for by the council's solicitor. The offence in the present summons did not appear to fall into either class. But, even if it did, the language of the section "subject to the direction" of the council was, the magistrate thought, capable at least of meaning such direction as it might choose to give; but, however that might be, there was nothing in the language of sect. 107 (3), or, as regards committees, sect. 99 (4), compelling the authority to give directions in any particular form or manner, and, if so, the magistrate thought that the course of business adopted by the council and committees as above stated might well justify the action of the respondent as resting on an implied direction and authority or on ratification. The magistrate accordingly convicted the appellant.

The magistrate added the following note:

I wish to point out to the court that the whole contention for the appellant was founded at the hearing on sect. 107 (3). My attention was not called to sect. 123, which I came upon in stating the case. That section prescribes a solemn form of authorisation for enabling any officer of the authority, other than its clerk, to institute proceedings on its behalf. I should have found considerable difficulty, as at present advised, in reconciling that provision with the conclusion I arrived at on sect. 107 standin alone.

The form of the summons was referred to during the argument. It began as follows:

To Frederic Giebler, of 596, King's-road, Fulham.

Whereas Frederic Henry Manning, sanitary inspector, town clerk, on behalf of the council of the metropolitan borough of Fulham, has this day laid information before me, one of the magistrates of the police courts of the metropolis, sitting at the West London Police Court, in the county of London, and within the metropolitan police district, for that you, within the said metropolitan borough on the 23rd day of March in the year of Our Lord one thousand nine hundred and five, did deposit for the purpose of sale. . . [Then followed the charge as set out in the beginning of the case.]

The above was a printed form, with the names and the dates and the subject-matter filled in in writing. The words "town clerk" after the respondent's name were in print, but these words were crossed out, and the words "sanitary inspector" written in.

The Public Health (London) Act 1891 (54 & 55 Vict. c. 76) provides:

Sect. 47 (1). Any medical officer of health or sanitary inspector may at all reasonable times enter any premises and inspect and examine—(*a*) any animal intended for the food of man which is exposed for sale, or deposited in any place for the purpose of sale or of preparation for sale; and (*b*) any article, whether solid or liquid, intended for the food of man, and sold or exposed for sale or deposited in any place for the purpose of sale or of preparation for sale, the proof that the same was not exposed or deposited for any such purpose or was not intended for the food of man, resting with the person charged; and if any such animal or article appears to such medical officer or inspector to be diseased, or unsound, or unwholesome, or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice. (2) If it appears to a justice that any animal or article which has been seized or is liable to be seized under this section is diseased, or unsound, or unwholesome, or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of sale or exposure for sale, or deposit for the purpose of sale or of preparation for sale, or in whose possession or on whose premises the same was found, shall be liable, on summary conviction, to a fine not exceeding fifty pounds for every animal, or article, or if the article consists of fruit, vegetables, corn, bread, or flour, for every parcel thereof so condemned, or, at the discretion of the court, without the infliction of a fine, to imprisonment for a term of not more than six months with or without hard labour.

Sect. 99 (4). Where a sanitary authority appoint a committee for the purposes of this Act, that committee, subject to the terms of their appointment, may serve and receive notices, take proceedings, and empower any officer of the authority to make complaints and take proceedings in their behalf, and otherwise to execute this Act.

Sect. 107 (1). Every sanitary authority shall appoint an adequate number of fit and proper persons as sanitary inspectors, and may distribute among them the duties to be performed by sanitary inspectors, and every such inspector shall be a person qualified and competent by his knowledge and experience to perform the duties of his office. (2) Where the Local Government Board, on a representation from the county council, and after local inquiry, are satisfied that any sanitary authority have failed to appoint a sufficient number of sanitary inspectors, the board may order the authority to appoint such number of additional sanitary inspectors, and to allow them such remuneration as the order directs, and the sanitary authority shall comply with the order. (3) The sanitary inspectors shall report to the sanitary authority the existence of any nuisances; and the sanitary authority shall cause a book to be kept in which shall be entered all complaints made of any infringement of the provisions of this Act, or of any by-laws made thereunder, or of nuisances; and every such inspector shall forthwith inquire into the truth or otherwise of such complaints, and report upon the same, and such report shall be laid before the sanitary authority at their next meeting, and, together with the order of the sanitary authority thereon, shall be entered in a book, which shall be kept at their office, and shall be open at all reasonable times to the inspection of any inhabitant of the district, and of any officer either generally or specially authorised for the purpose by the county council; and it shall be the duty of such inspector, subject to the direction of the sanitary authority, or of a committee thereof, to make complaints before justices and take legal proceedings for the punishment of any person for any offence under this Act, or any such by-laws.

Sect. 123. The county council or a sanitary authority may appear before any court or in any legal proceeding by their clerk, or by any officer or member authorised generally or in respect of any special proceeding by resolution of such council or authority, and their clerk, or any officer or member so authorised, shall be at liberty to institute and carry on any proceeding which the county council or sanitary authority are authorised to institute and carry on under this Act.

Clarke-Hall for the appellant.—The case raises the question as to whether it is a condition precedent to the right of the inspector to take these proceedings that he should have been authorised by the sanitary authority. Sect. 107 of the Act

provides for the appointment of sanitary inspectors, and sub-sect. 3 of that section provides as to their powers; they are to make reports and so on, and at the end of the sub-section it goes on to say that it shall be the duty of the inspector, "subject to the direction of the sanitary authority," to make complaints before justices and take legal proceedings. That makes it perfectly clear that the institution of criminal proceedings by the sanitary inspector must be by the authority or direction of the sanitary authority, or of a committee appointed by them under sect. 99, sub-sect. 4. In the present case the inspector had no authority at all from the sanitary authority, or any committee, for instituting these proceedings. In *Tyler* v. *Ferris* (93 L. T. Rep. 843; (1906) 1 K. B. 94), it was held under sect. 14 of the Weights and Measures Act 1904, which empowered an inspector with the consent of the local authority to prosecute, that a general consent that a named inspector should prosecute was sufficient. By sect. 123 the sanitary authority may appear in legal proceedings by their clerk, or by any officer authorised generally or specially by resolution in respect of any special proceeding, and the reason for such authorisation is shown by sect. 124, so that unless sects. 123 and 107 are complied with as to the proper authorisation of the inspector, the sanitary authority would not get the benefit of having the expenses incurred by such inspector paid out of the rates under sect. 124. Sect. 107 clearly limits the right of the inspector, not as regards the seizure of the meat, but as regards the instituting of proceedings; and that view is borne out by sect. 99, sub-sect. 4. There is no case upon the point under this Public Health (London) Act, but there is a case under sect. 5 of the Nuisances Removal Act 1855, which section is substantially the same as and is obviously copied into sect. 99, sub-sect. 4, of the Act now in question. In *Isle of Wight Ferry Company* v. *Ryde Commissioners* (25 J. P. 454), it was held that there must be an order in writing in each particular case from the local authority or their committee to their officer to make complaint, and that a previous general authority is not sufficient. Under sect. 5 of that Act the officer was to be authorised by "order in writing," under the present Act he is to be authorised by resolution. Under that Act in the present state of facts this conviction would not be good, and the only difference between the two Acts is that what was to be done in that case by order in writing is now to be done by resolution. There is a finding in the case that there was no resolution, therefore this conviction ought to be quashed.

Danckwerts, K.C. (*Jeeves* with him) for the respondent.—The short point in the case is whether initial proceedings can only be taken in such a case as the present by the local authority. Where the argument for the appellant has gone wrong is in assuming that proceedings under this sub-section can only be taken by the sanitary authority, and the appellant is bound to fail unless he can show that the previous authority of the sanitary authority is necessary. There are certain proceedings which require to be taken by the sanitary authority, and can only be taken by them—for instance, proceedings in respect of nuisances under sects. 2, 3, 4, and 5. Under these sections the authorisation of the local authority is necessary. The present proceeding is under sub-sect. 2 of sect. 47, and under that section anybody can take proceedings, either under sub-sect. 1 or sub-sect. 2. The present case is really concluded by *Allman* v. *Hardcastle* (89 L. T. Rep. 553), where a summons for an offence under sect. 60 (7) of the Metropolitan Police Act 1839 stated that the information was laid by an inspector of streets "on behalf of the Southwark Borough Council," and it was there held that the inspector of streets might lay the information as a private individual, and that the words "on behalf of the council" might be rejected as surplusage, as there was nothing to restrict the right to prosecute to the police. So, in this case the sanitary inspector as a private individual can take these proceedings, and the words "on behalf of the council" of the borough of Fulham can be rejected as surplusage, as there is nothing in the section to restrict the right to prosecute to the sanitary authority. In *Worthington* v. *Kyme* (93 L. T. Rep. 546) it was held that it was competent to any person to prosecute under sect. 6 of the Sale of Food and Drugs Act 1875, and that where the prosecution was instituted by an officer of a local authority acting by the directions of the local authority, it was immaterial to consider whether it was or was not *intra vires* of the local authority to give their officer such directions, as the inspector could prosecute as a private individual. There are other cases to show that proceedings may be taken by anyone in cases where the offence is not an offence against any one individual merely, but is an offence against the public. In *Reg.* v. *Stewart* (74 L. T. Rep. 54; (1896) 1 Q. B. 300) it was held that a private person could prefer an information under the Diseases of Animals Act 1894. Lindley, L.J. said that the right conclusion was that there was nothing in the Act sufficiently plain to deprive anyone of his ordinary right to prefer an information; and Kay, L.J. said that "*primâ facie* there is no doubt that anybody may take proceedings to recover a penalty. In *Back* v. *Holmes* (56 L. T. Rep. 713; 16 Cox C. C. 263) Wills, J. said: "The section"—sect. 72 of the Highway Act 1835—"appears to create an offence, and where an offence is created, with a penalty attached to it, anyone can initiate the prosecution," and Smith, J. said in the same case that anyone could prosecute. In *Cole* v. *Coulton* (2 L. T. Rep. 216; 29 L. J. 125, M. C.) Cockburn, C.J. said that the information being for an offence against public policy might be laid by anyone.

Clarke-Hall in reply.—This summons states that it was taken out on behalf of the local authority, and it is therefore beside the question to say that a private person can take it out. If in fact the summons itself states that it was taken out on behalf of the local authority—and here it is expressly stated to be taken out "on behalf of the Council of the Borough of Fulham"—then the respondent cannot come here and say that it was taken out by him as a private person. It is a matter of very great importance for the person prosecuted to know who is prosecuting him, and it would defeat the whole object of the Act to allow a sanitary inspector to pose as a person who had the authority of the sanitary authority when in fact he had not got it. No private person can take the proceedings. He cannot enter a

butcher's shop, seize the article, bring it before the magistrate and have it condemned; the whole scope of the Act shows that these things can only be done by the public authority. Under sub-sect. 1 of the same section—sect. 47—the right is limited to the medical officer of health and the sanitary inspector, and when we come to sub-sect. 2 the right to take the proceedings is limited also. *Isle of Wight Ferry Company* v. *Ryde Commissioners* (*ubi sup*) is precisely in point. He referred to sect. 253 of the Public Health Act 1875.

Lord ALVERSTONE, C.J.—In my opinion this appeal ought to fail. I think the case is practically covered by authority. The first and really important question is, Can a private individual take proceedings under sub-sect. 2 of sect. 47 of the Public Health (London) Act 1891? I quite agree, as to some part of the section, that it operates only to give certain powers to individuals—the medical officer of health or the sanitary inspector—and I agree with the argument for the appellant to the full extent that for certain purposes the duties and rights of the sanitary inspector and medical officer of health are hedged round by provisions for the protection of the ratepayers and for the protection of the local authority who are, or may be, the principals of the medical officer of health or sanitary inspector. It is quite clear, in my opinion, that if the sanitary authority are going to delegate their power to take proceedings to a particular officer, they must do so under sect. 123 by a resolution; and if a committee of the sanitary authority are going to authorise and empower people on their behalf to make complaints, they must do so in accordance with the provisions of sect. 99, sub-sect. 4. Therefore, for the purpose of considering who will be liable for costs, and whether or not in any particular proceeding, the proceeding has in fact been taken on the part of the local authority, those provisions are, in my opinion, of very great importance; but they seem to me, on the broad ground that counsel for the respondent has argued, to be beside the mark in this case. Therefore I come back to the question, Can a private individual take proceedings under sub-sect. 2 of sect. 47? Apart from express provision limiting the right, I should have thought that was now too clear for argument. The section contemplates that where there have been proceedings which, it may very likely be, can only be taken by either the medical officer of health or the sanitary inspector, certain consequences shall follow. Sub-sect. 2 says: "And the person to whom the same belongs or did belong at the time of sale or exposure for sale . . . shall be liable on summary conviction to a fine not exceeding fifty pounds for every animal, or article . . . or . . . to imprisonment." As I put it to counsel for the respondent in this case when he was arguing from the other point of view in *Allman* v. *Hardcastle* (*ubi sup.*), can it be contended that the only persons who can take proceedings under sub-sect. 2 of sect. 47 are the medical officer of health or the sanitary inspector, or the council who have authorised them? Counsel for the appellant has very properly in support of his argument answered that question in the affirmative, and he says that the right to take the proceedings is limited by virtue of the opening words of that section. It seems to me that that contention goes a great deal too far. Having regard to the object of this statute, it being a statute passed in order to ensure that food shall be wholesome and in order to prevent diseased food from being exposed for sale, it seems to me that, if it had been so intended to limit the right to take proceedings for a penalty or to punish the offender, and that the information must be laid by a limited class of individuals, as, for instance, a sanitary inspector or a medical officer of health, there must have been words taking away the ordinary right which anybody has to lay the information. And, for the reasons which have been stated in the judgments in the case referred to of *Back* v. *Holmes* (*ubi sup.*), I think it is not open to argument in this case that a private individual can lay the information. Then it is said that the information in this case was not laid by the respondent as a private individual, but that it was laid by him by and on behalf of the metropolitan borough of Fulham. As to that point, I think the case is covered by the decision of *Allman* v. *Hardcastle* (*ubi sup.*), which was decided by Wills, J., Channell, J., and myself. In that case the information with regard to the obstruction of a street had been laid on behalf of the Southwark Borough Council. It was contended that the Southwark Borough Council had no authority to take such proceedings, and that the proceedings, which could be taken, were intended to be taken by the police—the limited body of persons who were supposed to be able to take those proceedings in that case being the police—and it was contended that neither Allman nor the Southwark Borough Council could take any such proceedings. This court decided that the words "on behalf of the Southwark Borough Council" could be rejected, on the ground which I am repeating in this case, that in that case Allman was entitled to lay the information, and in this case Manning is entitled to lay an information under sub-sect. 2. Now, counsel for the appellant has contended that Manning ought not to be allowed to say that he was entitled to lay the information himself. Except for the purpose of the question of costs, and of determining against whom costs can be recovered, I cannot see that there is anything in that argument at all. It may very well be that if the summons was dismissed with costs, it might turn out that the costs could not be recovered against the council of the metropolitan borough of Fulham. But that, to my mind, is a very small matter, because if it was thought that the ability of the individual to pay costs was such an important matter that he ought not to be allowed to lay an information, the Legislature ought to have dealt with it and would have dealt with it. Finding no such words in the statute dealing with it, and seeing that the power to lay the information is not taken away by the statute, and is not limited to persons referred to in the earlier part of the section, it seems to me that it cannot possibly be contended that because there are sections in the Act which protect the local authority, that makes these proceedings bad *ab initio*. With regard to the case of *Isle of Wight Ferry Company* v. *Ryde Commissioners* (*ubi sup.*), it was a very different case altogether. That was a case in which there had been an obstruction of a foreshore. It was contended—and the Court of Queen's Bench said rightly contended—that

before an officer of the local authority could take proceedings for that kind of nuisance, there must be some authority to him from the local authority authorising him to take proceedings. That case involved very different considerations. The statute in question there was not of the character of the statute in question in this case, which is one dealing with a matter of great public importance, and the point whether the man, as a private individual, could have taken proceedings in that case for a nuisance was never raised, nor I think, could it have been raised. I think very different considerations would arise if we were dealing with an information of that kind, and an information, such as the present, under a statute which affects very great public interests. I think, therefore, that the respondent was entitled, as a private individual, to inform and to have the summons granted on his information, and that whatever liability he may be under personally for costs in the event of the proceedings being unsuccessful, the fact that the local authority are protected by the section to which counsel for the appellant has called our attention, is not sufficient to enable us to say that these proceedings ought not to have been instituted by him. I ought to point out that this point was not taken and argued in the court below on the grounds for which the respondent's counsel has now contended. We have invariably taken the view in this class of cases that where there are proceedings instituted which seem to be right on the facts as found, they ought to be supported even although the particular point on which we give our judgment was not the point raised in the court below. I think, therefore, that this appeal must be dismissed.

DARLING, J.—These proceedings were taken by the respondent, who was an officer of the Fulham Borough Council, and when the case was stated by the magistrate the real question that it was desired to have decided was whether the borough council took the proceedings by the respondent within sect. 107 of the Public Health (London) Act 1891. Counsel for the respondent, apparently, would have come here to argue that point; but in stating the case the magistrate came to the conclusion that a section which had not been called to his attention—namely, sect. 123—really put the respondent's counsel and the Fulham Council out of court as to that point. Sect. 123, as the magistrate himself says, prescribes a solemn form of authorisation for enabling any officer of the authority, other than the clerk, to institute proceedings on their behalf, and that form had not been complied with in this case. Therefore the respondent could not, on behalf of the council, take these proceedings. Counsel for the respondent felt that and thought it was conclusive against him. Then he said that he was not going to argue that point, but that he was going to contend that the respondent took the proceedings as a private individual. I quite agree with my Lord, and I have nothing to say in addition to what he has said, that it was open to the respondent to take these proceedings as a private individual. But I do not think that that is what he did. I do not think that he did proceed as a private individual. He certainly did not affect to proceed as a private individual; he affected to proceed as an officer of this Fulham Borough Council, and the Fulham Borough Council were really going to argue that he was their officer until the magistrate discovered sect. 123. The respondent upon the face of the summons said that he took the proceedings on behalf of the Fulham Borough Council. I should have come to the conclusion that the appellant would have been entitled to succeed in this case if it had not been for the words used by my Lord in his judgment in the case of *Allman* v. *Hardcastle* (*ubi sup.*). He there decided, and Wills, J. and my brother Channell agreed, apparently, that you could disregard these words "on behalf of," and treat the summons which, on its face, professed to be a summons taken out by an officer of a public body on behalf of a public body as a summons taken out by him as a private individual. It is not for me to say whether I should have come to that conclusion or not. Mr. Danckwerts in that case seems to have argued in favour of what possibly would have been my opinion, but the three learned judges who heard the case were not convinced by him on that occasion, and the fact that he did not succeed in convincing them then enables him to succeed now. If it had not been for that decision, I should have thought that this was not a summons taken out by the respondent as a private individual, but that it was a summons taken out by him as an officer of this borough council, that he had not got authority to take it out, and therefore the summons was bad, and that consequently the whole proceedings were bad. But in the face of that case of *Allman* v. *Hardcastle* (*ubi sup.*), of course I cannot say so. I agree with the result, at all events, at which this court arrives—namely, that the appeal must be dismissed. I ought also to say that I do not regard this as a mere point of procedure, because it does seem to me to be a very dangerous thing that a person in the position of the respondent in this case should be able to take proceedings without being authorised, and affect to act on behalf of the Fulham Borough Council; and, if it turns out that he has not got their authority, that the council will not be liable in costs, and the person against whom he has taken those proceedings will only have the private individual to look to.

BRAY, J.—The first point which we have to deal with is the question whether a private individual can take proceedings under sub-sect. 2 of sect. 47 of the Act. I am of opinion that he can. The strength of the appellant's argument was that the proceedings under sub-sect. 1 can only be taken by a medical officer of health or a sanitary inspector; and counsel for the appellant said that, notwithstanding the general words in the latter part of the section, we ought to come to the conclusion that it was only open to the medical officer of health or the sanitary inspector to take proceedings under those sub-sections. We must look at the language of sub-sect. 2, and the language is perfectly general. It says: "If it appears to a justice"—not "on the information of such medical officer of health or sanitary inspector," there are no such words—"that any animal or article which has been seized"—if it stood there there might be more in the appellant's contention, but it goes on to say: "or is liable to be seized"—in other words, the proceedings may be taken although there has been no seizure under sub-sect. 1—"under this section is diseased," and so on, "he shall condemn the

same," and then the person may be subject to a fine, and so on. I cannot get rid of the perfectly general language of that sub-section, and I do not think I have any right to insert the words "on the information or complaint of a medical officer of health or sanitary inspector." I think one is fortified in that view by the equally general words in sub-sect. 3, where it says: "Any article liable to be seized under this section." In my opinion, therefore, any individual can take these proceedings. Then the question arises as to whether the respondent, inasmuch as he clearly purported to take these proceedings on behalf of the borough council, can now say, "I am a private individual and must be treated as such." In my opinion that point is concluded by *Allman* v. *Hardcastle* (*uti sup.*), in which my Lord used these words: "It seems to me that these words"—they are the same practically as in this case—"'on behalf of the Southwark Borough Council,' are absolutely unnecessary and may be disregarded." I think we are bound by that decision. I do not dissent from the observations of my brother Darling upon that. I think it may entail some inconvenience, and, perhaps, even more than inconvenience, to assist the decision; and, without saying whether I agree with it or differ from it, I am bound by it. In what I have said I have not intended to express any opinion upon sect. 123.

Appeal dismissed without costs.

Solicitors: for the appellant, *W. T. Ricketts* and *Son*; for the respondent, *R. M. Prescott.*

Wednesday, April 4, 1906.

(Before Lord ALVERSTONE, C.J. and BRAY, J.)

PLANCQ (app.) *v.* MARKS (resp.). (*a*)

Motor-car—Speed—Speed exceeding twenty miles an hour—Evidence of rate of speed by constable as shown by stop-watch—Sufficiency—"Opinion of one witness" merely—Motor Car Act 1903 (3 *Edw.* 7, *c.* 36), *s.* 9.

Upon the hearing of an information under sect. 9 *of the Motor Car Act* 1903 *for driving a motor-car on a public highway at a speed exceeding twenty miles an hour, a police sergeant proved that he placed a police constable at a certain point on the road and stationed himself on the same road at a distance of a quarter of a mile from the constable; that, when the motor-car passed the constable, the constable signalled to him and he immediately started the second hand of his stop-watch and stopped the same when the car passed him; and that the time taken by the car between the two points as shown by his stop-watch was* 31⅕ *seconds, or at the rate of twenty-eight miles an hour.*

The stop-watch was produced in court and not objected to.

The only evidence as to the rate of speed was that of the police sergeant, who gave evidence of the time as shown by his stop-watch.

The defendant having been convicted:

Held, that the evidence of the police sergeant was not evidence of his "opinion" merely, but was evidence of the fact recorded by his stop-watch as to the time taken in travelling over the distance, and that therefore the defendant was not convicted "merely on the opinion of one witness as to the rate of speed" within the meaning of sect. 9, *sub-sect.* 1, *of the Act.*

CASE stated on an information preferred by George Marks of Beaconsfield, police inspector (the respondent), against Georges Plancq, of Hampstead, in the county of London, charging the appellant that he on the 6th July 1905, on a certain public highway—to wit, the Bath road, in the parish of Burnham, in the county of Bucks—unlawfully did drive a certain motor-car at a speed exceeding twenty miles per hour—to wit, twenty-eight miles per hour—contrary to the form of the statute in such case made and provided; and that he, the appellant, was warned of that intended prosecution at the time the offence was committed.

Upon the hearing of the information the following facts as to the rate of speed of the motor-car were proved in evidence before the justices:—

Police sergeant Pearce proved that on the 6th July 1905 he placed police constable Wright at a certain point on the Bath road, and that he (Pearce) stationed himself at another point on the same road at a measured distance of one quarter of a mile from the point at which Wright was stationed; that a motor-car passed the point at which Wright was stationed, and thereupon Wright signalled to him; that immediately such signal was made he started the second hand of his stop-watch, and stopped the same when the car passed him; that the time taken to cover the said distance was shown by the stop-watch to be 31⅕ seconds; that he, Pearce, thereupon signalled to police constable Tew, who was stationed further along the road, to stop the motor-car, which he did; that he, Pearce, then took the name and address of the appellant, who was driving the car, told him that he had covered the distance of a quarter of a mile in 31⅕ seconds, or at the rate of twenty-eight miles an hour, and warned him of this intended prosecution; that the stop-watch used by Pearce was produced in court and not objected to.

Police constable Tew proved that he stopped the motor-car on receiving a signal from Pearce, and that Pearce showed him his stop-watch, which had been stopped at 31⅕ secs.

It was contended on behalf of the appellant that on the above evidence the appellant could not be convicted of the offence, inasmuch as under sect. 9 of the Motor Car Act 1903 no person may be convicted of such offence merely on the opinion of one witness as to the rate of speed, and that the only evidence as to the rate of speed was that given by police sergeant Pearce.

Under the circumstances the justices were of opinion that sect. 9 did not apply, as the evidence of police sergeant Pearce was not of his opinion merely, but was evidence of the fact recorded by his stop-watch. They therefore overruled the above objection that had been raised on behalf of the appellant, and convicted him of the offence.

The Motor Car Act 1903 (3 Edw. 7, c. 36) provides:

Sect. 9 (1). Section four of the principal Act (which relates to the rate of speed of motor-cars) is hereby repealed, but a person shall not, under any circumstances, drive a motor-car on a public highway at a speed exceeding twenty miles per hour, and, within any limits or place referred to in regulations made by the

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law

Local Government Board with a view to the safety of the public, on the application of the local authority of the area in which the limits or place are situate, a person shall not drive a motor-car at a speed exceeding ten miles per hour. If any person acts in contravention of this provision he shall be liable, on summary conviction, in respect of the first offence to a fine not exceeding ten pounds, and in respect of the second offence to a fine not exceeding twenty pounds, and in respect of any subsequent offence to a fine not exceeding fifty pounds, but a person shall not be convicted under this provision for exceeding the limit of speed of twenty miles merely on the opinion of one witness as to the rate of speed. (2) Where a person is prosecuted for an offence under this section, he shall not be convicted unless he is warned of the intended prosecution at the time the offence is committed, or unless notice of the intended prosecution is sent to him or to the owner of the car as entered on the register within such time after the offence is committed, not exceeding twenty-one days, as the court think reasonable.

Drysdale Woodcock for the appellant.—The short point in the case is as to the meaning of the word "opinion" in the words in sect. 9 "merely on the opinion of one witness as to the rate of speed." The section expressly provides that there cannot be a conviction under the section for exceeding the speed of twenty miles an hour merely on the opinion of one witness as to the rate of speed. In this case the appellant was convicted on the opinion of one witness only —namely, Pearce. The evidence afforded by his stop-watch was merely one of the grounds on which he based his opinion that the rate of speed exceeded twenty miles an hour. In every case of this kind in which the driver has been convicted there have been two policemen, one at each end of the distance, and each having a stop-watch, and to support this conviction one of the other constables ought also to have stated his opinion as to the rate of speed.

The respondent did not appear.

Lord ALVERSTONE, C.J.—I am clearly of opinion that there is no ground for this objection. The concluding words of the paragraph in sect. 9 were inserted for the purpose of preventing persons from being convicted under the section upon what was really the mere opinion of a single witness as to the rate of speed. The test seems to me to be whether the evidence of the witness was mere matter of opinion or matter of fact. In this case it could not be said that the evidence of the police sergeant Pearce was mere opinion. He had stationed another constable at a certain point on the road at a fixed distance from him; then on the signal being given to him that the motor-car was passing that point he started his stop-watch, which was afterwards produced in court, and when the car passed him he stopped the watch and found that the time registered by the stop-watch was 31⅘ seconds. He was therefore able to state with certainty at what rate the car travelled. I do not think that was opinion at all. It seems to me that it was evidence of fact on which the magistrates might have come to a conclusion one way or the other, but I cannot say it was mere evidence of opinion. I therefore think the appeal should be dismissed.

BRAY, J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Trinder, Capron, and Co.*

Thursday, April 26, 1906.

(Before Lord ALVERSTONE, C.J., RIDLEY and DARLING, JJ.)

ELWES (app.) *v.* HOPKINS (resp.). (*a*)

Motor-car—Conviction for driving at a dangerous speed, "having regard to all the circumstances of the case"—Appeal to quarter sessions—Evidence of traffic reasonably expected to be on highway—Admissibility—Motor Car Act 1903 (3 *Edw.* 7, *c.* 36).

The appellant was convicted for driving a motor-car in a public highway at a speed which was dangerous to the public, having regard to all the circumstances of the case. On appeal to quarter sessions, evidence was given on behalf of the respondent as to the traffic which might be reasonably expected to be on the highway.
Held, that the evidence was admissible.

CASE stated by quarter sessions on an appeal by the appellant against a conviction for driving a motor-car on a public highway at a speed which was dangerous to the public, having regard to all the circumstances of the case.

Upon the hearing of the appeal the following facts were proved:—

The appellant on the 17th March 1905, at Cheltenham, drove a motor-car along a certain highway known as the Promenade, at four o'clock in the afternoon, at a very fast speed, witnesses for the prosecution alleging it was going from "twenty to twenty-five miles an hour," "twenty miles an hour or over," "twenty miles an hour or more," and "considerably over twenty miles an hour."

The appellant admitted that twenty miles an hour would be too fast a rate at which to drive a car down the Promenade, but alleged that on this occasion he was not going more than fifteen miles an hour. At the time of the alleged offence there was little vehicular traffic in the carriage-way of the Promenade. No person was in fact in danger owing to the driving of the car by the appellant.

The Promenade is more used than any highway in Cheltenham, and the small amount of traffic at the time of the commission of the alleged offence was unusual.

The Court of Quarter Sessions held as a fact that at the time of the commission of the alleged offence the appellant was driving at a speed which was dangerous to the public, having regard to all the circumstances of the case.

They came to that conclusion from the evidence given by various witnesses, who spoke as to the pace at which the motor-car was going, and the traffic that was usually in the Promenade at the time of day when the offence was committed, and as to the difficulty when in the Promenade of seeing the approach of traffic from the many side streets leading into the Promenade.

The admission of evidence of hypothetical traffic—namely, the traffic which might be reasonably expected to be on the highway—was objected to by counsel for the appellant, on the ground that the words in sect. 1 of the Motor Car Act 1903, "and to the amount of traffic which actually is at the time or which might reasonably be expected to be on the highway," were not contained in the conviction, and that the appeal

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

was against the conviction as provided by sect. 11 of the Motor Car Act 1903.

The Court of Quarter Sessions overruled the objection and dismissed the appeal.

A. M. White for the appellant.—The conviction only follows sect. 1 of the Motor Car Act 1903 down to the words "having regard to all the circumstances of the case." Therefore the evidence objected to is not admissible. If the conviction had included the latter part of the section the case might have been different, but on an appeal to quarter sessions the conviction cannot be departed from, and evidence of a different offence cannot be included. He referred to

Paley on Convictions, 8th edit., p. 213.
Smith v. *Moody*, 87 L. T. Rep. 682; (1903) 1 K. B. 56.

H. M. Sturges for the respondent.—The Irish courts have already decided this question. He referred to

Rex v. *Dublin Justices*, 2 Ir. Rep. (1904) 698.

Lord Alverstone, C.J.—Notwithstanding the ingenious argument that has been addressed to us, I have no doubt in my mind about this point. The conviction before the petty sessions was as follows: "Before the Court of Summary Jurisdiction sitting at the Police Court, Cheltenham, on the 31st March 1905 Cecil Elwes, of Leckhampton Court, Cheltenham, hereinafter called the defendant, is this day convicted for that he on the 17th March 1905, at Cheltenham, did drive a motor-car on a public highway there situate at a speed which was dangerous to the public, having regard to all the circumstances of the case, contrary to the statute, &c." That conviction follows the words of sect. 1 of the Motor Car Act 1903 as far as they go. On this conviction the appellant appealed to quarter sessions, and, on the hearing of this appeal, objection was taken as to the admission of evidence as to the traffic which might reasonably be expected to be on the highway in addition to evidence as to the traffic which was actually on the highway when the car was driven along it. This evidence which was objected to was admissible under the earlier words of the section which form part of the conviction—namely, "having regard to all the circumstances of the case." It cannot be said that the quarter sessions are not to receive evidence as to the general user of the highway. This appeal must be dismissed.

Ridley and Darling, JJ.—Concurred.

Appeal dismissed.

Solicitors: *Crowders, Vizard*, and *Oldham*, for *Ticehursts, McIlquham*, and *Wyatt*, Cheltenham; *Field, Roscoe*, and *Co.*, for *Griffiths* and *Waghorne*, Cheltenham.

Friday, May 4, 1906.

(Before Lord Alverstone, C.J. and Darling, J.)

London County Council (apps.) v. Great Eastern Railway Company (resps.). (a)

Railways—Locomotive—Smoke—Engine emitting smoke—Engine properly constructed to consume its own smoke—No default on part of company other than not providing smokeless coal—Offence—Railways Clauses Consolidation Act 1845 (8 *& 9 Vict. c.* 20), *s.* 114—*Regulation of Railways Act* 1868 (31 *& 32 Vict. c.* 119), *s.* 19.

A locomotive steam engine drawing a passenger train on the respondents' railway was on each of two occasions on the same morning emitting dark smoke for a period of less than two minutes. It was proved that the engine was properly constructed, and was constructed on the principle of consuming, as far as practicable, the smoke of the coal then in use upon the engine, which was a coal of a bituminous character, and that such coal was a good hard steam coal and the normal locomotive coal in use in some districts. It was also proved that it was not through any default of any servant of the company in the stoking or management of the engine that such smoke was emitted; that the engine could have used Welsh coal, and that, if Welsh coal had been used, less smoke would have been emitted, but that Welsh coal would have cost the company twice as much as the coal which was used.

Held, that there was no obligation upon the railway company to provide Welsh coal or the best coal for their engine, and, as there was no allegation of any default on the part of the railway company or their servants other than in not providing the best coal for the engine, no offence had been committed by the company under sect. 114 *of the Railways Clauses Consolidation Act* 1845, *as amended by sect.* 19 *of the Regulation of Railways Act* 1868, *as the omission to supply the best class of coal was not a "default" of the company within the meaning of the latter section.*

Case stated on an information laid on behalf of the London County Council (the appellants) against the Great Eastern Railway Company (the respondents) "for that you on the 8th day of July 1905, at Bethnal Green Junction, in the metropolitan borough of Bethnal Green, in the county of London and within the said district, did use upon your railway at Bethnal Green Junction a locomotive steam engine—to wit, locomotive steam engine No. 363—using coal or other similar fuel emitting smoke and not then constructed on the principle of consuming and so as to consume its own smoke, and which did not then consume its own smoke, whereby you have rendered yourselves liable to the penalty prescribed by the statute in that case made and provided."

It was proved before the magistrate at the hearing on the part of the appellants by Samuel Tinworth, a coal officer of the appellants, and Herbert Court, his assistant, that on the 8th July 1905 he was watching from a building near to the Bethnal Green Junction Station of the respondents when a passenger train belonging to the respondents, drawn by engine No. 363, came into

(a) Reported by W. W. Orr, Esq., Barrister-at-Law.

his view at 6.22 a.m., from the direction of Liverpool-street Station, drew up at Bethnal Green Junction, and passed out of his view at 6.24 a.m., and also at 7.47 a.m. the same engine came into his view hauling a similar train which stopped at Bethnal Green Junction Station and passed out of his view at 7.49 a.m., and that during a portion of each of those periods of two minutes the engine was emitting dark smoke.

It was further proved before him on the hearing of the summons that the engine was a properly constructed engine and constructed on the principle of consuming as far as practicable the smoke of the coal then in use upon the engine, which was a Derbyshire or Yorkshire coal of a bituminous character, and that such coal was a good hard steam coal and the normal locomotive coal in use in some districts.

It was further proved to the magistrate's satisfaction that it was not through the default of any servant of the respondent company in the stoking or management of the engine that any such smoke was emitted at the time aforesaid.

It was also proved before the magistrate that the respondents on another line (the East London Line, over which they had running powers) were under obligation to employ and did employ on their engines on such line a Welsh smokeless steam coal different from that used on engine No. 363 on the 8th July. This Welsh coal produces smoke not so dark as that of the coal used by engine No. 363 and not so much in proportion to the amount of coal used as is produced by the Derbyshire or Yorkshire coal. The engine No. 363 as constructed could have used similar Welsh coal, and, if this had been done, less smoke would have been emitted from the engine. The Welsh coal costs about twice as much to the respondents as the coal used upon the engine on the occasion complained of, and the greater expense of it was the principal reason why it was not used on the engine.

It was contended before the magistrate by the appellants that sect. 19 of the Regulation of Railways Act of 1868 specially amended sect. 114 of the Railways Clauses Consolidation Act of 1845, and that, whereas the earlier Act only required that an engine should be constructed on the principle of consuming its own smoke, the amending Act went further and required that the engine should in fact consume its own smoke as far as practicable, and that the object of these two sections being to require engines to be so constructed and used as to emit as little smoke as possible, and that inasmuch as the engine No. 363 in fact failed to consume its own smoke, the respondents were guilty of the offence charged against them.

It was further contended on behalf of the appellants that upon the true construction of the Acts the respondents were guilty of the offence charged in that they had used upon the engine a bituminous coal which necessarily produced dark smoke beyond the power of engine No. 363 as constructed to consume, when, by using smokeless Welsh coal in the engine, they could have avoided emitting such smoke from the engine as was seen by the appellants' witnesses, and that such user of bituminous coal by them was a default on their part within the meaning of sect. 19 of the Regulation of Railways Act 1868.

The respondents contended, on the other hand, that, provided their engine was constructed on the principle of consuming and so as to consume as far as practicable the smoke of the coal actually used upon it as aforesaid, and provided there was no negligence in the stoking or management of the engine with such coal, they were under no obligation to use any particular coal, and were not guilty of any default within the meaning of the Acts in not doing so.

The magistrate was of opinion: (*a*) That the engine No. 363 was properly constructed within the meaning of sect. 114 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20); (*b*) that it did not fail to consume its own smoke so far as was practicable, having regard to the coal which was used; (*c*) that the use of the coal that was used was not a default of the company within the meaning of sect. 19 of the Regulation of Railways Act 1868 (31 & 32 Vict. c. 119), and that there was no other default; (*d*) that the smoke emitted by the engine was of a darker colour and slightly more in quantity than would have been emitted if Welsh coal had been used; and he accordingly dismissed the summons.

The question for the opinion of the court was whether the magistrate was right in law in his decision on the above facts, or whether he was bound in law to hold that the use of a coal producing a darker smoke and more smoke than would have been produced by the use of a different coal was a default on the part of the company.

The Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20) provides:

Sect. 86. It shall be lawful for the company to use and employ locomotive engines or other moving power, and carriages and waggons to be drawn or propelled thereby. . . .

And with respect to the engines and carriages to be brought on the railway, be it enacted as follows:

Sect. 114. Every locomotive steam engine to be used on the railway shall, if it use coal or other similar fuel emitting smoke, be constructed on the principle of consuming and so as to consume its own smoke; and if any engine be not so constructed the company or party using such engine shall forfeit five pounds for every day during which such engine shall be used on the railway.

The Regulation of Railways Act 1868 (31 & 32 Vict. c. 119) provides:

Sect. 19. Where proceedings are taken against a company using a locomotive steam engine on a railway on account of the same not consuming its own smoke, then if it appears to the justices before whom the complaint is heard that the engine is constructed on the principle of consuming its own smoke, but that it failed to consume its own smoke, as far as practicable, at the time charged in the complaint through the default of the company, or of any servant in the employment of the company, such company shall be deemed guilty of an offence under the Railways Clauses Consolidation Act 1845, section one hundred and fourteen.

Bodkin for the appellants.—The case raises the question as to whether it is a default on the part of the railway company to supply to one of their engines an unsuitable class of coal which produces more smoke than the engine can consume. Sect. 86 of the Railways Clauses Act of 1845 made it lawful for a railway company to use locomotive engines, and by sect. 114 every locomotive steam engine used on the railway must be constructed on the principle of consuming and so

as to consume its own smoke. Upon this section it was decided in 1859, in *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Wood* (1 L. T. Rep. 31; 2 E. & E. 344; 29 L. J. 29. M. C.), that the penalty only attaches under sect. 114 where the engine using coal is so constructed as not to consume its own coal when used with proper care and under ordinary circumstances; and that, where an engine is properly constructed but owing to the carelessness of the persons using it the smoke is emitted instead of being consumed, then no penalty attaches under the section, so that if the non-consumption of the smoke arose from the neglect of the party using the engine, no penalty attached; but if it arose from the improper construction of the engine, then the penalty did attach. That led to an amendment of the law in sect. 19 of the Regulation of Railways Act 1868, which provided that if the engine failed to consume its own smoke, as far as practicable, through the default of the company or of any of their servants, then there should be an offence under sect. 114 of the Act of 1845. These two sections are to be read together, and their purpose was not only that the engine should be constructed on the principle of consuming its own smoke, but that it should, as far as practicable, consume its own smoke and emit as little smoke as possible. These sections were considered in *South-Eastern and Chatham Railway Company* v. *London County Council* (84 L. T. Rep. 632), and the court there held that, where a locomotive emitted black smoke for a longer time than was necessary, arising from the use of smoky coal, and no explanation was given by the company, an offence had been committed under sect. 114. Lord Alverstone, C.J. said, "but I do think the statute meant that under ordinary circumstances no smoke should come out." There, no doubt, the smoke was black smoke, and we find a distinction drawn between black smoke and smoke in a similar connection in sect. 24 of the Public Health (London) Act 1891. The gravamen of the charge is that there should be some default of the company or their servants, and the only default on the part of the company would be either in the construction of the engine or in the kind of fuel supplied. The case finds that there was no default on the part of the company's servants, or in the construction of the engine, and therefore the only question is whether there was a default of the company as to the kind of coal supplied. The company were bound to supply coal of such a kind that the engine would consume its own smoke "as far as practicable," and those words must mean "as far as possible"—that is, consistently with the efficient carrying on of their business: (*Cooper* v. *Woolley*, 15 L. T. Rep. 539; 36 L. J. 27, M. C.). They were bound to supply smokeless coal, and the question of the extra expense is immaterial, as was pointed out by Hawkins, J. in *Patterson* v. *Chamber Colliery Company* (56 J. P. 200). In *Smith* v. *Midland and Lancashire and Yorkshire Railway Companies* (37 L. T. Rep. 224, at p. 226), Bacon, V.C., speaking of sect. 114, said that the working of engines which do emit smoke and which do not consume their own smoke is unlawful in the very words of the Act of Parliament. [Lord ALVERSTONE, C.J.—He was looking at sect. 114 only; he did not refer to the amending section.] The later section does not affect the question except in so far as there has been default on the part of the company or their servants. If the company were using any coal except the best coal, then they were contravening sect. 114; and there are two findings (*b*) and (*d*) at the end of the case which are equivalent to saying that if coal of a non-bituminous character had been used, then all or nearly all of the smoke would have been consumed by this engine. There is therefore an offence under sect. 114.

Avory, K.C. (*Grain* with him) for the respondents.—The magistrate was right in dismissing the summons, as there was no evidence before him of any default on the part either of the company or of any of their servants. The case of *South-Eastern and Chatham Railway Company* v. *London County Council* (*ubi sup.*), where the court held that an offence had been committed by the railway company within sect. 114 of the Act of 1845, as amended by sect. 19 of the Act of 1868, is different from the present case. That case was decided upon the ground, as stated by Lord Alverstone, C.J., that the magistrate had before him evidence not only of the issue of black smoke, but of an expert who said that it was not necessary for an engine to smoke so long, and that the railway company had elected to give no explanation, and that the magistrate had found that the failure of the engine to consume its own smoke arose through the default of the company or of a servant of the company; and there was the evidence of two witnesses who were called to show such default. There was, therefore, abundant evidence before the magistrate of a default. In the present case not only was there no such evidence before the magistrate, but the only evidence before him was that for a portion of two minutes the engine emitted dark smoke. [Lord ALVERSTONE, C.J.—What do you say as to the company being bound to provide the best coal?] The statute has not said that the company are to use the best coal; sect. 114 of the Act of 1845 recognises that the railway company are to use a fuel that does emit smoke; and the objection to use the best smokeless coal is based not merely on the ground of expense, but also on the difficulty of obtaining a supply of that coal in many places. [He was stopped.]

Lord ALVERSTONE, C.J.—In this case it has been most ingeniously argued for the appellants that the effect of the amendment of sect. 114 of the Railways Clauses Act of 1845 by sect. 19 of the Act of 1868 has been indirectly to impose upon a railway company an obligation to use coal of the highest quality from the point of view of smokelessness. It seems to me that that is going a very great deal too far. I am not prepared to say that the magistrate, who has held that in the circumstances of this case there was no default on the part of the company, has come to a wrong conclusion on a question of fact. Sect. 114 of the Act of 1845 undoubtedly says that an engine using coal or other fuel emitting smoke shall be constructed on the principle of consuming, and so as to consume, its own smoke. Persons did not know as much about these matters in the year 1345, when that Act was passed, as they knew some twenty-five years later; but, be that as it may, it was contemplated that there might be well and badly constructed engines, and that engines might be constructed so well that they would consume

their own smoke. Then it was pointed out in the case of *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Wood* (*ubi sup.*) that, in order to justify proceedings under sect. 114 of the Railways Clauses Act of 1845, there must be proof that the engine was wrongly constructed, and that for a conviction under that section it would not be sufficient to show that the smoke came out of the engine through the negligence of a servant of the company. Thereupon the amending section—sect. 19—of the Regulation of Railways Act 1868 provided that if it should appear to the justices when the complaint was heard that the engine was constructed on the principle of consuming its own smoke, but that it failed to consume its own smoke as far as practicable at the time charged in the complaint through the default of the company or of a servant of the company, then the company should be deemed to be guilty of an offence under sect. 114. This amending section, therefore, clearly contemplates that some coal which emits smoke will be used. If counsel for the appellants had been able to show that the railway company might, without the slightest difficulty, have provided coal which did not emit any smoke at all, it is possible that an argument might have been based upon that before the magistrate, but I do not think that such an argument could be advanced here. It is not unimportant to observe that the finding of the magistrate as to that part of the case is that the smoke emitted by the engine was of a darker colour and slightly more in quantity than would have been emitted if Welsh coal had been used. We have nothing at all to do with the colour of the smoke for the purpose of this particular case, and it does not affect the question except that it might in some cases afford evidence of bad stoking, or evidence that the engine was emitting smoke that might have been kept in, or let out in a much less quantity. With regard to the quantity of smoke emitted, all the magistrate can say is that, if Welsh coal had been used, a slightly less quantity of smoke would have been emitted. Now, is this statute to be construed so as to impose upon the railway company the obligation of using that kind of coal which has the least smoke-producing power? I have not the least doubt that, if that had been the intention of this section, in cases arising under the section there would have been a great many different opinions from different witnesses as to which kind of coal did produce the least smoke, and the position would have been quite as embarrassing as the one we have now to consider. In my opinion, the language, "fails to consume its own smoke, as far as practicable, at the time charged in the complaint through the default of the company," points in the first instance substantially to the default of the company in the construction of the engine, or in not providing proper coal—not in not providing the best coal, but in not providing proper coal suitable for that engine. Then there follow the words "or of any servant in the employment of the company"; but I need not deal with that, because no such default of a servant of the company is alleged in this case. The findings in this case are that the engine was properly constructed; that the coal used was a good hard steam coal and the normal locomotive coal in use in some districts. By normal locomotive coal I understand coal used as a rule to a very large extent by other railway companies. It is quite true there is the finding that for some contractual reasons the respondent company have undertaken to use Welsh smokeless coal on the East London line. It is perfectly plain, however, that their contractual obligations cannot extend their obligations under the Act of Parliament, and that is the reason why I asked during the argument whether or not that bargain depended upon anything which would throw light on this particular question. It is clear to my mind that it would be putting a wrong construction on the section to say that the company have been guilty of default because they have not used the particular kind of coal that is picked out in this case in order to allege that the smoke would have been less had the company used that particular kind of coal. In my opinion, therefore, the magistrate has come to a perfectly right conclusion, and, at any rate, whether he has come to the right conclusion or not, there is no mistake in law on which we can properly reverse his finding, because, if we did reverse his finding, we should have to say, not that the company have not used an engine so as to consume its own smoke as far as practicable, but that they must use coal, whatever it may cost and however difficult it may be to get, in the use of which the engine does, in fact, consume more smoke than in the use of the particular coal which was used in this engine at the time in question. I think, therefore, that the decision of the magistrate was right.

Darling, J.—I am of the same opinion. I think counsel for the appellants put his argument in the best way when he put it in these words: "The company are bound to provide an engine which shall consume its own smoke as far as practicable." That, no doubt, is true; and then he says, "and, further, the company are bound to provide a fuel to permit the engine, as far as practicable, to consume its own smoke." That is where I think he has not made out his case. The statute might have said that in those very apt words which counsel has used; but it has not said so, and the argument narrows itself down to this, that it is an offence to burn, even in the best constructed locomotive, anything but anthracite coal, probably coal from Wales, because that is the coal which will give off the least smoke, and therefore the coal which makes the engine capable of using the power given to it of consuming smoke to the greatest possible extent. Now, I think that the fact that the Legislature have not said that in plain words is very strong evidence to show that what the Legislature meant was this: These engines must be used in various parts of the country, just as manufactories must be used in various parts of the country; and it is a nuisance that there should be a diffusion of smoke in the air which is avoidable by reasonable means—means which will not hamper the industry too much. If we are to apply to a locomotive engine the doctrine contended for on behalf of the appellants, we could apply it just as well to manufactories as to locomotives, and it would come to this, that the local coal, unless it was in that small area where the anthracite coal exists, could not be used at all either in manufactories or locomotives. I cannot think

that the Legislature ever had such an intention as that in their minds. In my opinion, given the use of a kind of coal in all circumstances reasonable to use, when a man has constructed an engine which will consume, as far as practicable, the smoke which that coal will necessarily give off, he has complied with the statute. If a man were to do the utmost he can, and were to make the engine as well as at present it is known how to make one, and were to use the best coal that is known and fire the engine in the best way that he can, then the engine might consume all the smoke, and yet, if Mr. Bodkin's reading of sect. 114 of the Act of 1845 is correct, it would land us in this—that an offence against that section would have been committed if at any time all the smoke had not been consumed. I do not think the Legislature could have meant that. It seems to me that they did strengthen the law to some extent by the later Act of 1868; but I think it now stands at the point at which my Lord has put it in his judgment, with which I entirely agree.

Appeal dismissed.

Solicitor for the appellants, *T. W. Seager Berry.*

Solicitor for the respondents, *Edward Moore.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

DIVORCE BUSINESS.

DIVISIONAL COURT.

Tuesday, March 13.

(Before Sir GORELL BARNES, President, and BARGRAVE DEANE, J.)

WEIGHTMAN *v.* WEIGHTMAN. (*a*)

Summary jurisdiction—Husband and wife—Appeal—Separation order—Application for discharge of order—Fresh evidence—Time for appeal—Summary Jurisdiction Act 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11—*Summary Jurisdiction* (*Married Women*) *Act* 1895 (58 *&* 59 *Vict. c.* 39), *ss.* 7, 8.

An application under sect. 7 *of the Summary Jurisdiction* (*Married Women*) *Act* 1895, *to alter, vary, or discharge an order made under that Act is on the same footing, as far as fresh evidence is concerned, as an application for a new trial. When, therefore, there is fresh evidence, that is, evidence which could not reasonably have been made available at the date of the order, or relating to something which has happened since the date of the order, either party is entitled to take out a fresh summons under the section, and have the case determined. There is no time limit fixed, and sect.* 11 *of the Summary Jurisdiction Act* 1848, *prescribing six months as the time within which an application must be made, does not apply.*

APPEAL from the refusal of the stipendiary of Manchester to discharge an order made against the appellant (the husband) dated the 16th March 1904.

The parties, Joseph Weightman and Sarah Eliza Weightman, were married in 1888 and resided in the neighbourhood of Manchester until the year 1904, when they separated. In 1900 the mother and the brother of Joseph Weightman came to live with them, and remained members of the household until Feb. 1904. Shortly after they left the conduct of the wife became so bad that her husband was compelled to leave her. This was on the 2nd March 1904. The wife took out a summons under the Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict. c. 39), and on the 16th March 1904 a separation order was made against the husband on the ground of desertion. At the time of the hearing of the summons the husband was unaware of certain facts as to his wife's conduct, but on the 21st Dec. 1905, his daughter informed him that she had seen her mother and her uncle in the act of committing adultery on the 13th March 1904, three days prior to the hearing of the summons. On the 11th Jan. 1906, the husband took out a summons to discharge the order, and this was heard on the 24th Jan. 1906. The adultery was proved, but the stipendiary dismissed the summons. In his judgment he gave the following reasons for his decision:

I find that adultery was committed on the 13th March 1904, with the husband's brother, Matthew Weightman, and that the husband had no knowledge of it until Dec. 1905, and that he took out this summons immediately afterwards. I should like to help the husband, but I feel I cannot. The power this court has to deal with these cases is defined strictly by statute, and is defined, so far as this case is concerned, by sect 7, which enacts that where a separation order has been made the court may alter, vary, or discharge it on fresh evidence, and may upon application from time to time increase or diminish the weekly payments. No power is given to grant any new trial or to rehear. I am not quite clear, but I think that such alteration, variation, or discharge is by sect. 7 limited to the payment of money; but I do not definitely decide this now, but I am of opinion that the court cannot at the instance of one of the parties discharge the original order upon evidence which existed but was unknown at the time the order was made. I think the order when made is equivalent to an order absolute in the Divorce Court, and here we have no King's Proctor to intervene. Special provision is made for adultery committed after, and where this is proved the order must be discharged. I think, too, there is another objection fatal to this application. Courts of summary jurisdiction (except in cases where special power is given them) can only make an order on something that has arisen within six months of the date of the application for the order. Here an application is made for an order discharging the original order, which was made twenty-one months before on facts that arose more than twenty-one months ago. I do not think I have any power to do this, and I think if it had been intended this court should have the power the statute would have given it. In order to give effect to sects. 7 and 8 I think the words "at any time" must mean "at any time within six months," as sect. 8 makes the Summary Jurisdiction Acts applicable to these cases.

The grounds of appeal were (1) that it was proved that the wife had in fact committed adultery on the 13th March 1904, and that the husband did not become aware of that fact until the 21st Dec. 1905, and that the magistrate was wrong in holding that there was no "fresh evidence" on which he could discharge the order of the 16th March 1904, and (2) that, having found as a fact that the husband had applied to discharge the order promptly and without delay, the magistrate was wrong in holding that he had no jurisdiction to discharge the order because six

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

months had elapsed since the order had been made.

Sects. 7 and 8 of the Summary Jurisdiction (Married Women) Act 1895 are as follows:

Sect. 7. A court of summary jurisdiction acting within the city, borough, petty sessional or other division or district, in which any order under this Act or the Acts mentioned in the schedule hereto, or either of them, has been made, may, on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time, alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made, so that the same do not in any case exceed the weekly sum of two pounds. If any married woman upon whose application an order shall have been made under this Act, or the Acts mentioned in the schedule hereto, or either of them, shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged.

Sect. 8. All applications under this Act shall be made in accordance with the Summary Jurisdiction Acts, and, in the case of a conviction of a husband for aggravated assault upon his wife, her application may, by leave of the court, be made by summons to be issued and made returnable immediately upon such conviction,

Sect. 11 of the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), is as follows:

In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose.

Newbolt for the appellant. — The learned stipendiary was clearly wrong in the view which he took. The evidence before him was "fresh evidence," upon which he ought to have acted under sect. 7 of the Act of 1895, and the adultery of the wife being proved the order of 1904 should have been rescinded. There was no question as to the limitation of time. The "six months" of sect. 11 of the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43) did not apply at all. The words "at any time," in sects. 7 and 8 of the Act of 1895 were not to be limited. The limit of six months only applied to sect. 4 of the Act of 1895.

No counsel appeared for the respondent.

The PRESIDENT. — In the present case there was a summons taken out on the ground that fresh evidence had been discovered. The law as to fresh evidence was clearly laid down by the late Lord St. Helier in the case of *Johnson* v. *Johnson* (81 L. T. Rep. 791; (1900) P. 19). In the course of his judgment the late President said: "The Summary Jurisdiction (Married Women) Act 1895, s. 7, provides that a court of summary jurisdiction, acting as therein specified, may, upon fresh evidence, alter, vary, or discharge an order previously made. But it is necessary that magistrates should clearly understand what 'fresh evidence' means, though in my view there is no real doubt about it. It was practically the same sort of evidence as that upon which a new trial would, in the ordinary course, be granted; it must relate to something which has happened since the former hearing or trial, or it must be evidence which has come to the knowledge of the party applying since that hearing or trial, and which could not by reasonable means have come to his knowledge before that time. It must amount to what was called in the old forms of pleading *res noviter ad notitiam perventa.*" At the time of the hearing of the original summons the petitioner had no means of proving that his wife had committed adultery, and it appears that he had no knowledge of it. As soon as he did know of it he acted upon it and took out a fresh summons to discharge the original order made against him. As to the second point, the limit of six months, this has no application at all in the present case. The husband made his application as soon as he became aware of the fact of his wife's adultery, and this would have been a complete answer to the original charge if he had been aware of it at the time and had given evidence of it. The learned stipendiary magistrate appears to have taken the view that he could not vary the order because the application was not within the terms of the Act, and because it was too late. As far as regards time, there is nothing in that point, as this case is on the same footing as an application for a new trial. Under sect. 7 of the Act of 1895 the magistrates have the power to rescind orders on the grounds laid down in *Johnson* v. *Johnson* (*ubi sup.*), since such applications are on the same footing as applications for new trials. Moreover, the section gives power to rescind an order "at any time." The appeal, therefore, must be allowed, and the order of the learned stipendiary magistrate made on the 16th March 1904 will be discharged.

BARGRAVE DEANE, J.—I agree.

Solicitor: *E. R. Keele*, for *T. W. Harris*, Manchester.

HOUSE OF LORDS.

Thursday, April 5, 1906.

(Before the LORD CHANCELLOR (Loreburn), Lords MACNAGHTEN, DAVEY, JAMES OF HEREFORD, ROBERTSON, and ATKINSON.

COSTER AND ANOTHER *v.* HEADLAND. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Distress—Poor rate—Costs and charges of distress—Distress for sum not exceeding 20l.—Limitation of amount of costs and charges—Distress (Costs) Act 1817 (57 *Geo.* 3, *c.* 93), *s.* 1, *schedule—Distress (Costs) Act* 1827 (7 *&* 8 *Geo.* 4, *c.* 17)—*Distress for Rates Act* 1849 (12 *&* 13 *Vict. c.* 14), *s.* 1.

The provisions of the Distress (Costs) Act 1817, *as extended to a distress for poor rate for an amount not exceeding 20l. by the Distress (Costs) Act* 1827, *are not repealed by the Distress for Rates Act* 1849, *but are still in force; and no costs or charges in respect of such a distress can be taken in excess of the amounts prescribed by those statutes.*

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal (Collins, M.R., Stirling and Mathew, L.JJ.), reported *ante*, p. 63; 92 L. T. Rep. 98; (1905) 1

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

K. B. 219, who had reversed a judgment of the Divisional Court (Lord Alverstone, C.J., Kennedy and Channell, JJ.) dismissing an appeal from a County Court judge, on the ground that the case was covered by the decision in *Hill* v. *Pannifer* (90 L. T. Rep. 511; (1904) 1 K. B. 811).

The appellants were Vincent Coster, an inspector, and Robert Lamb, a police constable, stationed at Bromley, in Kent.

The respondent, Henry Headland, was a person duly rated and assessed to the poor of the parish of Foots Cray.

On the 27th April 1903 Mr. Headland was assessed by the Foots Cray overseers in the sum of 3*l.* 10*s.*

On the 8th July 1903 he paid 3*l.* 5*s.* on account of this sum, and the collector accepted it as part payment. A distress warrant was issued against him to recover the 5*s.* unpaid, and thirty-eight warrants and distresses against other persons were issued and levied, and the costs and charges claimed in all amounted to 15*l.* 2*s.* 3*d.*, of which one-thirty-ninth was appropriated to Mr. Headland. In satisfaction a silver salver of the respondent was taken and sold for 1*l.* 0*s.* 9*d.*, which the appellant Coster received, and no part of this sum had been returned to the respondent, though he had asked that the excess over legal charges should be paid back. The sums claimed in the warrant were the 5*s.* deducted, a further sum of 8*s.* for costs incurred by the overseers, "together with the reasonable charges of taking and keeping the said distress"—*i.e.*, the one-thirty-ninth of 15*l.* 2*s.* 3*d.*, or 7*s.* 9*d.* This made up the whole 1*l.* 0*s.* 9*d.* The question was the legality of the charge of 7*s.* 9*d.* For the respondent it was contended that this was 5*s.* 7*d.* in excess of the charges authorised by the Distress for Rates Act 1827, which applied to demands not exceeding 20*l.*, in which the schedule to the Distress (Costs) Act 1817 was adopted. It was admitted for the appellants that, if those Acts were still applicable, the respondent's contention was correct. The respondent's estimate was made in accordance with the schedule to the Act of 1817.

The sections of the Acts are set out at length in the report in the court below.

Danckwerts, K.C. and *A. E. Gill* for the appellants.—The magistrates were acting ministerially, and not as a court of summary jurisdiction, in issuing the summons. See

Reg. v. *Price*, 42 L. T. Rep. 439; 5 Q. B. Div. 300.

The real question is whether the case falls under the Distress for Rates Act 1849 or the earlier Acts of 1817 and 1827. *Moyse* v. *Cocksedge* (Barnes, 459; Willes, 636), decided in 1749, was a decision before the statute 27 Geo. 2, c. 20, which was the first Act dealing with the reasonable charges of taking, keeping, and selling a distress. The dictum in that case, that there was an implied power to levy a reasonable sum for expenses under the Act 43 Eliz. c. 3, has never been approved. Then came the statutes 27 Geo. 2, c. 20; 18 Geo. 3, c. 19; 57 Geo. 3, c. 93; and 7 & 8 Geo. 4, c. 17. The Acts of 1817 and 1827 were repealed by the Act of 1848 (11 & 12 Vict. c. 43), but that Act was found not to apply to distress, and therefore the Act of 1849 was passed, but at that time the earlier Acts were repealed, and the Act of 1849 is the governing statute. Costs, except in the Court of Chancery, are entirely the creation of statute. They cited

Skingley v. *Surridge*, 11 M. & W. 503;
Clark v. *Woods*, 2 Exch. 395;
Garnett v. *Bradley*, 39 L. T. Rep. 261; 3 App. Cas. 944;
Woodgate v. *Knatchbull*, 2 T. R. 148;
Dew v. *Parsons*, 2 B. & Ald. 562;
Com. Dig., vol. 4, edit. 1822, p. 258, "Extortion" (E);
Graham v. *Gill*, 2 M. & S. 294;
Dartford Brewery v. *Moseley*, 94 L. T. Rep. 263; (1906) 1 K. B. 462;
Andrews v. *Barnes*, 57 L. T. Rep. 790; 58 L. T. Rep. 748; 39 Ch. Div. 133.

The decision in *Hill* v. *Pannifer* (*ubi sup.*) was right.

Shearman, K.C. and *Mortimer Montgomery* for the respondent.—*Moyse* v. *Cocksedge* (*ubi sup.*) is good law. Apart from authority, the Acts of 1817 and 1827 are not repealed either by the Act of 1848 or the Act of 1849, and if those Acts and the Act of 1849 can be reasonably construed together, that construction ought to be put upon the later Act.

Danckwerts, K.C. in reply.

At the conclusion of the arguments their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Loreburn). — My Lords: In this case I am of opinion that the judgment of the Court of Appeal was right, and ought to be affirmed. What is under consideration is charges for "taking, keeping, and selling distress," not what is sometimes spoken of as "costs and expenses," which are in some cases differently treated. An Act of Parliament which says in terms that charges for distress shall in cases under 20*l.* be according to a particular schedule is still upon the statute-book. Here there is a charge for distress in a case under 20*l.*, and there is a charge made which is beyond the schedule rate. That seems to me necessarily to conclude the case unless there is some special reason which shows that the Act of Parliament is inapplicable. Mr. Danckwerts says that the Act is inapplicable because in the year 1754 there was passed a statute which provides for "reasonable charges" being made, and that the effect of the Act of 1827, which deals with the under 20*l.* charges, was to carve out of the Act of 1754 an exception as to those cases under 20*l.*, and he says that when the Act of 1754 was repealed, which happened in 1848, the substratum of the Act of 1827 fell, and therefore the Act itself became inoperative. He also says that a new standard of charges—namely, that they should be reasonable—was set up as applicable to all cases under the Act of 1849. Now, in the first place, I want to see if the Act of 1849 does set up a new standard, and does provide that in all cases reasonable charges shall be made. It may be so, but in my opinion the construction of the Act is equally open to this interpretation, that it assumes the right to reasonable charges as still existing, and I think that this is in fact the true construction of the Act of 1849. But even if a new standard is set up by the Act of 1849, is it incompatible with the special limitation as to distresses under the sum of 20*l.*? I think not, and that it makes no difference whether the one Act precedes or follows the other. I read them both together.

One of them says that the charges are to be reasonable; the other says that the charges in cases under 20*l.* are to be according to the schedule. If I find two Acts of Parliament which are to be read together, I am not to say that I will go further, and ask when the one was passed and when the other was passed, because the relative dates of the two appear to me to be perfectly immaterial. Further, I cannot see why the repeal of the Act of 1754 caused the Act of 1827 to fall to the ground. It is true that the Act of 1827 had nothing to attach itself to, as far as the present class of charges was concerned, after the Act of 1754 was repealed; but it was alive, and was left upon the statute-book, and would instantly apply to any relevant subject-matter that might be raised by fresh legislation. Under these circumstances I think that the judgment in the Court of Appeal was perfectly right, and ought to be affirmed, and I move your Lordships accordingly.

Lord MACNAGHTEN.—My Lords: I am of the same opinion. I think that the only statutes to be regarded are the statutes of 1827 and 1849. I think that the statute of 1827 is a statute of universal application, and when the statute of 1849 was passed it applied to it, and would only not have applied if it had been specially excluded.

Lord DAVEY.—My Lords: I agree, and on the same grounds. The reasons stated by Stirling, L.J. seem to me so clearly put that I am quite content to accept what he said as a judgment of my own.

Lord JAMES OF HEREFORD: My Lords: I concur.

Lord ROBERTSON.—My Lords: I think that the clue to this case is really to be found in the effect of the Act of 1827. It is not merely a general statute, but it is a statute applicable to future rates, and is intended to apply to every rating Act which is passed in the future. It lies in wait, as it were, for all Acts which may be passed, and imprints upon them a certain limitation. I will assume in favour of the appellants that when the Act of 1849 was passed there was no legal power to levy distress for such charges. I say that I assume it without at all pronouncing an opinion on the subject. Be it so. Then a rate under the Act of 1849 is merely another instance of a future rate of the class to which this Act of 1827 applies. I will assume, to put it in another way, that the reference to poor law in the Act of 1827 was inoperative after the Act of 1848. But it became operative, or, to put it in another way, was fed by the Act of 1849. Accordingly the only remaining question is whether the words of the Act of 1849 are inconsistent with the Act of 1827 so strongly and clearly as to necessitate the conclusion that there was an implied repeal. I agree with the Lord Chancellor that the words "reasonable charges" have such a latitude as to make no difficulty in the recognition of this special limitation which is driven by the Act of 1827 sectionally across all legislation in favour of persons whose rates do not amount to 20*l.* On these grounds, without entering into some of the controversial matters which have been discussed in the very able arguments which we have heard on both sides, I think that the judgment of the Court of Appeal ought to be affirmed.

Lord ATKINSON.—My Lords: I concur, for the reasons which have been given by my noble and learned friends

Order appealed from affirmed. Appeal dismissed with costs.

Solicitors for the appellants, *Wontner* and *Sons*.

Solicitors for the respondent, *Lloyd-George*, *Roberts*, and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 23, 24, *March* 7, 8, 10, 12, 13, 14, *and April* 7, 1906.

(Before VAUGHAN WILLIAMS, STIRLING, and MOULTON, L.JJ.)

SWANSEA HARBOUR TRUSTEES (apps.) *v.* ASSESSMENT COMMITTEE OF SWANSEA UNION AND THE OVERSEERS OF THE PARISH OF SWANSEA (resps.). (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Rating — Occupation — Docks — Harbour — Statutory power to levy harbour dues — Dues connected with occupation of land — Swansea Harbour Act 1854 (17 & 18 *Vict. c. cxxvi.*), *ss.* 125, 126, 127.

The Swansea Harbour Trustees were appointed and incorporated by a private Act of Parliament as conservators of the harbour and river at Swansea within certain defined limits.

Besides piers and other works which the trustees had constructed on lands purchased by them within the limits of the harbour, they had also constructed under their statutory powers a floating dock and basin which occupied part of what had been the bed of the river.

The soil of the harbour and river underneath this floating dock and basin was not purchased by the trustees, but remained, as it always had been, the property of the lord of the manor.

By various private Acts the trustees were authorised to take certain dues in respect of ships using the harbour.

Held, by the Divisional Court, (1) *that the trustees were in rateable occupation of the floating dock and basin, and* (2) *that the harbour dues were to be taken into consideration in estimating the rateable value of the lands within the harbour limits in occupation of the trustees.*

Upon an appeal by the trustees against the latter part of the judgment of the Divisional Court:

Held, reversing the decision of the Divisional Court, that the harbour dues were not so connected with the occupation of land by the trustees that they should be taken into consideration in estimating the rateable value of the lands.

Reg. *v.* Hull Dock Company (7 *Q. B.* 2) *establishes no general principle of law, but depends entirely on an inference of fact drawn by the court.*

APPEAL by the Swansea Harbour Trustees from part of the judgment of the King's Bench Division (Lord Alverstone, C.J., Lawrance and Ridley,

(*a*) Reported by E. MANLEY SMITH and W. W. ORR, Esqrs., Barristers-at-Law.

JJ.) upon a special case stated for the opinion of the court under sect. 11 of the Quarter Sessions Act 1849 (12 & 13 Vict. c. 45).

The facts appear sufficiently in the judgments.

C. A. Russell, K.C. and *W. C. Ryde* for the appellants.

Danckwerts, K.C. and *R. Cunningham Glen* for the respondents.

Cur. adv. vult.

Dec. 21, 1905.—The judgment of the court (Lord Alverstone, C.J., Lawrance and Ridley, JJ.) was read by

Lord ALVERSTONE, C.J.—This was an appeal from quarter sessions on a special case stated under the Quarter Sessions Act 1849 (12 & 13 Vict. c. 45). The appeal was brought by the Swansea Harbour Trustees against the assessment committee of the Swansea Union and overseers of the parish of Swansea in respect of a rate dated the 27th April 1901 made upon the appellants as occupiers of the docks, railway, and appurtenances at Swansea. The questions raised for our decision by the appeal are—first, whether the appellants are rateable in respect of their occupation of the Town Float, or North Dock, and the basins connected therewith; and, secondly, which of the rates or dues, which the appellants are authorised to levy under the various Acts of Parliament enumerated in the case, ought to be taken into consideration in arriving at the gross and rateable value of the assessable hereditaments. In order to appreciate the point which is raised in the first question—namely, as to whether the appellants are to be rated as occupiers of the Town Float—it is necessary to summarise the main facts as stated in the case or to be derived from the Acts of Parliament therein referred to. Prior to the year 1791 the river Tawe appears to have come down to Swansea Bay by a channel which included the water area of the North Dock Basin, the Town Float, or North Dock, and the Half Tide Basin. In 1791 the predecessors of the appellants were empowered to deepen the bar by cutting a channel through it, to make stop-gates across the river Tawe, and to convert it into a floating harbour. There are a number of other statutes, both before and after the year 1791, which it is not material to consider. By an Act passed in 1836 further powers were given to the trustees to make a navigable cut or canal, now known as the New Cut, from Fabian's Bay to Pentreguinea, to construct locks and weirs near the mouth of such cut, and to make certain other ancillary works in connection with the works so authorised. By the Swansea Harbour Act 1854 certain powers of charging harbour dues and tonnage rates on vessels and rates on goods were conferred upon the trustees, and it was recited that under the various Acts of Parliament, from 31 Geo. 3 down to 10 & 11 Vict., the trustees had constructed piers at the entrance to the harbour, with a lighthouse on the western pier, and had converted the bed of the river Tawe opposite the town of Swansea into a floating dock, called the Town Float, with two iron swing-bridges over the same, and had made a navigable cut and deepened and improved the bed of the river from the entrance to the harbour between the piers up to the Forest Copper Works, and made other works in the port or harbour and communicating therewith. By sect. 60 of that Act the trustees were empowered to carry out a number of additional works, including the extension of the western pier and various improvements to the then existing works. Sect. 58 of that Act gave certain seaward limits to the harbour of Swansea, which are delineated upon plan No. 2 put in evidence before us. Under the powers contained in various statutes prior to 1857, a company called the Swansea Dock Company had constructed a dock (shown upon the plan as the South Dock), and in the year 1857 that dock was transferred to the appellant trustees, and has since remained their property. In the year 1874 powers were given to the trustees to construct the dock to the eastward of the entrance (shown upon the map as the Prince of Wales Dock) and certain other incidental works, and also to deepen, widen, and improve the entrance channel. In the year 1896 the appellant trustees were authorised to, and did subsequently, construct a new entrance to the Half Tide Basin at the south end of the Town Float; and by sect. 17 of the Act of 1896 they were authorised to levy certain additional rates upon vessels using the Town Float after the construction of the new entrance. The above is a brief summary of the principal dates and leading Acts of Parliament under which the works which are included in the rateable hereditaments were constructed. The hereditaments in respect of which the appellants were rated are those described in par. 2 of the case, which is as follows:

> The hereditaments in respect of which the respondents claim to rate the appellants in and by the said rate are indicated upon a plan which has been signed by the solicitors to the appellants and also by the solicitors to the respondents (and which is hereinafter referred to as "plan No. 1"), and comprise the hereditaments on the said plan coloured "blue," "hatched blue," "pink," and "light green," and also the hereditaments described on the said plan as "Town Float or North Dock," "North Dock Basin," and "Half Tide Basin (North Dock)," inclusive of the gates and lock between the North Dock and the two last-mentioned basins respectively, and also the "lock basin," with the lock between that and the North Dock Basin and the lock and gates between the said North Dock Basin and Half Tide Basin (North Dock) respectively and the river. The Beaufort Dock is not included in the said assessment, not being in the occupation of the appellants. Among the said hereditaments are further included the connection constructed under the Swansea Harbour Act 1874 between the Prince of Wales' Dock and the Tennant Canal. The statements made in the reference on the said plan are agreed.

It is alleged by the appellants that the bed of the river Tawe, on the part coloured blue, but not hatched, is vested in the Duke of Beaufort, and this is admitted by the respondents, but subject to the provisions and operations of the various Acts. Under these circumstances it was contended by Mr. Russell, on behalf of the appellants, that the trustees were not in rateable occupation of the Town Float and two basins. It was admitted that they were in occupation of certain locks and entrances which are indicated upon the plans, but it was contended that there was no rateable occupation of the water-covered area of the North Float of the two basins. In support of this view it was urged that, in respect of the soil of the unhatched blue area, the trustees only had an easement, or an interest in the nature

of an easement. In support of this, reliance was placed upon *Rex* v. *Mersey and Irwell Navigation Company* (9 B. & C. 95), *Rex* v. *Thomas* (9 B. & C. 114), *Rex* v. *Aire and Calder Navigation Company* (9 B. & C. 820), *Rex* v. *Aire and Chalder Navigation Company* (3 B. & Ad. 139), *and Lambeth Overseers* v. *London County Council* (76 L. T. Rep. 795; (1897) A. C. 625). In our opinion it is now well established that, although the ownership of the land occupied may be very material in determining whether there is a rateable occupation, there may be a sufficient occupation for rating purposes although unaccompanied by ownership of any portion of the soil. This is established by a long series of cases, of which *Reg.* v. *West Middlesex Waterworks Company* (32 L. T. Rep. O. S. 388; 1 E. & E. 716) may be cited, but the law is conclusively settled by *Holywell Union* v. *Halkyn Drainage Company* (71 L. T. Rep. 818; (1895) A. C. 117), in which Lord Herschell said, at p. 120 (1895) A. C.): "No doubt, if it could be shown that the respondent company were the owners of the tunnel, this would negative the idea of their being entitled merely to an easement, and, being owners, they would *primâ facie* be the occupiers; they would be so regarded unless the occupation were shown to be in someone else. But even if it be established that on the true construction of the deed they are not owners, it does not follow that they were possessed of an easement only and were not occupiers," and Lord Davey (71 L. T. Rep., at p. 823; (1895) A. C., at p. 131) said: "My Lords: I agree with the learned judges in the Court of Appeal, that the drainage company are not owners of the soil of the tnnnels or watercourse. But that does not seem to me conclusive on the question of their rateability in respect of their occupation. The right of the company may be an easement or incorporeal right; but the easement may be of such a character as requires the occupation of land for its exercise, and confers upon the company a right to occupy land during its continuance. According to a long course of authority, the occupation of land under such circumstances is sufficient for rating purposes, though unaccompanied by ownership of any portion of the soil." It is further to be observed that, as stated in the case, the legal ownership of the Duke of Beaufort is subject to the provisions and operations of the Acts of Parliament to which we have already referred, and it needs no lengthened argument to point out that under such Acts of Parliament there may be *de facto* occupation, although the occupiers are not the legal owners, and although there is no relation of landlord and tenant between them and the owners. As can be gathered from a careful consideration of the authorities to which reference has already been made, the question is largely one of fact. In the three cases in 9 B. & C. there was no finding that there was any occupation by the undertakers; on the contrary, the case proceeded upon the assumption that all they had done was to improve the navigation of the river in question. In the last case, *Rex* v. *Aire and Calder Navigation Company* (3 B. & Ad. 139), an attempt was made to get round this distinction by assessing the Aire and Calder trustees in respect of their rateable occupation of the dams, and estimating the value of that occupation by including the tolls for the use of the navigable cuts This was an obvious attempt to evade the effect of the previous decision in *Rex* v. *Aire and Calder Navigation Company* (9 B. & C. 820), and to include in the value of the rateable hereditament receipts which were not earned by it, and had no sufficient legal connection with it. In *Blyth Harbour Commissioners* v. *Newsham Churchwardens and Overseers* (71 L. T. Rep. 34; (1894) 2 Q. B. 293, 675), to which we have to make reference later in connection with another argnment of the appellants, there was no occupation of the harbour in respect of which the dues were levied, and it was held, following the judgment of the *Aire and Calder* case (3 B. & Ad. 139), that the dues paid by the vessels could not be taken into consideration in enhancing the rateable value of these quays. The *Brockwell Park* case, *Lambeth Overseers* v. *London County Council* (76 L. T. Rep. 795; (1897) A. C. 625), has no bearing upon the present case. There was no occupation by the London County Council; they were merely custodians and trustees for the public; and, further, there was nothing which could give beneficial occupation. Dealing with the facts of this case, the result of the works carried out under the various Acts of Parliament is that, so far as the Town Float, Half Tide Basin, and North Tide Basin are concerned, in the year 1901, the trustees had for all practical purposes the exclusive occupation of the ponds of water known as the Town Float and the basins. They had by works which are admitted to be in their rateable occupation changed the bed of the old river in the docks and diverted the flow of water to the new cut. The trustees, and they only, received dock dues from vessels which entered those basins and loaded and unloaded in the dock; they also received dues in respect of vessels which passed out from the dock through the cut constructed by them under their statutory powers to the Swansea Canal. Whatever may be the true position with regard to the legal ownership of the bed of the river, this *de facto* beneficial occupation of the float, basin, and locks existed through the whole rateable year, and therefore we have no hesitation in answering the first question in favour of the respondents. The second question raised is as to what dues should be taken into consideration in arriving at the gross and rateable value. Before considering the law applicable to this part of the case and the cases cited thereon, it is necessary to add to the above-mentioned statement of facts that the trustees are the legal owners of the soil, of all the waterways which are hatched blue, including the water passage between the piers, the accesses to the Prince of Wales' and South Docks, and the soil of those docks and the soil of the new cut where that is also hatched blue, and in addition are owners of the freehold land coloured pink, and the leasehold land coloured light green. They are also owners, either as freeholders or leaseholders, of the land coloured dark red and dark green, but this may be left out of consideration, because they are the subject of separate assessments. The main point raised by the appellants as regards this part of the case is that in estimating the rateable value the harbour dues should not be taken into consideration. In the view we take of the case it is not necessary to consider all the numerous sections which are enumerated in par. 25 of the case. The question is one of principle, and does not depend on the particular language of any special section.

The main point was raised with regard to the harbour rates on shipping. By sect. 125 of the Act of 1854 the trustees may demand the rates specified in sched. A of that Act on all vessels entering or leaving the harbour; by sect. 126 of the same Act the trustees were empowered to demand and receive, in respect of goods loaded and discharged in vessels entering the Town Float or Half Tide Basin, the rates specified in sched. B; and by sect. 127, in respect of goods loaded and discharged by vessels in parts of the harbour other than the Town Float or Half Tide Basin, two-thirds of the rates specified in sched. B. By the later Acts, which, as we have said, it is not necessary to consider in detail, other powers of levying rates were conferred upon the trustees, with the provision that upon vessels to or from which goods were loaded and unloaded in the South Dock and Prince of Wales' Dock, they should charge reduced harbour rates. It was contended by the appellants, relying upon the case of *Blyth Harbour Commissioners* v. *Newsham Churchwardens and Overseers* (*ubi sup.*), that inasmuch as the harbour rates on shipping were payable by vessels entering and leaving the harbour, independently of the question whether or not they entered the Town Float, these rates could not be taken into consideration in estimating the rateable hereditament occupied by the trustees. In order properly to appreciate this argument it is necessary to ascertain clearly what was the ground of the decision in the *Blyth Harbour* case (*ubi sup.*). In that case an attempt was made to take into account, in estimating the rateable value of quays which were in the occupation of the Blyth Harbour Commissioners, the harbour dues which were levied upon vessels entering the harbour. It was found as a fact that the facilities afforded by the commissioners at their quays contributed to the amount of the harbour dues received by them, or, in other words, that more vessels were induced to come into the harbour for the purposes of loading and discharging by reason of the quays, and thereby the amount of harbour dues received by the commissioners was increased. It was, however, expressly found that the Blyth Commissioners were not the occupiers of the harbour and that the harbour dues were not received in respect of the use of the quays, and the Master of the Rolls, Lord Esher, in his judgment, points out that the harbour commissioners would receive the dues even if they did not occupy any of the quays, and that it could not be reasonably contended that the commissioners were paid the dues for the use of the quays and mooring ports. All the judges carefully pointed out that in *Reg.* v. *Hull Dock Company* (5 L. T. Rep. O. S. 126; 7 Q. B. 2), on which the respondents in this case rely, the judges drew an inference of fact that the tolls were paid in respect of the use of the land the subject of the rateable occupation. It seems to us that when this distinction is appreciated, and when it is kept in view that the question is in reality one of fact, there is no inconsistency between the various decisions. In the *Hull Dock* case (*ubi sup.*), where the dock company made a dock, but had no property in the harbour and occupied the dock and the entrance basin to the dock, it was held that the harbour dues could be taken into consideration in so far as they were paid by ships which actually entered the dock, the ground of the decision being, as stated at p. 26 (7 Q. B.) in the considered judgment of the court, delivered by Lord Denman, that "the benefit conferred by the use of the dock is not the less the meritorious cause of the toll because other ships pay, to which that meritorious cause does not apply. To those which come into the docks the benefit is conferred by the docks and in the docks; and therefore the toll paid for that benefit must be held to be earned there in the docks, and to be profits arising there." The same principle is clearly recognised by Lord Blackburn in his judgment in *New Shoreham Harbour Commissioners* v. *Lancing* (22 L. T. Rep. 434; L. Rep. 5 Q. B. 489, at p. 496): "It is equally clear that, when parties occupy land, they are rateable for the value of that land, and that tolls, though not rateable, may be considered as enhancing the value of the occupation of the land whenever it appears that the occupation of the land is so connected with them that it can be said that the tolls and rates are levied on account of the occupation of the land; or, perhaps, though not levied on account of the occupation of the land, where they could not be received without an occupation of land," and Cave, J. again states the principle in order to distinguish the case of *Reg.* v. *Berwick Assessment Committee* (54 L. T. Rep., at p. 163; 16 Q. B. Div., at p. 498) from that of *Reg.* v. *Hull Dock Company* (*ubi sup.*). The question therefore which we have to decide is whether, upon the facts stated in this case, the occupation of the land is so connected with the harbour rates that it could not be said that the tolls and rates are levied on account of that occupation. There is no evidence before us that any substantial part of the harbour rates are levied in respect of vessels which do not occupy, and make use of, some part of the docks, quays, and cuts occupied by the trustees and forming part of the rateable hereditament. It was stated in the course of argument that a very small portion was paid in respect of such vessels, but be that as it may, if the trustees intended to rely upon this distinction, the facts ought to have been stated in the case to raise it. Upon the facts stated before us we have no hesitation in drawing the inference that the harbour dues are paid in respect of and directly connected with the rateable hereditament in the occupation of the trustees. Reliance was placed by the respondents upon the fact that, in some statutes—for example, sect. 81 of the Act of 1854—there is a prohibition against any vessels anchoring in any part of the harbour under penalty. In our opinion this section is not directly material, beyond supporting the view that practically all the harbour dues are in fact levied in respect of vessels which do use the quays, docks, and works of the trustees, for the purpose of loading and unloading goods. It was further contended by the appellants that even the dues on the unloading of goods insched. B of the Act of 1854 were, as to two-thirds of them, to be regarded as harbour dues, because, by the provision of sect. 127, and the corresponding provision in sect. 37 of the Act of 1874, vessels which did not load or unload in the Town Float were to pay harbour dues at a less rate. This point is already covered by our decision with regard to the harbour dues, but we think it right to say that, even had we taken a different view

upon the appellants' contention based on sect. 125 of the Act of 1854, in our opinion the total amount of the dues levied under sect. 126 and corresponding sections, in respect of goods loaded and unloaded in the Town Float, must be taken into consideration in estimating the rateable value of the rateable hereditament. One further point remains to be noticed. By sect. 17 of the Act of 1896, upon the completion of the new entrance to the Half-Tide Basin and the Town Float, the trustees were empowered to levy additional dues in respect of goods shipped and unshipped in the Town Float. It was contended by Mr. Danckwerts that we ought to give a direction that the dues leviable under this Act should also be taken into consideration in arriving at their rateable value. We do not propose to express any opinion upon that question, as it cannot be properly answered until the facts are ascertained. Rateable value depends upon the amount of rent which the hypothetical tenant would pay as defined by the Parochial Assessments Act 1836; the mere power to make charges is not in itself conclusive; the question is one of fact—what rent, having regard to the experience of the past and the reasonable prospects of the future, the tenant would be willing to pay. The answer to the second question is that all the harbour and dock rates and dues which upon the facts proved before the arbitrator (by whom the figures are by agreement to be worked out) were levied, or, if the assessment is made in advance, would be levied, during the year of assessment in respect of the use of the property, the subject-matter of the rate, are to be taken into consideration in estimating the rateable value of the rateable hereditament. In our opinion the contention of the appellants on both points fails, and this appeal must be dismissed with costs.

Appeal dismissed. Leave to appeal.

The appellants appealed from the second part of this decision, as to the inclusion of the harbour dues in estimating the rateable value of the hereditaments in their occupation.

Feb. 23, 24, *March* 7, 8, 10, 12, 13, *and* 14.—*C. A. Russell*, K.C. and *Walter Ryde* for the appellants.

Danckwerts, K.C. and *R. Cunningham Glen* for the respondents.

Cur. adv. vult.

April 7.—VAUGHAN WILLIAMS, L.J. read the following judgment:—This is an appeal against part of an order made by the King's Bench Division sitting in Banc on the hearing of a special case stated for the opinion of the court pursuant to an order of the 6th March 1905 made pursuant to sect. 11 of the Quarter Sessions Act 1849. The special case as stated raised three questions relating to the rating of Swansea Harbour and certain docks and basins therein. The King's Bench Division decided questions 1 and 2 in favour of the respondents, the rating authority for the Swansea Union, and, as there is no appeal against this part of the order, the result is that we must take it as admitted that the respondents have rightly included the Town Float or North Dock itself, and the basins, &c., connected therewith in the assessable premises. This leaves open for our consideration only the answer to the third question asked in the special case, which answer was that all of the rates and dues mentioned in the special case (so far as are not admitted by the appellants) can be included in arriving at the gross and rateable value of the assessable hereditaments. In other words, the King's Bench Division decided that on the facts stated before them they drew the inference that the harbour dues were paid in respect of and directly connected with the rateable hereditament in the occupation of the trustees. This decision of the King's Bench Division seems to have been based upon the conclusion that the facts and inferences of fact in this case brought this case within the principle of the judgment of Lord Denman in *Reg.* v. *Hull Dock Company* (7 Q. B. 2). I cannot agree in this conclusion for reasons to which I will presently advert, but before doing so I will first deal with the scheme and provisions of the Swansea Harbour Act 1854. In my judgment that Act was intended to operate as a fresh starting point of legislation, so that the rights and obligations of the new harbour trustees under that Act must be construed in reference to what is found in that Act and not in reference to what may be found in the earlier Acts relating to Swansea Harbour and the rights and obligations of the old trustees; and I further think that the nature and basis of any rates or tolls granted by the Act of 1854 must be ascertained in reference to the provisions of the Act of 1854 and the state of the property and circumstances of the new trustees at the date of the passing of that Act and not in reference to the provisions and circumstances contained in and existing at the date of later Acts, although, of course, this observation does not apply to absolutely new rates granted by the later Acts. It will be observed that the Act of 1854 defines by sect. 3 the limits of the harbour of Swansea within which the Act shall be put in force and that in respect of Port Tennant, which it is enacted shall be comprised within these limits, ground is included not then covered by water. Then all the old Acts—*i.e.*, the recited Acts—are repealed, and new trustees are appointed and incorporated. It is true that by sects. 43 and 45 of the Act of 1854 the property and powers of the old trustees are vested in the new trustees, and that the present and future rights and liabilities of the old trustees are saved in the sense that the new trustees shall for this purpose represent the old trustees, and that the new trustees are by sect. 58 appointed conservators of the harbour of Swansea and the river Tawe and all parts of Swansea Bay included within certain imaginary lines drawn between certain named points, which lines probably extend beyond Swansea Harbour; but these provisions do not seem to me to vest the soil of Swansea Harbour in the new trustees which in my judgment was not vested in the old trustees. The Act goes on to give to the new trustees powers to construct certain works and to purchase certain lands. But I can find nothing in these sections vesting the soil of the harbour generally in the new trustees. Certain lands, such as purchased lands within the harbour, are vested in them, but nothing else. In the main the trustees are appointed to exercise powers and not to acquire lands. This is my view of the scheme of the Act of 1854, and I think that, in construing that Act, one should not refer to the provisions of the recited Acts. But even if one did so, I am of opinion that those Acts do not vest the soil of the harbour

generally in the old trustees, and generally favour rather the case of the appellants than the case of the respondents. The extent to which the soil of the harbour was in 1854 vested in the harbour trustees may be ascertained from examination of the plan of 1853 which was deposited with the Bill that resulted in that Act. It will be seen from that that a very small portion of the soil of the harbour was then vested in the harbour trustees. And even if one examines the plan accompanying the special case, it will be obvious that no inconsiderable portion of the harbour is at the present day not vested in the new trustees. And I may observe that even with regard to portions of the harbour vested in the trustees under later Acts for the purpose of works to be executed, including docks and quays, the scheme of the later Acts seems to be that the Legislature intended that for the purpose of the levying of harbour dues the docks thus constructed and in respect of which the trustees were entitled to levy dock dues should continue to be within the harbour for the purpose of harbour dues, the intention of the Legislature apparently being that the trustees should not by reason of their having constructed docks and other conveniences diminish the area within which they were entitled to levy harbour dues. I now pass to the sections granting rates. Sect. 125 deals with harbour rates on shipping as specified in sched. A, which regulates tonnage rates. So far as the words of this section are concerned, there is nothing to suggest any connection between this rate and any rateable hereditament occupied by the respondents. As to sect. 126, which relates to dues on goods loaded into or discharged from vessels entering the Town Float or Half Tide Basin according to the rates specified in sched. B, it is not denied generally by the respondents that as far as this section is concerned such rates would have to be taken into account in the assessment for rating of the Town Float or Half Tide Basin. One exception is made with which I will deal later on. But it is said that this does not apply to the rates mentioned in sect. 127. Those are (*a*) goods, except British copper ores, loaded into or discharged from vessels lying or being in any part of the harbour other than the Town Float and Half Tide Basin, two-thirds of the rates on goods specified in sched. B. (*b*) In respect of British copper ores loaded into or discharged from vessels lying or being in any part of the harbour other than the Town Float or Half Tide Basin, at the rate of 1½*d.* per ton. (*c*) Provided always that the trustees shall not demand or take in respect of any goods shipped or unshipped into or from any vessel within the limits of Port Tennant as by this Act defined and which shall enter Port Tennant by or through the present entrance thereto in Fabian's Bay, more than one-half part of the rates which may for the time being be demanded and taken under the powers of this Act for goods of a like nature when shipped or unshipped into or from any vessel within the Town Float or Half Tide Basin. A difficult question arises on sect. 127, whether the rates therein specified are the same rates as can be taken under sect. 126 with an abatement or reduction in case the ship is loaded or discharged at spots outside the Town Float and Half Tide Basin, but within the harbour, or is loaded or discharged with British copper ore, or whether these rates are different rates of varying amounts stated not in figures, but by a statement of the proportion which such amounts respectively bear to the maximum stated in respect of each kind of goods in sched. B. In the case of British copper ore the rate stated in sched. B is 2½*d.* and not 1½*d.*, as provided in sect. 128 in the case of ships loading or discharging copper ore in any part of the harbour other than the Town Float or Half Tide Basin. On the whole, I have come to the conclusion in fact that the rates in sect. 127 are different rates from those in sect. 126, and while the former are rates connected with the occupation of the Town Float or Half Tide Basin the latter are rates in gross. In coming to this conclusion in fact I am not differing from the King's Bench Division, because the King's Bench Division based its decision on wider general grounds, which rendered it unnecessary to take into consideration the question which I have been discussing as to the nature of the rates granted by sect. 127. My observations and conclusion also apply to the rates granted by sect. 129. The appellants, however, do not admit that the whole of the dues on goods shipped or discharged within the Town Float and its entrance basins are to be taken into account in assessing the rateable value of the occupation of those lands and works. On this point they raise the following very ingenious contention: By sect. 127 of the Act of 1854 (omitting special provisions not necessary for the statement of their contention) the trustees are empowered to levy tolls to the amount of two-thirds of those set out in sched. B on goods "loaded into or discharged from vessels lying or being in any part of the harbour other than the Town Float," &c. By sect. 126 the trustees are empowered to levy tolls to the full amount of those set out in sched. B on goods "loaded into or discharged from all vessels entering the Half Tide Basin," &c. But the Half Tide Basin is undoubtedly within the harbour, say the appellants, so that this is equivalent to levying two-thirds of the tolls set out in sched. B on goods loaded or discharged in any part of the harbour with additional dues equal to one-third of the tolls set out in sched. B, should the vessel enter the special part of the harbour of which they have rateable occupation—viz., the Town Float, &c. Hence, say they, it is only this one-third of the tolls set out in sched. B that comes to them in virtue of their occupancy of the Town Float, &c., and therefore this portion alone should be considered as enhancing the value of that occupation. I do not agree with this contention. The question is as to whether certain dues authorised by statute are of the nature of tolls in gross or not. This must be decided by the consideration of the language of the statute taken in connection with the surrounding circumstances and the nature of the subject-matter to which it applies. Had the statute been in the form suggested by the appellants as equivalent to its actual form—in other words, if the Legislature had associated the two-thirds dues on goods loaded or discharged from vessels entering the Town Float, &c., with the like dues payable in respect of ships in any other part of the harbour, irrespective of any special occupation of such other part by the trustees—it would have furnished a cogent argument in favour of the view that the Legislature intended that those two-thirds dues should be of one and the same nature

wherever the vessel might be, and therefore, according to my view, tolls in gross. Else why should the Legislature divide the tolls and make those vessels entering the Town Float, &c., pay two separate tolls instead of one toll of equivalent amount? But this is exactly what it has not done. It has established one simple and undivided toll on goods loaded into or discharged from vessels entering the part of the harbour in which the trustees are admitted to have a rateable occupation, and which toll, therefore, would *primâ facie* go to enhance the value of that occupation. We are asked to dive into the mind of the Legislature and to say that it meant something different from this, because the quantum of the tolls would not be altered by the change. But the point is not the quantum, but the nature of the tolls, and the quantum is at best only very indirect evidence as to the intended nature of the tolls. I can see nothing in these provisions which justifies me in dividing up the single toll on goods loaded into or discharged from vessels entering the Town Float, &c., into two distinct tolls differing in character, and I am therefore of opinion that the whole of the dues on goods loaded into or discharged from vessels entering the Town Float, &c., must be taken into consideration as enhancing the rateable value of that hereditament. Having attempted by the preceding observations to sufficiently state the nature of rates granted by the Act of 1854 and the facts and inferences of fact relating thereto, I will now examine the judgment of Lord Denman in *Reg.* v. *Hull Dock Company* (7 Q. B. 2), upon which, as I have said, the judgment of the King's Bench Division is largely based, and compare it with the judgment of Lord Esher in *Blyth Harbour Commissioners* v. *Newsham and South Blyth Churchwardens* (71 L. T. Rep. 34; (1894) 2 Q. B. 675). Now it is to be observed that Lord Denman in delivering the judgment of the court distinctly recognises and affirms the principle laid down in *Reg.* v. *Bristol Dock Company* (1 Q. B. 535). The principle thus recognised in the *Hull* case, and also in *Lewis* v. *Overseers of Swansea* (5 E. & B. 508), was that where a toll or rate is taken without any distinction as to the occupation of the land which is used for the carriage of goods, the toll or rate must be treated as a toll in gross wholly unconnected with the occupation of the land, and the occupation of the land by the person entitled to levy the toll must be treated as a mere accident. Lord Esher, in the *Blyth Harbour* case, after having pointed out that Lord Denman in his judgment in the *Hull* case recognised this rule and principle laid down in the cases mentioned, thus accounts for the conclusion in the *Hull* case. First he says, "*Reg.* v. *Hull Dock Company* . . . recognises precisely the same rule and principle, but the judges, having power to draw inferences of fact, drew the inference that the toll in question there was paid in respect of the use of the land to be rated. Having drawn that inference, the case came completely within the settled rule and principle. Whether the court drew the right inference of fact—whether we should have drawn the same inference if the case had come before us under the same circumstances — is wholly immaterial." Later on he says: "We have here to deal with the judgment of the court below. Charles, J. in delivering that judgment said, with respect to the harbour dues and the dues on goods, 'We have then to inquire for what they are paid. Are they paid for the use of the quays and mooring posts, or apart from and independent of such use? It seems clear from the statements in the case that they are paid under a separate obligation and irrespective of the use of the quays altogether.' Having there stated the question, and having referred to the judgments in *Lewis* v. *Overseers of Swansea* (5 E. & B. 508), he proceeds: 'Having regard to the finding in the present case that the dues are payable whether the quays are used or not, these observations appear exactly to apply to the Blyth Harbour Commissioners, who would receive the dues just as they do at present, even if they did not occupy any of the quays.' It cannot be denied that the latter statement is true in fact; and that being so, the conclusion at which the court below arrived was that it could not reasonably be said that the commissioners are paid the dues for the use of the quays and mooring posts." In the case of *Reg.* v. *Berwick Assessment Committee* (54 L. T. Rep. 159; 16 Q. B. Div. 493) Cave, J. points out that in the *Hull* case "the docks were the sole meritorious cause of the company's right to the dues," and Wills, J., in the same case, speaking of the *Hull* case, says: "In that case the charge was upon every vessel entering the harbour, basin, or docks, and it was the same in each of the three cases. The court held that when once a vessel did enter the docks the rate was earned by the docks, and was, therefore, to be taken into account in assessing their earnings." Lastly, I will quote from the last part of the judgment of Lord Denman in *Reg.* v. *Hull Dock Company* (*ubi sup.*): "But it is said, further, that these tolls are due from a ship the moment it enters the port of Kingston-upon-Hull, whether it proceeds into the docks or not; therefore, as the dues attach before arrival in the docks, they cannot be said to be profits earned in the docks. The language in the Act of Parliament 14 Geo. 3, c. 56, is not uniform and consistent in the different sections, nor free from doubt; but it sufficiently appears from sects. 42, 43, and 44 that the tolls are not due, and do not attach upon a ship merely coming into the port. They attach on ships coming into the said harbour, basin, or docks within the port of Kingston-upon-Hull, or unlading or lading goods within the said port. 'Harbour' there may probably mean the old harbour or Hull Haven; but, whatever it means, a distinction is made between coming into the docks and unlading or lading within the port sufficient to show that the tolls do not attach on a ship the moment it comes into the port. The fact, therefore, on which this part of the argument rests is not as stated. But, if it were, the argument is not convincing. The ship which actually comes into and uses the docks is not the less benefited by them, because the toll must have been paid even if it had not come in; and the benefit conferred by the use of the dock is not the less the meritorious cause of the toll because other ships pay, to which that meritorious cause does not apply. To those which come into the docks the benefit is conferred by the docks and in the docks, and, therefore, the toll paid for that benefit must be held to be earned there in the docks, and to be profits arising there." It seems to me clear that the decision in *Reg.* v.

Hull Dock Company (7 Q. B. 2) depended entirely upon the inference of the court drawn from the particular words of the section granting the rate coupled with the facts stated in the special case that the docks were the sole meritorious cause of the grant of the rate. Having come to the conclusion that a large part of the soil of the harbour of Swansea was not the property of the Swansea Harbour Trustees in 1854, and that a considerable part of the harbour continued not to be their property at the time of the making of the rates in question in this case, I think that, inasmuch as these harbour rates are payable as well in respect of the parts of the harbour not owned or occupied by the trustees as in respect of the parts owned or occupied by them, and inasmuch as a hypothetical tenant of the lands owned by the trustees would not be entitled to receive the harbour rates whether on shipping or goods, the right conclusion in fact is that the receipt of these rates cannot fairly be said to be attributable to the ownership or occupation of any land or corporeal hereditament by the trustees. Before leaving the discussion of these authorities I should cite the judgment of Blackburn, J. in *New Shoreham Harbour Commissioners* v. *Overseers of Lancing* (L. Rep. 5 Q. B. 489), because the Queen's Bench Division, in deciding the case under appeal, especially refer to this case, in which Blackburn, J. said: "Tolls, though not rateable, may be considered as enhancing the value of the occupation of the land whenever it appears that the occupation of the land is so connected with them that it can be said that the tolls and rates are levied on account of the occupation of the land; or, perhaps, though not levied on account of the occupation of the land, where they could not be received without an occupation of land." And Lord Alverstone goes on to say: "There is no evidence before us that any substantial part of the harbour rates are levied in respect of vessels which do not occupy and make use of some part of the docks, quays, and cuts occupied by the trustees and forming part of the rateable hereditament. It was stated in the course of argument that a very small portion was paid in respect of such vessels, but, be that as it may, if the trustees intended to rely on this distinction the facts ought to have been stated in the case to raise it. Upon the facts stated before us we have no hesitation in drawing the inference that the harbour dues are paid in respect of and directly connected with the rateable hereditaments in the occupation of the trustees." In my opinion the observations of Blackburn, J. in this very case of *New Shoreham Harbour Commissioners* v. *Overseers of Lancing* (*ubi sup.*) upon the character of the connection which must appear between the occupation of the land and the levy of the tolls, before it could be said that the levy of the tolls enhances the value of the occupation of the land, would lead to the conclusion in the present case that the levy of the tolls is not so connected with the occupation by the trustees of rateable hereditaments as to enhance their rateable value. The harbour of Swansea is not occupied by the trustees, and although it may be true that the occupation of the docks and quays has largely increased the number of ships entering the harbour and, therefore, the harbour dues, yet the occupation of the rateable hereditaments is not necessary to the right to demand such dues, but is altogether too remote to justify the court in taking the harbour dues into consideration in assessing the value of the land occupied by the trustees. In the very case of *New Shoreham Harbour Commissioners* v. *Overseers of Lancing* (*ubi sup.*) the harbour commissioners occupied piers in the parish of Lancing, which formed the entrance to the harbour and afforded facilities for entrance to vessels that made use of the harbour, and there was no doubt but that few tolls could have been collected but for the existence of the piers, but Blackburn, J. says: "Looking at it as strongly as I can for the respondents, the argument would come to be this. Without the entrance as it exists few or none of the tolls could be received, and the piers are necessary as serving to keep open the entrance, and so are instrumental to the right of levying the tolls; if the piers fell into decay the entrance would be choked up, and it is argued that in such case the tolls would be lost, and that therefore the possession and occupation of them for the purpose of keeping them in repair is to be considered as enhancing the value of the harbour; this, I repeat, is too remote." This view of Blackburn, J., coupled with the illustration which he gives, shows that he would have held that the mere fact that the occupation of land increased the entry of ships into the harbour, and therefore the volume of the receipt of the tolls, would not enhance the value of the land, and shows that he did not think that the quantity of the increase in the harbour dues would render the occupation of the convenient land adjoining the harbour necessary for the demand of the harbour dues, and the provision in each of the subsequent harbour Acts that the new works executed for the convenience of ships should be deemed part of the harbour seems to me to point to the same conclusion. Moreover, in the case of *Blyth Harbour Commissioners* v. *Newsham and South Blyth Churchwardens* (*ubi sup.*) the fact that the improvements in the harbour, including the facilities provided on pieces of land which had been conveyed to the commissioners, greatly increased the trade of the harbour, and as a consequence the commissioners received for harbour and goods dues larger sums than they otherwise would have done, did not prevent the Court of Appeal from holding that they could not take these dues into account in estimating the value of the quays. The test applied by Blackburn, J. seems to be—Are the conveniencies on the rateable land so attached to the tolls or dues that a hypothetical tenant would give a larger rent for the land on which the conveniences had been erected because of the right of the commissioners to levy the harbour dues? I gather this from the judgments of Blackburn, J. in *Faversham Navigation Commissioners* v. *Faversham Union* (31 J. P. 822) and *Ipswich Dock Commissioners* v. *St. Peter's* (7 B. & S. 310). But there remain two questions which require grave consideration before we differ from the conclusion of Lord Alverstone and his brother judges parties to the judgment appealed from. One is the question whether, assuming that the ownership of the soil of the harbour to a considerable extent is not vested in the trustees, so that in the absence of other occupiers the court might infer occupation from ownership, there yet may not be an inference of occupation from the fact that the trustees have in their dealings

with that part of the harbour of which they are not the owners done much more than exercise mere powers or rights such as those consequent on the grant of an easement, and have thus become occupiers and so liable to be rated in respect of the harbour. This inference is based upon the opinion expressed in the House of Lords in the case of *Holywell Union* v. *Halkyn District Mines Drainage Company* (71 L. T. Rep. 818; (1895) A. C. 117), but I do not think that any such inference can be drawn. The opinion of Lord Herschell makes it clear that it is true that there may be rateable occupation, although there is neither ownership nor tenancy of the land in respect of which the rate is sought to be imposed, but the land must be occupied for the purpose of and in connection with the enjoyment of the powers. The powers must be of such a character as require occupation of the land for their exercise. It may be that the occupation need not be exclusive; others may enjoy rights in the same area of land; but there must be *de facto* occupation. A mere exercise of rights or powers unaccompanied by *de facto* occupation will not do. I think that in the present case there is no more evidence of occupation than there was in the case of the Blyth Harbour Commissioners and many other cases in which trustees collecting harbour dues have not been held to be in occupation. The other question which I have to deal with is the question whether there is anything in the later Acts to change the status of the rates granted in 1854. I have been carefully through them, and I think not. Such rates as were rates in gross in 1854 so continue, notwithstanding the later Acts. I think that the whole scheme of the later Acts which in form are substantially identical shows this. Take, for example, the Act of 1857, under which the Swansea Harbour Trustees acquired the docks of the Swansea Dock Company, sect. 16 of which provides that, notwithstanding the vesting of the docks and the repeal of the recited Acts relating to the dock company, 1850 to 1855, and to the corporation, 1850, the docks shall be deemed to be within the limits of the harbour, and sect. 18, which provides that after the vesting of the docks acquired under the Act, the commissioners shall not, in addition to the several dock rates by this Act authorised, demand, in respect of any goods shipped or unshipped into or from any vessel within the docks, more than one-half part of the rates which may for the time being be demanded and taken under the powers of the Act of 1854 on goods of a like nature when shipped or unshipped into or from any vessel within the Town Float or Half Tide Basin in that Act mentioned. This maintenance of the distinction between the commissioners as purchasers of the South Dock, and the commissioners as grantees of the rates under the Act of 1854 in my opinion is an instance showing that the Legislature did not by the Acts subsequent to the Act of 1854 intend to alter the status of the harbour rates on shipping or goods from what they were under the Act of 1854—*i.e.*, rates in gross. The following propositions set forth the conclusions at which I have arrived on the considerations hereinbefore appearing: (1) That the Swansea Harbour Commissioners do not own the soil of the harbour as a whole, although they do own certain portions which they have acquired by purchase, and on which, under the powers of successive Acts of Parliament, they have executed works for the convenience of ships loading or discharging within the limits of the harbour, which works sometimes are on land taken in from the harbour which formerly was covered by the water of the harbour. (2) That the commissioners are not occupiers of the harbour within the principles laid down in the House of Lords in *Holywell Union* v. *Halkyn District Mines Drainage Company* (*ubi sup.*). (3) That the land of the commissioners used as dock, quays, &c. (*i.e.*, the rateable hereditaments specified in the case) are not so connected in user with the harbour dues as that the harbour dues ought to be taken into account in valuing these hereditaments. I think, therefore, that this appeal ought to be allowed.

STIRLING, L.J. read the following judgment: —This is an appeal from part of the order of a Divisional Court of the King's Bench Division made on the 21st Dec. 1905 in answer to three questions raised by a special case. The answer to the first and second questions was (and as to this there is no appeal) that the appellants are in and have a rateable occupation of the Town Float or North Dock and the basins connected therewith. The answer to the third question was that all of the rates and dues mentioned in the special case (so far as are not admitted by the appellants) can be included in arriving at the gross and rateable value of the assessable hereditaments. To this answer the appellants object so far as it relates to certain rates and dues mentioned in par. 5 of the special case, and designated (*a*) harbour rates on shipping; (B) harbour rates on goods; and (*d*) dock rates on goods under sect. 126 of an Act of 1854. These rates and dues are imposed by a series of private Acts relating to Swansea Harbour, of which the earliest was passed in 1854 and the latest in 1896. The law applicable to the subject was thus stated by Blackburn, J. in *New Shoreham Harbour Commissioners* v. *Overseers of Lancing* (*ubi sup.*): "It is very clear in law that tolls are not *per se* the subject of a rate. It is equally clear that, when parties occupy land, they are rateable for the value of that land, and that tolls, though not rateable, may be considered as enhancing the value of the occupation of the land whenever it appears that the occupation of the land is so connected with them that it can be said that the tolls and rates are levied on account of the occupation of the land; or, perhaps, though not levied on account of the occupation of the land, where they could not be received without an occupation of the land. This, however, might be subject to some qualification." In applying this principle to the present case, two points have to be considered: (1) Whether the rates and dues imposed by the Act of 1854 were or were not such as ought to be taken into consideration as enhancing the value of the land of which the Swansea Harbour Trustees were in rateable occupation at the time of the passing of the Act; and (2), if this question be answered in the negative, whether any alteration has been introduced by the subsequent legislation. In order to arrive at a satisfactory conclusion on the first of these points, it seems desirable to give a short sketch of the history of Swansea Harbour (so far as the materials before the court enable this to be done) down to the time of

the passing of the Act of 1854. The earliest Act dealing with the harbour was passed in 1791 (31 Geo. 3, c. clxxxiii.), entitled "An Act for repairing, enlarging, and preserving the harbour of Swansea, in the county of Glamorgan." By it a body of trustees was constituted for the purpose (amongst others) of erecting piers, quays, wharves, and embankments in the harbour and river of the port of Swansea (that river being the river Tawe), and enlarging, maintaining, securing, and lighting the same, the making of proper channels or cuts for letting off land water or floods, and improving, cleaning, and deepening the bar and river of the port, and making convenient avenues thereto, and regulating the use of the harbour; and also the erection of a pier and lighthouse at the Mumbles, and making public docks, pills, gates and bridges, and sea baths at the town of Swansea within the port. The soil of the harbour seems at that time to have been vested in the Duke of Beaufort as the lord of certain neighbouring manors. The Act does not in any way vest this soil in the trustees, and the duke's rights were carefully preserved by a saving clause—sect. 64. The Act enables the trustees by sect. 32 to acquire by compulsory purchase lands for the purpose of making improvements, and by sect. 39, on payment of the purchase money, "to take possession, have and hold, or use and enjoy" the purchased lands. This would make the trustees to enter into occupation of the purchased lands; whether it would be sufficient to vest in them the legal title without conveyance may be doubtful. For the purpose of raising a sufficient fund for effecting the purposes of the Act, it is enacted by sect. 25 that "there shall be paid to the trustees . . . for every ship or vessel" (with certain exceptions) "entering into the river or harbour of Swansea and within the Saltwork Point and Black Point" (with an exception needless to specify) "a rate or duty not exceeding 2d. for every ton of the burthen or tonnage . . . of such ship or vessel." The next statute to which our attention was directed was passed in 1836 (6 & 7 Will. 4, c. cxxvi.) for the purpose of authorising extensive improvements in the harbour. These were divided into three heads: (1) The making of a navigable canal or cut for the waste water from Fabian's Bay to communicate with the river Tawe at or near Pentreguinea, and the erection of a gate or lock across the then existing bed of the Tawe so as to divert the water of the river from its then course through the cut or canal, and the making of various auxiliary alterations; (2) the erection of a gate or lock from the corporation public quay across the bed of the river Tawe so as to form the space between that point and the Pottery into a wet dock, and the making of divers auxiliary works; and (3) the deepening and improving the bed of the river Tawe and to make it navigable for ships or vessels as high as the Forest Works near Morriston. The Act conferred powers of purchasing lands for the purposes of these improvements, and these were to be conveyed to the trustees. Sect. 140 saves the royalty, right, or property of the Duke of Beaufort, his heirs, successors, or assigns in and to the water, channel, and soil of the river of Swansea, otherwise Tawe, or the port and harbour thereof. By sect. 68 the trustees were empowered (after the completion of the works) to levy and collect in addition to the harbour dues granted by prior Acts an additional duty or rate upon all vessels entering the harbour. The trustees proceeded to construct the navigable channel or cut from Fabian's Bay to Pentreguinea mentioned in the Act and diverted the waters of the Tawe into it; and they also converted the former bed of the Tawe into a wet dock, which now constitutes the Town Float or North Dock mentioned in the special case and in the judgment of the Divisional Court. In 1847 a private Act was passed to enable a joint stock company thereby incorporated under the name of the Swansea Dock Company to construct and maintain a dock and other works on the south side of Swansea with an entrance thereto from the river Tawe. This dock has since been constructed, and was known at first as the Swansea Dock, but more recently as the South Dock. By sect. 55 of the last-mentioned Act it was enacted that this dock and other works should "with reference to all duties, tolls, rates, penalties, and exemptions be deemed and taken to be within the limits of the harbour of Swansea." This brings me to the Act of 1854 (17 & 18 Vict. c. cxxvi.), the preamble of which contains the following recitals: [His Lordship read the recitals on pp. 2014 and 2015.] Sect. 3 enacts that "this Act shall be put in force within the limits of the harbour of Swansea, which limits comprise Port Tennant as by this Act defined, and all works by this Act authorised to be made or maintained, and all places within the navigation of the river Tawe as high as the Forest Weir." Port Tennant is defined by sect. 128, which speaks of "Fabian's Bay in Swansea Harbour." It is of importance to ascertain what land within these limits was vested in or in the rateable occupation of the trustees at the time of the passing of this Act. It is not now disputed that the trustees were in the rateable occupation of the Town Float and adjoining basins; but in par. 3 of the special case it is admitted for the purposes of the case only that the soil of the bed of the river (on which the Town Float was constructed) is still vested in the Duke of Beaufort. There can be no doubt that the trustees were in occupation of or had vested in them such lands as they or their predecessors had acquired under the powers of the various Acts for purposes of the improvements thereby authorised; but there is nothing to show that any portion of the soil of the harbour as it existed in 1791 was vested in them, or (with the exception of the Town Float or adjoining basins) was in their rateable occupation. In particular it seems to me, upon a comparison of the plan No. 1 annexed to the case with the deposited plan of the improvements sanctioned by the Act of 1854, that the portion of the harbour lying between a point near the entrance to the Half Tide Basin, North Dock, and the ends of the east and west piers of the harbour as they existed in 1854 (coloured blue, not hatched, in plan No. 1) were not then—and, indeed, are not now—in the rateable occupancy of the trustees. It also appears that there were very considerable lands within the limits of the harbour as defined by sect. 3 which were not in the occupation of other persons than the trustees—viz:: (1) the Swansea Dock, which is recognised by sect. 129 as forming part of the harbour for the purposes of rates and dues; and (2) Port Tennant. It may conveniently be here pointed out that vessels can enter the harbour not only from the sea, but also by the

Tennant Canal, which connects Port Tennant with Neath. I now pass on to consider the sections of the Act of 1854 which impose duties or rates, and in the first place I refer to sects. 125 and 127. The former of these gives the trustees the right to demand and take in respect of all vessels of the burden of ten tons and upwards by admeasurement, "entering or leaving the harbour," the rates specified in sched. A. These dues become payable, therefore, on a vessel entering the harbour, and that although the vessel might never come within any portion of which the trustees were in occupation. Sect. 127 empowers the trustees to demand and take in respect of goods "loaded into or discharged from vessels lying or being in any part of the harbour." The words "any part of the harbour" on their natural construction include parts of the harbour not in the occupation of the trustees; and this is shown to be the true meaning by the provisions in sect. 127 as to vessels within the limits of Port Tennant, and in sect. 129 as to vessels within the Swansea Dock. Now, the question is, in the words of Lord Blackburn, Is the occupation of the land occupied by the trustees so connected with these rates or dues that it can be said that they are levied on account of the occupation of the land, or that they could not be received without an occupation of the land? Apart from authority I should say that this question must be answered in the negative: for all these dues appear to me leviable whether the ship or vessel does or does not enter any land in the occupation of the trustees. I am confirmed in this view by the judgments of the Divisional Court and the Court of Appeal in *Blyth Harbour Commissioners* v. *Newsham and South Blyth Churchwardens, &c.* (*ubi sup.*), decided on an Act of Parliament the scheme of which closely resembled that contained in the Act of 1854. I think that *Lewis* v. *Overseers of Swansea* (5 E. & B. 508) also supports it, though it relates to customary and not statutory tolls. So also in my opinion does the case of *Faversham Navigation Commissioners* v. *Faversham Union* (31 J. P. 822). For the respondents the case of *Reg.* v. *Hull Dock Company* (*ubi sup.*) was relied on; but that was a decision on a statute framed on what seem to me to be quite different lines. The dues were there imposed by a single clause in respect of vessels "coming into or going out of the harbour, basin, or docks . . . or unlading or putting on shore or lading or taking on board any of their cargo, goods, or merchandise within the said port," and the court upon the construction of the Act arrived at the conclusion that the use of the docks was the meritorious cause of the tolls imposed by the Legislature, and therefore must be held to have been earned there in respect of vessels which actually entered the docks. In the present case I am unable to arrive at that conclusion, for, as I shall immediately have occasion to point out, remuneration is specially provided for the use of the docks in the occupation of the trustees. I may also add that the decision in *Reg.* v. *Hull Dock Company* (*ubi sup.*) was not followed in *Blyth Harbour Commissioners* v. *Newsham and South Blyth Churchwardens* (*ubi sup.*), where the provisions of the statute considered closely resembled those of the Swansea Harbour Act 1854. I now return to sect. 126 of the Act, which empowers the trustees to demand and take in respect of all goods loaded into or discharged from vessels entering the Town Float or Half Tide Basin the rates specified in sched. B. As already mentioned, it is not disputed by the appellants that in 1854 the Town Float and basins were in the rateable occupation of the trustees. *Primâ facie* this occupation of the Town Float and basins does appear to me to be so connected with the rates now in question that it can be said that they are levied on account of the occupation, and, indeed, this is in part conceded by the appellants, who admit that one-third of the rates must be taken into account in determining the value of the land occupied by the trustees. The appellants contend, however, that the remaining two-thirds of these rates ought to be regarded as tolls in gross like those imposed by sect. 127. This is to treat sect. 126 as imposing a rate of two-thirds of the amount specified in sched. B in respect of goods loaded into or discharged from vessels lying in the harbour generally, and an additional rate of one-third of those amounts in respect of goods loaded into or discharged from vessels lying in the Town Float. If the statute had been framed in this form the case of *Reg.* v. *Berwick Assessment Committee* (*ubi sup.*) would have been a direct authority in favour of the appellants' contention; but as the Act of 1854 stands, though the pecuniary result may be the same, I have been unable to satisfy myself that the inference sought to be drawn as to the intention of the Legislature is more than a plausible guess. In these circumstances I think that these rates ought to be taken into account in assessing the rateable value of the Town Float. I now proceed to state shortly the history of the harbour subsequently to 1854. Under the provisions of the Act of 1854 the trustees altered and extended the piers of the harbour. By the Swansea Harbour Act 1857 the Swansea Dock (now known as the South Dock) was vested in the trustees. The site is coloured blue, hatched blue, in plan No. 1. By the Swansea Harbour Act 1864 the trustees were empowered to execute various works, and to construct a new cut or entrance channel commencing at or near the opening between the then existing piers of Swansea Harbour and terminating at or near low water in Swansea Bay, and to stop up the then entrance of the channel of Swansea Harbour and to divert the waters of the river Tawe into the channel authorised by the Act. The trustees have executed the works so authorised. For the purposes of the Acts of 1854 and 1864 the trustees acquired from the Duke of Beaufort and took from him a conveyance not merely of the site of the extended piers, but also of the channel between them. The land so acquired is coloured blue, hatched blue, on plan No. 1, and constitutes the present entrance to the harbour from the sea. Such entrance is therefore now vested in the appellants. By the Swansea Harbour Act 1874 the trustees were enabled to construct very extensive additional works, and in particular a large dock in Fabian's Bay and on lands in Port Tennant and adjoining lands. These works have been executed. The dock so constructed is known as Prince of Wales' Dock, and the site of it is vested in the trustees, and is coloured blue, hatched blue, in plan No. 1. It is admitted by par. 29 of the special case that

the appellants are in occupation of all the lands marked blue, hatched blue, on the plan No. 1. It thus appears that a very much larger area is now in their occupation than was so in 1854; but a substantial portion of the harbour—viz., that already referred to as lying to the south or south-east of the entrance to the Half Tide Basin, North Dock (coloured blue, not hatched, on plan No. 1)—still remains not in their occupation. By sect. 15 of the Act of 1857, sect. 129 of the Act of 1854 was repealed, but by sect. 16 it was provided that, notwithstanding such repeal, the docks and works of the Swansea Dock Company should with respect to (amongst other things) all duties and rates be deemed within the limits of the harbour; and by sect. 17 it was provided that the trustees should not (in addition to the dock rates by the Act of 1857 authorised) take in respect of any goods shipped or unshipped into or from any vessel within the docks more than one-half part of the rates which might for the time being be taken under the provisions of the Act of 1854 for goods of a like nature when shipped or unshipped into or from any vessel within the Town Float. The effect of these enactments seems to me to be simply to preserve to the trustees the duties and rates in respect of vessels and goods to which they were entitled under the Act of 1854. In the subsequent Acts the language is somewhat different. It will be sufficient to discuss the provisions contained in the Act of 1854, sects. 16 and 17 of which are as follows:

Sect. 16. For the purpose of rates on shipping in respect of all vessels using the pier, channel, and works authorised by this Act, those works shall be deemed to be within the limits of the harbour as fully and effectually as though the same works had formed part of the works of the Act of 1854 authorised to be made and maintained.

Sect. 17. For the purposes of rates on goods in respect of all goods loaded into or discharged from vessels lying or being in the channel, or using the piers and works hereby authorised, those works shall be deemed to be within the limits of the harbour other than the Town Float and Half Tide Basin mentioned in the Act of 1854 as fully and effectually as though the same works had formed part of the works other than the Town Float and Half Tide Basin by the Act of 1854 authorised to be made and maintained.

In argument much stress was laid on the words "using the pier, channel, and works" in sect. 16, and on the words "lying or being in the channel, or using the piers and works hereby authorised" in sect. 17. It was contended, first, that this and similar language found in subsequent statutes constituted a legislative interpretation of the Act of 1854, and showed that the harbour rates and duties thereby imposed in respect of shipping and goods were to be regarded as so connected with the lands in the occupation of the trustees as to show that they were levied on account of that occupation; and, secondly, that, even if this were not so as regards all the rates and duties imposed by the Act of 1854, still rates and duties levied under the Act of 1864, and the subsequent Acts, ought to be held to be levied on account of the occupation of the works by those Acts respectively authorised. In my judgment neither consequence follows from the language of the enactments. Where a vessel is found "using the pier, channel, and works," as mentioned in sect. 16 of the Act of 1854, or "lying in the channel or using piers and works," mentioned in sect. 17, the Legislature provides that for the purposes of rates on shipping under sect. 16, and for the purposes of rates on goods under sect. 17, the vessel is "to be deemed within the limits of the harbour" as though the new works authorised by the statutes subsequent to 1857 had formed part of the works by the Act of 1854 authorised to be made or maintained (other, in the case of goods, than the Town Float). This sends us back to the Act of 1854 to find what rates and duties in respect of shipping and goods are payable, and there is not enough in the language of the subsequent statutes to satisfy me that the Legislature intended that those rates and duties should be, or be deemed to be, of a nature differing from that which was given to them by the Act of 1854 when properly interpreted. These are the conclusions at which I have arrived upon the best consideration I can give to this subject. I express them, however, with less confidence inasmuch as I find myself differing from the Divisional Court. I think that in construing the Act of 1854 less weight has been given to the facts relating to the occupation of the harbour by the trustees and more to the case of *Reg.* v. *Hull Dock Company* (*ubi sup.*) than I am myself able to give. For these reasons I think that the appeal ought to be allowed as regards the duties falling under the heads (*a*) harbour rates and shipping and (*b*) harbour rates on goods mentioned in par. 25 of the special case, but not those which fall under the head (*d*) dock rates on goods under sect. 126 of the Act of 1854.

MOULTON, L.J. read the following judgment:—The tolls and dues in question in this appeal are the creation of a series of statutes commencing in 1854 and marking the several stages of the development of the harbour of Swansea in the hands of the present trustees, a body which itself came into existence under the first of these Acts—viz., that of 1854. It is true that there had previously existed a body of trustees for somewhat similar purposes and with somewhat similar powers who had possessed and exercised the right of levying tolls and dues on shipping using the harbour of Swansea. The constitution, duties, and powers of these earlier trustees are to be found in a series of Acts of Parliament commencing in the year 1791 and ending in the year 1847, and a large part of the argument of the respondents in this appeal consisted in urging upon us that we ought to look upon the existing trustees and the existing tolls and dues as constituting in substance a continuation of the earlier state of things, and that we therefore ought to consider the clauses in the earlier Acts in deciding upon the status and nature of the existing tolls and dues and their relation to the property vested in the present trustees. After giving careful consideration to the able argument which was advanced on this point, I am unable to agree with it. I am of opinion that it was the intention of the Legislature to make a new departure by the Act of 1854. It repealed entirely all previous legislation relating to Swansea Harbour (with the exception of one Act relating to the Mumbles Lighthouse, which is not material to the present case), created a new body of trustees, and authorised a new scheme of tolls and dues differing in amount and character from those previously in

force. It swept away not only the old tolls payable to the former trustees, but also other customary payments receivable by the Duke of Beaufort or by the corporation of Swansea. In view of all these indications on the part of the Legislature of its intention to make a new departure by the Act of 1854, it appears to me that the court can get no useful guidance from the consideration of the earlier Acts. They raise much the same type of questions as those raised by the later Acts, but with individual differences in the detail of the surrounding circumstances and the language used. Thus the court would meet with the same class of difficulties in deciding the status of these tolls and dues under the earlier Acts as we are compelled to face with relation to the later Acts, and when it had decided those questions it would derive little profit from its labour seeing that there would always remain the question whether that which obtained under the repealed Acts survived the change wrought by the Act of 1854. I do not, therefore, propose to deal with these earlier Acts, which are no longer in force, save by saying that, in my opinion, they would not assist the case of the respondents. It is clear that some at least of the earlier tolls and dues which were replaced by those at present in force were of the character of tolls in gross, as, for instance, the customary payments to the corporation which formed the subject-matter of the decision in the case of *Lewis* v. *Overseers of Swansea* (5 E. & B. 508). Starting, then, with the Act of 1854, we find that the tolls and dues fall under two distinct heads: (1) Dues on vessels entering or leaving the harbour which are levied according to the tonnage of the vessel and may be conveniently called tonnage dues; (2) dues on goods loaded into or discharged from vessels in the harbour. It is convenient and almost necessary to consider these two classes of dues separately. Taking first the tonnage dues, we find that they are originally granted by sect. 125 of the Act of 1854, which is in the following words: "The trustees from time to time may demand and take in respect of all vessels of the burden of ten tons and upwards, by admeasurement, entering or leaving the harbour the several rates on shipping respectively specified in the schedule A to this Act annexed, and those rates shall be payable from the commencement of this Act." The harbour of Swansea (in respect of the user of which these dues are payable) is defined by sect. 3 of the Act of 1854, and extends to and includes Port Tennant on the east and the river Tawe up to Forest Weir on the north. It is not clear from the Act itself what is its western boundary, and no doubt, if it were important, some inquiry would have to be made into past history to determine this point. But sect. 3, taken together with sect. 128 of the Act, suffices to show that it included far more than the lands then vested in the trustees, or of which they could by any stretch of imagination be considered occupiers. For example, the entrance channel of the harbour itself was not their property nor in their occupation. Taking into consideration, on the one hand, the fact that the trustees had important conservancy duties to perform over the whole harbour, and, on the other hand, that these tolls are leviable on all vessels entering or leaving the harbour, whether or not they pass over any lands of which the trustees were the owners or occupiers at that date, or availed themselves of any of the works constructed by them, I have no difficulty in coming to the conclusion (following the principle illustrated in the decision of *Lewis* v. *Overseers of Swansea* (*ubi sup.*), which I consider to have received the sanction of this court in *Blyth Harbour Commissioners* v. *Newsham and South Blyth Churchwardens* (*ubi sup.*), that these tolls were not so connected with the occupation of any hereditaments of which the trustees were occupiers as to render them rateable, but were in the nature of tolls in gross, and therefore are not capable of being rated. Such, then, was the nature or status of the tonnage dues under the Act of 1854. Now, what has been the character of the subsequent legislation with regard to these tolls? It may be briefly summed up thus: Their amount and incidence has been left wholly unchanged throughout the intervening period, save that as from time to time changes have been made in the conformation of the harbour and new works for the convenience of vessels using it have been constructed under Parliamentary authority, the Legislature has invariably provided that the added portions shall be, or be deemed to be, within the harbour as defined by the Act of 1854, so that vessels entering or leaving them become subject to these tonnage dues. This is just what one would expect the Legislature to do if these dues were of the nature of tolls in gross intended to be paid in respect of the use of the harbour generally and not of any particular portion of it, and accordingly these subsequent provisions do not, in my opinion, indicate any intention on the part of the Legislature to alter the status or nature of these tonnage dues. It is true that these additional works executed by the trustees change the proportion which the part owned or occupied by the trustees bears to the remainder of the harbour, but there is no point of time at which they own or occupy the whole of the harbour. Indeed, when we come to the Act of 1901 (which is, however, subsequent to the rate now before us) we find an enormous change in the other direction. The proportion of the harbour not owned or occupied by them is vastly increased. But in whichever direction the change takes place I am of opinion that it does not affect the status of the tolls. They were originally tolls in gross, and no indication is given of any intention to alter their character, nor does anything occur which by law necessarily has that effect. I am therefore of opinion that the tonnage dues under sect. 125 of the Act of 1854 as extended in their ambit by the sections relating to them in the later Acts are not rateable. This conclusion is supported by a consideration of sect. 134 of the Act of 1854. Additional tonnage dues are thereby imposed for prolonged stay, but it will be observed that they are limited to vessels using the Town Float (a part of the harbour of which it is admitted that the trustees now have and then had rateable occupation), and are no longer imposed on all vessels entering or leaving the harbour without any distinction between the portion used or the nature of the property or occupation of the trustees in such portion. Such tonnage dues are clearly of a rateable character, and contrast sharply in their incidents with those I have just considered. It will be found that a like distinction is kept up in subsequent

Acts, and that, while the tonnage dues imposed by sect. 125 of the Act of 1854 are left unchanged in the generality of their application, new tonnage dues of the type of those imposed by sect. 134 are made payable in respect of the prolonged use of works subsequently constructed of the nature of docks (*i.e.*, analogous to the Town Float) which were acquired or constructed by the trustees, and of which they undoubtedly had rateable occupation. I will now turn to the dues in respect of goods loaded into or discharged from vessels within the harbour of Swansea. The provisions of the Act of 1854 with regard to these may (so far as is material for the questions that we have to decide) be briefly summarised as follows: By sect. 127 certain dues were imposed in respect of all goods loaded into or discharged from vessels lying or being in any part of the harbour other than the Town Float. The amount of the dues was 1½*d.* per ton on copper ores, and two-thirds of the dues on other goods set out in sched. B to the Act, with a maximum limit relating to Port Tennant only and since repealed. By sect. 126 certain dues were imposed in respect of goods loaded into and discharged from vessels entering the Town Float. These were higher than those imposed by sect. 127, being the full amount of the dues set out in sched. B above mentioned. By sect. 129 a maximum limit similar to that in favour of Port Tennant was imposed in favour of the works of the Swansea Dock Company—a company formed by Act of Parliament to construct a dock, which was afterwards known as the South Dock, and which was then in process of construction. Considering the state of things thus established, it appears to me that, applying the same principles as I have applied to the case of the tonnage dues, the necessary conclusion is that the dues authorised by sect. 127 (as limited by the proviso in favour of Port Tennant at the end of that section, and by the provision in favour of the works of the Swansea Dock Company in sect. 129) are dues in gross, inasmuch as they are not associated necessarily with any lands or hereditaments of which the trustees were in rateable occupation. On the other hand, the dues authorised by sect. 126 are statutably associated with the use of the Town Float, of which the trustees were in rateable occupation, and these dues must be taken into account in estimating the rateable value of that occupation. With regard to the claim of the appellants that part only of the dues imposed by sect. 125 in arriving at the rateable occupation of the Town Float, I agree entirely with the judgments that have already been delivered, and hold the contention unsustainable. Such, then, was the state of things created by the Act of 1854. By the Act of 1857 the undertaking of the Swansea Dock Company was acquired by the trustees, including the uncompleted South Dock, which was subsequently completed by them. The provisions as to dues on goods shipped or unshipped into or from vessels within the South Dock were as follows: By sect 88 the trustees were empowered to charge the dues set out in sched. B to that Act in respect of all goods shipped or unshipped within the dock. There can be no doubt that these dues are so connected with the occupancy of the dock that they must be taken into consideration in determining the rateable value of the dock, and this is admitted by the appellants. But, in addition to these dues on goods, certain other dues are payable by reason of the following sections: By sect. 16 the docks are to be deemed to be within the limits of the harbour, and consequently the general harbour dues in respect of goods imposed by sect. 127 of the Act of 1854 become payable. Sect. 129 (which imposed in favour of the works of the Swansea Dock Company the limitation of the general harbour dues on goods above spoken of) is repealed by sect. 15, but by sect. 18 a similar limitation is imposed on the rates for goods which the trustees may demand "in addition to the several dock rates" authorised by the Act. These rates, then, are imposed as an extension of the general harbour dues on goods given by sect. 127 of the Act of 1854, and remain of the same amount. In my opinion we are clearly entitled to infer that the Legislature intended these dues to be of the same nature as those imposed by the Act of 1854, and therefore to be of the nature of tolls in gross. The form of the legislation possesses just those features, the absence of which, in my opinion, justified the conclusion that the whole of the rates under sect. 126 of the Act of 1854 were rateable. It imposes in respect of goods shipped or unshipped two distinct tolls, the one clearly connected with the use of a hereditament of which the trustees are in rateable occupation, and the other merely an extension of the ambit of dues of a general character and not rateable imposed by the Act of 1854. The Act of 1874, by which one may say the Prince of Wales' Dock was authorised and substituted for Port Tennant, is, *mutatis mutandis*, substantially on all fours with the Act of 1857 with which I have just dealt. Sect. 41 of the Act of 1874 performs the same function as sect. 88 of the Act of 1857, and sects. 28 and 37 of the Act of 1874 perform the same functions respectively as sects. 16 and 18 of the Act of 1857. The repeal by sect. 39 of the Act of 1874 of the proviso to sect. 127 of the Act of 1854 completes the parallel, as it exactly corresponds in this respect with sect. 15 of the Act of 1857. The dues on goods imposed by other Acts of Parliament may be very shortly dealt with. Those authorised by the Act of 1864 are put by sects. 17 of that Act in the same position as dues imposed by sect. 127 of the Act of 1854, and therefore are not rateable. Sect. 57 of the Act of 1886 leaves no doubt that the works (*b*) (*c*) (*d*) are to be deemed part of the Town Float for all the purposes of this case, and that works (*a*) should be treated as though they were part of the South Dock. Sects. 14 and 15 of the Act of 1894, in my opinion, enact that the dock there spoken of is to be treated as though it were part of the Prince of Wales' Dock, and that the other works are to be treated as part of the general harbour undertaking. The Act of 1896 introduces no dues in goods which are not of a rateable character referable to the occupation by the trustees of the new entrance to the Town Float or of the Town Float itself. It is not material to determine to which they more properly belong. I have considered it necessary to review the long list of authorities that have been quoted to us on the one side or the other. Blackburn, J. says at the opening of his judgment in the case of *New Shoreham Harbour Commissioners* v. *Overseers of Lancing* (*ubi sup.*): "The principle on which

tolls can be rated is well established. The difficulty in this as in many other cases is to apply the principle." This remark applies with peculiar force to the present case, and, as its facts differ materially from those of the other cases quoted, we are driven back upon the consideration of the principle that underlies them all. But one reported case requires notice, because it is clear that it was regarded by the court below as governing the present case. I refer to the case of *Reg.* v. *Hull Dock Company* (*ubi sup.*). In that case the Court of Queen's Bench decided that, even if certain dues were payable by all ships entering the harbour of Hull, the company (who were entitled to receive those dues) must be held rateable for so much of these as were levied on ships using a certain dock belonging to them situated within that harbour, but not for the remainder of the dues. The company had no property in the harbour itself. This case came under review before this court in the case of *Blyth Harbour Commissioners* v. *Newsham and South Blyth Churchwardens* (*ubi sup.*), and the judgment of Lord Esher in that case shows clearly that he regarded it as establishing no general principle, but as resting entirely on an inference of fact which the judges who decided it felt themselves entitled to draw, and which they did draw, from the special circumstances of the case, and it is thus we must regard it. Taken apart from these special circumstances, the decision is, in my opinion, unsustainable. Inasmuch as the harbour dues were payable on the ship entering the harbour and might have been collected then, I cannot see how a hypothetical tenant of the dock would have been entitled to any share of them. It was not necessary for this court in deciding the case of *Blyth Harbour Commissioners* v. *Newsham and South Blyth Churchwardens* (*ubi sup.*) to pronounce upon the correctness of the decision of fact which they considered had been come to by the Court of Queen's Bench in *Reg.* v. *Hull Dock Company* (*ubi sup.*), but the decision which they gave in the case before them is, in my opinion, a weighty authority in favour of the decision to which we have come, and throws great doubt upon the sustainability of the decision in *Reg.* v. *Hull Dock Company* (*ubi sup.*) so far as some of the grounds are concerned upon which that decision is expressed to have been based.

Appeal allowed.

Solicitors: for the appellants, *Stephens* and *Sons*, for *Talfourd Strick*, Swansea; for the respondents, *Waterhouse* and *Co.*, for *T. W. James* and *Thomas*, Swansea.

Dec. 11, 12, 13, 14, 1905, *and April* 11, 1906.

(Before VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

MAYOR, ALDERMEN, AND BURGESSES OF BOROUGH OF SWANSEA *v.* NATIONAL TELEPHONE COMPANY LIMITED. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Telephone — Rival systems in same exchange area—Intercommunication — Proper facilities —Telegraph Act 1899 (62 *&* 63 *Vict. c.* 38), *s.* 3, *sub-ss.* 1, 4, 5.

A telephone company had before Sept. 1902 *established a system of public telephonic communication in a certain area. Under the Telegraph Act* 1899 *the Postmaster-General granted a licence to a municipal corporation over the same area, and extended the then existing licence of the company for such a period as to call sect.* 3, *sub-sect.* 5, *into operation. The corporation established and opened their system, and made a request for intercommunication within sect.* 3, *sub-sect.* 5, *having at that time the number of subscribers required to satisfy art.* 1 *of the Telegraph (Intercommunication) Order* 1899. *The company refused to allow the corporation to connect with their system, unless they provided junction circuits directly to connect their exchange, both with its central exchange and also with each of its subsidiary exchanges within the area.*

It was decided by Buckley, J. (92 *L. T. Rep.* 799) *that proper facilities within the meaning of sect.* 3, *sub-sect.* 5, *of the Telegraph Act* 1899 *were facilities for using all the several component parts of the system, and that the object of the Act was that the customer of each company should use the trunk line of the other company; also, that the defendants had improperly refused to give such proper facilities.*

The defendants appealed.

The Court of Appeal, being of opinion that Buckley, J. had taken a view which was unduly favourable to the plaintiffs, submitted certain questions to a scientific referee for inquiry and report.

Held, that, having regard to the replies contained in that report, while under sect. 3, *sub-sect.* 5, *of the Act of* 1899 *and the Order of* 1899 *made pursuant thereto, and in the events which had happened, the plaintiffs were entitled to be afforded by the defendants all proper facilities for restricted intercommunication within the meaning of that order between persons using the telephonic system of the defendants and the telephonic system of the plaintiffs, yet certain specified junction circuits ought to be provided in order to afford such proper facilities.*

Order of Buckley, J. varied.

THE plaintiffs in this action were the corporation of Swansea, who, under a licence from the Postmaster-General, constructed, after the passing of the Telegraph Act 1899, a telephonic system in the borough of Swansea.

The defendants were the National Telephone Company Limited, who, also under a licence from the Postmaster-General, had a telephonic system in the same borough established prior to the passing of that Act.

Under sect. 3, sub-sect. 5, of the Telegraph Act 1899 and the Telegraph (Intercommunication) Order 1899, being an order of the Postmaster-General made under it, the plaintiffs, on the 1st Jan. 1904, required the defendants to allow them to connect their telephonic system with the existing system of the defendants at Swansea.

The defendants refused their permission on the ground that the plaintiffs must connect their system with all the defendants' subsidiary exchanges within the area.

By their statement of claim the plaintiffs sought: (1) A declaration that under or by virtue of sect. 3, sub-sect. 5, of the Telegraph Act 1899 and the order of the Postmaster-General

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

made under it, and in the events which had happened, the plaintiffs were entitled to be afforded by the defendants all proper facilities for "restricted intercommunication" within the meaning of that order between the respective telephonic systems of the plaintiffs and defendants; and that the defendants were bound to connect the telephonic junction lines which had been laid by the plaintiffs with the central switchboard in the defendants' telephone exchange in the borough of Swansea, and by means of such connection to afford to the subscribers of the plaintiffs the same facilities for such intercommunication as were thereby given by the plaintiffs to the defendants' subscribers. (2) To have it determined what further works ought to be done, and by whom, for securing intercommunication between the respective telephonic systems of the plaintiffs and defendants as contemplated by sub-sect. 5 of sect. 3 of the Act of 1899 and the order, and how the costs of all works done or to be done for securing such inter-communication ought to be borne.

The facts of the case are fully set out in the considered judgment of Buckley, J., before whom the action came on for trial, when his Lordship decided (92 L. T. Rep. 799) that proper facilities within the meaning of sect. 3, sub-sect. 5, of the Telegraph Act 1899 were facilities for using all the several component parts of the system; and that the object of the Act was that the customer of each company should use the trunk line of the other company; also, that the defendants had improperly refused to give such proper facilities.

From that decision the defendants now appealed.

Astbury, K.C. and *Danckwerts*, K.C. (with them *H. H. Gaine*) for the appellants.

Buckmaster, K.C. and *R. J. Parker* for the respondents.

Astbury, K.C. replied.

The arguments adduced in the court below were substantially repeated, and the cases there cited were again referred to.

At the conclusion of the arguments on the 14th Dec. 1905 the court (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) reserved judgment.

On the 16th and 22nd Jan. 1906, however, the appeal was placed in the cause list to be mentioned, and eventually the following questions were sent to Major P. Cardew, R.E., for inquiry and report:

1. Whether, in order to afford all proper facilities for the transmission of telephonic messages between persons using the system of the telephone company in the Swansea exchange area and persons using the system of the corporation in the same area and between persons using the latter system and persons using the former system, junction wires in sufficient numbers should be laid between all or some and which of the company's exchanges and all or some and which of the corporation's exchanges, and whether such junction wires should be "one way wires"—that is to say, one set to be used for calls from the company's subscribers to the corporation's subscribers, and a corresponding set to be used for calls from the latter's subscribers to the former, and whether such junctions should be inclosed in cables in sets, or how otherwise.

2. Whether the laying down of the sufficient junction wires between the several exchanges of the corporation and company respectively at (1) Swansea, (2) Mumbles and (3) Morriston will afford all such proper facilities as aforesaid.

3. Whether, in order that all such proper facilities as aforesaid should be afforded, it is necessary that there should be provided junction circuits to directly connect the corporation's principal exchange in Swansea with each of the following exchanges of the company—viz: Swansea, Blackpile, Forestfach, Pontardulais, Pontardawe, Sketty, Killay, Gorseinon, Clydach, Llansamlet, or any and which of such places.

4. Whether any and what additional or other steps ought to be taken by the corporation and company respectively, in order that each of the parties concerned should afford all such proper facilities as aforesaid.

On the 28th Feb. 1906 Major Cardew reported as follows, after an inspection of the systems of the corporation and company at Swansea:

As it is now common practice that all telephonic circuits should consist of a "line" and a "return" wire in place of using, as was formerly customary, a single line wire and completing the circuit by means of the earth, I have in my answers used the term "junction circuit," which must be understood to include two wires properly erected and connected.

Answer 1.—Junction circuits should be laid between the corporation's exchanges and the company's exchanges as follows: Between corporation exchange at Swansea and company's exchange at Sketty, one junction circuit; Gorseinon, two junction circuits; between corporation exchange at Morriston and company exchange at Clydach, one junction circuit; Pontardawe, one junction circuit; these junction circuits should be all "one way junctions" to be used for calls from the corporation's subscribers to the company's subscribers. They may be either inclosed in cables in sets, or erected overhead, or partly in one way, partly in the other.

Answer 2.—No. Further facilities will be required to provide for what may reasonably be expected as regards intercommunication.

Answer 3.—At present junction circuits should be provided to directly connect the corporation principal exchange in Swansea with each of the following exchanges of the company—viz., Sketty, Gorseinon. Additional junction circuits to other exchanges may be required later when the traffic has sufficiently increased.

Answer 4.—(*a*) The corporation should make such arrangements at Morriston as will best provide for calls from their subscribers to Clydach and Pontardawe by the junction circuits to be provided and their existing junction circuits to Morriston; (*b*) the junction circuits to be provided may pass through the company's exchanges at Swansea and Morriston respectively, but should not be brought to the switchboard in those exchanges for operating purposes; (*c*) besides the junction circuits specified above, which should be laid at once, additional junction circuits should be provided as and when required by the traffic as follows: When the number of calls in any one hour from subscribers on the corporation's system to an exchange on the company's system not at present to be connected directly with the corporation's system has exceeded five on three or more occasions in one month, a direct junction circuit should be provided from one corporation exchange to the company's exchange, and by this circuit the calls should be transmitted from the corporation's system to the company's exchange; (*d*) similarly when the number of calls in any one hour from subscribers on the company's system to an exchange on the corporation's system has exceeded the same limit, a direct junction circuit should be provided from one company's exchange to the corporation's exchange, and by this circuit the calls should be transmitted from the company's system to this exchange of the corporation; (*e*) from and after the time when one or more junction circuits have been

provided for the purpose of transmitting calls from the corporation's system to any exchange on the company's system, or from the company's system to any exchange on the corporation's system, all such calls should be so transmitted, and these junction circuits should be added to as may be required to provide adequately for this service.

April 11.—The following written judgment of the court was delivered by

STIRLING, L.J.—At the close of the argument in this case we were disposed to think that Buckley, J. had taken a view which was unduly favourable to the plaintiffs. But as the action related to matters which called for some local and scientific investigation, we were desirous of obtaining a report of a scientific referee on certain questions to be submitted to him. An order was made to that effect in January last, and the referee has made a report, dated the 28th Feb. last. We have considered that report, and find ourselves confirmed in the opinion which we had previously formed. We therefore propose to make the following order: Read the order of Jan. 1906 and the report of Major P. Cardew, R.E., dated the 28th Feb. 1906, made pursuant to that order. Then the order will go on, that the appeal be allowed, and that the judgment and order of Buckley, J., dated the 25th May 1905, be discharged, except so much thereof as did order that the operation of the said judgment (except as therein mentioned) should be stayed pending the hearing of this appeal upon the terms therein mentioned, and instead thereof order as follows: Declare that under sect. 3, sub-sect. 5, of the Telegraph Act 1899 and the Telegraph (Intercommunication) Order 1899 made pursuant to the said Act, and in the events which have happened, the plaintiffs are entitled to be afforded by the defendants all proper facilities for restricted intercommunication within the meaning of the said order between persons using the telephone system of the defendants and the telephone system of the plaintiffs in the pleadings referred to. Declare that in order to afford such proper facilities junction circuits (within the meaning of the said report of the 28th Feb. 1906) ought now to be provided to directly connect the plaintiffs' principal exchange in Swansea and each of the exchanges of the defendants at Sketty and Gorseinon in manner following—that is to say, to connect the plaintiffs' principal exchange at Swansea and the exchange of the defendants at Sketty one junction circuit, and to connect the plaintiffs' principal exchange at Swansea and the exchange of the defendants at Gorseinon two junction circuits. Declare that the several junction circuits so to be provided as aforesaid should be all one way junctions—that is to say, one set to be used for calls from the defendants' subscribers to the plaintiffs' subscribers, and the corresponding set to be used for calls from the plaintiffs' subscribers to the defendants' subscribers, and that such junction circuits may be either inclosed in cables in sets or erected overhead, or partly in one way and partly in the other. Declare that the junctions so to be provided may pass through the company's said principal exchange at Swansea, but should not be brought to the switchboard in that exchange for operating purposes. Liberty for either party to apply as to relief consequent on the aforesaid declarations, and as to costs of making the junctions, and as to further facilities, and generally. The costs of the appeal to be taxed and paid by the respondents to the appellants. Each party to bear their own costs down to and including the trial before Buckley, J.

Order varied.

Solicitor for the appellants, *W. E. L. Gaine.*

Solicitors for the respondents, *Sharpe, Parker, Pritchards, Barham,* and *Lawford,* agents for *John Thomas,* Swansea.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Saturday, March 17, 1906.

(Before KEKEWICH, J.)

WOLFF v. VAN BOOLEN. (a)

Practice—Parties—Bankruptcy of plaintiff suing for himself and all other creditors—Abatement—Application to dismiss action—Action in representative capacity—Order XVII., r. 1.

Where a receiving order followed by an adjudication in bankruptcy had been made against the plaintiff in an action in which the claim on behalf of himself and all other creditors was for an order setting aside an assignment of personal property by way of settlement made by the first defendant upon his wife, the second defendant, previously to his bankruptcy and the defendants applied for a stay of proceedings in the action:

Held, that the action must be dismissed unless the official receiver intervened within a specified time, on the ground that, although the action was brought on behalf of all the creditors, the plaintiff could only sue as a creditor, and that, when he ceased to be such by the assignment by operation of law to his trustee in bankruptcy, he ceased to be a person capable of continuing the action; that he was not a trustee of the right of action, but suing as a creditor in his own right; and that a receiving order and injunction obtained in the action did not operate in the same manner as a judgment in a creditor's administration action, where the court undertakes to protect all the creditors.

ON the 22nd Nov. 1901 Reuben van Boolen by deed assigned to his wife, the second defendant, Sarah van Boolen (1) an unexpired residue of a leasehold term of premises in Grosvenor-road demised by an indenture of lease dated the 8th Sept. 1855; (2) five policies of insurance upon his life; (3) certain jewellery and trinkets; and (4) household furniture and effects.

In Jan. 1904 the plaintiff, Jacob Wolff, commenced an action for debt against the first defendant, Reuben van Boolen. Judgment was obtained for 75*l.* 8*s.* 9*d.* and 45*l.* 8*s.* 6*d.* costs.

On the 28th April 1904, Reuben van Boolen was adjudged bankrupt, the receiving order being made against him on the 14th April 1904, the petitioning creditor's debt being the sum recovered in the action.

On the 14th Nov. 1904 the writ in an action by Jacob Wolff for himself and all other creditors of Reuben van Boolen was issued, the plaintiff's claim being for a declaration that the post-nuptial settlement of the 22nd Nov. 1901 might

(a) Reported by W. P. PAIN, Esq., Barrister-at-Law.

be set aside in favour of the official receiver, and for the appointment of a receiver.

Sarah van Boolen, wife of Reuben van Boolen, was an original defendant to the action.

On the 14th April 1905 Joyce, J. appointed a receiver of the leasehold property comprised in the assignment of Nov. 1901, and granted an injunction restraining the defendants from parting with the possession of the chattels comprised in that deed, such property and chattels being the subject-matter of the claim in the present action.

By an order made on the 4th July 1905 the official receiver of the Wandsworth County Court, as trustee of the property of Reuben van Boolen, was added as a defendant to the action.

On the 28th Sept. 1905 a receiving order in bankruptcy was made against the plaintiff in a representative capacity, Jacob Wolff, and he was on the 26th Oct. 1905 adjudged bankrupt. The same official receiver became official receiver in both bankruptcies.

On the 15th Nov. 1905, in reply to a letter from the defendants' solicitor, the official receiver expressed himself as not being satisfied that the plaintiff's right of action in a representative capacity was abated by the bankruptcy of the nominal plaintiff, and, when applied to by the plaintiff, he refused to lend his name as a party to the action against Van Boolen without security against any order against him for costs.

Order XVII., r. 1, provides that

> A cause or matter shall not become abated by reason of . . . bankruptcy of any of the parties if the cause of action survive or continue.

In the above circumstances the defendants Reuben van Boolen and Sarah van Boolen gave notice of the present application, for an order that all further proceedings in this action be stayed on the ground of the plaintiff's bankruptcy.

Bertram Jacobs for the applicant, the defendant in the action.—The matter has not been before your Lordship before. The history of the case is that, having recovered judgment against him, Wolff made Van Boolen bankrupt, and the whole question is whether, after becoming bankrupt himself, Wolff can continue an action previously commenced by him on behalf of himself and all other creditors of Van Boolen. The cases show that Van Boolen is entitled to a stay of proceedings. If the trustee in bankruptcy does not choose to go on with the action, then the defendant is entitled to a stay. [He was stopped by the Court. KEKEWICH, J.—The trustee is entitled to security for costs. How can you go on, Mr. Evans, without the official receiver?]

Frank Evans for the plaintiff.—The position is that this is an action brought to set aside the transfer of certain property as being a fraudulent assignment within the doctrine of *Freeman* v. *Pope* (23 L. T. Rep. 208; L. Rep. 5 Ch. 538). Wolff did not sue in his own name. [KEKEWICH, J.—A person who sues on behalf of himself and all others must be one of those others.] There is no reported decision on this point, although in a case before your Lordship a distinction was drawn between a plaintiff suing on behalf of himself and all other debenture-holders and his power to consent to a stay, and the position in that respect of a plaintiff in a creditor's administration action:

> *Re Alpha Company; Ward* v. *Alpha Company*, 87 L. T. Rep. 646; (1903) 1 Ch. 203.

There are very few cases as to the true nature of a debenture-holder's action. [KEKEWICH, J.—I agree with you. I have again and again endeavoured to ascertain what the true nature of that action is.] When this matter came before Joyce, J., his Lordship said we should have an opportunity of asking the official receiver to join in the action. We had joined the official receiver as a defendant. The power of a plaintiff in a debenture-holder's action after judgment to consent to a stay of proceedings is pointed out in *Re Alpha Company; Ward* v. *Alpha Company* (*ubi sup.*). The plaintiff is *dominus litis*. This action for setting aside a fraudulent transaction is more in the nature of an administration action than a debenture-holder's action. [KEKEWICH, J. pointed out that the order which had been in use in administration suits for centuries contains a direction that the assets shall be applied in due course of administration, and in virtue of that the court restrains actions by creditors, and in the result takes upon itself the administration in order to be able to see that justice is done. Up to judgment the creditor can discontinue his action.] It is not said that the decree was the same here, but that the action we are now bringing for the administration of this bankrupt's estate is in the nature of an administration action. In a debenture-holder's action a solvent plaintiff must be selected in case there should be questions of set-off between the company and the representative plaintiff. A demurrer—or more technically a plea—for want of interest would have lain only if the action had been commenced after the plaintiff's bankruptcy. After the adjournment of the application before Joyce, J. the official receiver declined to permit the use of his name without an indemnity for costs of the action, but the same official receiver acts in both bankruptcies, and whatever the plaintiff recovers he would be bound to hand over to the official receiver for the benefit of his creditors. He can continue the action in a representative capacity. No trust estate of a bankrupt vests in the official receiver: (46 & 47 Vict. c. 52, s. 44 (1). The action does not abate, provided the plaintiff joins a trustee in bankruptcy as a party. The injunction obtained on the 14th April 1905, coupled with the appointment of a receiver, operates as a judgment in administration. I submit this action is one in the nature of an administration action with a party suing as trustee, and, so far as the court has any discretion in the matter, it should be allowed to proceed.

KEKEWICH, J.—As regards actions instituted by one person on behalf of himself and all other members of a class, it is an absolute rule that the one must be a member of the class which he purports to represent. If he wishes to bring an action on behalf of shareholders, he must himself be a shareholder. That is not only a settled rule, but it is implied in the form of the proceedings. He sues on behalf of himself and all other creditors, and it would be absolute nonsense if he was not a creditor, and the use of the word "other" means that he is one himself. If he had

instituted this action being a bankrupt, so that the debt he seeks to recover would be in the trustee, the action would be wrong in its inception. It seems to me that the same rule must apply if he becomes bankrupt during the proceedings; an assignment takes place by act of law of the right of action, and he becomes incapable of conducting it. As I put it to his counsel in the course of the argument, if he had assigned any debt he could not recover it, and it would put an end to the action. As a matter of course the action would have passed because the right is transferred. It is assigned by act of law; the act of law has assigned it for him. As against that there are two arguments which merit notice. First, it was said that he was a trustee; and that, being a trustee, the debt has not passed to the official receiver and trustee in his bankruptcy. Of course, if that is the true view, the matter is unarguable. But he is not a trustee of the action. He can discontinue it, by the leave of the court, as *dominus litis*, but what he would recover he would recover for the defendant's trustee, and, if he succeeds in setting aside these assignments for the benefit of his creditors, what he recovers vests in the trustee for them. That would have to be applied for the benefit of the creditors. He may become a trustee afterwards of the fruits of the action, but he is not a trustee of the action, and therefore the right of action passes to the trustee in bankruptcy. Secondly, it is pointed out that there is a receiver appointed in this action, and it is argued that that is equivalent to a judgment. In the first place, the order appointing the receiver is not equivalent to a judgment or anything approaching to it. It is an interlocutory process which is something to protect the property while the rights to it are yet unsettled, and where there is to be a judgment. But supposing, for the moment, it is equivalent to a judgment, and that the plaintiff had in substance got an order such as he asks for in his statement of claim, that does not alter the position. The court in cases of this kind does not undertake to protect the creditors. After judgment this gentleman can say, "I do not care to go on with it," or assign his interest. But, whatever the court would think fit to do, it would be quite improper to allow this action to proceed. The order I shall make is this: Unless the official receiver obtains an order to carry on the proceedings against the defendants on or before the 24th April, the action to stand dismissed with costs. In that event direct taxation of costs, and give the defendants leave to apply to prove in the plaintiff's bankruptcy.

Solicitors for the plaintiff, *C. Groebel* and *Co.*
Solicitor for the defendants, *Arthur S. Joseph.*

KING'S BENCH DIVISION.

Thursday, March 8, 1906.

(Before Lord ALVERSTONE, C.J., RIDLEY and DARLING, JJ.)

MADDEN (app.) *v.* RHODES AND OTHERS (resps.). (*a*)

Trade union—Officer of union—Officer "wilfully withholding" property of union—Absence of fraud or criminality—Liability to summary proceedings for penalties — Trade Union Act 1871 (34 *&* 35 *Vict. c.* 31), *ss.* 4, 9, 12.

An officer of a trade union who, having in his possession moneys, books, or other effects belonging to the trade union, "wilfully withholds" the same, is not, in the absence of any fraud or criminality on his part, liable to be proceeded against for penalties under sect. 12 *of the Trade Union Act* 1871, *and a court of summary jurisdiction has no power under that section to entertain a complaint against him for such wilful withholding of the property of the trade union; but under sect.* 9 *of the Act a civil proceeding may be taken against him for the recovery of the property.*

Barrett *v.* Markham (27 *L. T. Rep.* 313; *L. Rep.* 7 *C. P.* 405) *followed.*

CASE stated by the metropolitan police magistrate sitting at the Marlborough-street Police-court, upon the hearing of a summons before him on the 10th July 1905, between Edward Madden, a trustee of the Amalgamated Society of Tailors and Tailoresses, and Thomas Rhodes and four others, the trustees of the West-end branch of that society.

The magistrate dismissed the summons on the ground that, as no fraud or dishonesty on the part of the defendants was proved or alleged, the matter was not within his jurisdiction, having regard to the decision in *Barrett* v. *Markham* (27 L. T. Rep. 313; L. Rep. 7 C. P. 405).

The summons was issued under sect. 12 of the Trade Union Act 1871 (34 & 35 Vict. c. 31) by the appellant on behalf of the Amalgamated Society of Tailors and Tailoresses, a society registered as a trade union under the Act, against the respondents as trustees of the West-end branch of the trade union, complaining that they being officers of the trade union having in their possession certain moneys, securities, books, papers, and other effects of the Amalgamated Society of Tailors and Tailoressess wilfully withheld the same.

A copy of the existing rules of the society, duly registered as required under the Trade Union Acts, was exhibited with the case.

A general committee of management of the society, termed an executive council, is elected by the conference of delegates of branches which meets periodically to decide all questions of importance to the trade, to enact new rules, amend existing ones, and transact any business in the interests of the amalgamation, and to elect a general committee of management, termed "an executive council." Each branch of the society is "to appoint its own officers and conduct its own business in accordance with rules."

A dispute having arisen between the executive council and the West-end branch in respect of the duties and appointment of an officer (not men-

(*a*) Reported by W. W. OAR, Esq., Barrister-at-Law.

tioned in the rules) referred to as the out-collector of the West-end branch, the conference of the 10th Aug. 1904 resolved:

That it be an instruction from the conference that in future the out-collector of the West-end branch must make members and take contributions for all branches of the West London district, and such other branches as the executive council may direct, but no collector can be appointed without the consent of the executive council.

On the 28th April 1905 the executive council, reciting the continued refusal of the West-end branch to perform the duty imposed upon it by the above resolution, demanded "the resignation of the branch officers and committee and the appointment of loyal members of our amalgamation," and further authorised the appellant, with another general trustee, to proceed to the West-end branch and "to compel the trustees of that branch to deliver up all moneys, books, vouchers, documents, and all property of whatever description, held by them in trust for the Amalgamated Society of Tailors and Tailoresses."

The West-end branch replied with the following unanimous resolution:

This meeting of members of the West-end branch of the A. S. T. having considered the present situation in all its bearings, are satisfied that the branch officials have done nothing to justify the action of the executive council, and hereby demand the withdrawal of all adverse resolutions against the branch, and the acknowledgment of Mr. Willis's position as collector; failing which we authorise the officers and committee to withdraw the branch from the A. S. T., and pledge ourselves to support such action in any and every possible manner.

It was admitted that there was no fraud or criminality.

The magistrate was therefore of opinion that the questions raised were not within the jurisdiction of a magistrate at a police-court under sect. 12 of the Trade Union Act 1871, and he dismissed the case.

The following rules of the society were referred to:

Rule 5. Trustees.—Each executive council shall, during their term of office, be appointed the general trustees of the society, and all moneys subscribed by members shall be held by them in trust for the members generally, and shall be applied to the carrying out the foregoing objects according to these rules; and the branch trustees, when required by the aforesaid general trustees, shall deliver up possession of all moneys, goods, documents, and all property of whatever description held by them in trust for the society. . . . Any officer or member misapplying the funds shall repay the same, and suffer such other punishment as the law may direct. . . .

Rule 6. Division into branches—1. This society shall be divided into branches, each branch to appoint its own officers, and conduct its own business, in accordance with rules. 2. A branch shall consist of not less than six members; but no branch or district shall close without the sanction of the executive council; and the E. C. shall cause all members to be transferred to the nearest branch.

Rule 23. Branch trustees — (1) Each branch shall appoint not less than three nor more than five trustees, who shall place all moneys, not absolutely required for the current business of the branch, in a Post Office Savings Bank; such funds to be deposited in the name of the society. (2) No trustee shall at any time dispose o any of the society's money which may be invested in their name, contrary to the true meaning and intent of the society. The local trustees shall at any time, when required by the executive council or decision of a branch meeting convened for that purpose, deliver up all the moneys, cheques, properly signed, books, and other property of the society to the persons appointed to receive the same. Should they, however, refuse to deliver up the said money, cheques, books, or other property, the general trustees shall, by legal means, compel them. (3) The executive council shall, as described by rule 5, be appointed the general trustees of the society; but the branch trustees appointed by each branch shall hold or bank all moneys received by the branch in accordance with the rules of the society.

Rule 24. Each branch shall deposit its money in the Post Office Savings Bank. All money in each bank to be banked in the name of the trustees. Trustees shall not hold the bank book, or the keys of the box where the bank book is kept. The name of the society shall be given to the bank where the money is deposited.

The Trade Union Act 1871 (34 & 35 Vict. c. 31) provides:

Sect. 4. Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements—namely: (1) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed: . . .

Sect. 9. The trustees of any trade union registered under this Act, or any other officer of such trade union who may be authorised so to do by the rules thereof, are hereby empowered to bring or defend, or cause to be brought or defended, any action, suit, prosecution, or complaint, in any court of law or equity, touching or concerning the property, right, or claim to property of the trade union, and shall and may, in all cases concerning the real or personal property of such trade union, sue and be sued, plead and be impleaded, in any court of law or equity, in their proper names, without other description than the title of their office; and no such action, suit, prosecution, or complaint shall be discontinued or shall abate by the death or removal from office of such persons or any of them, but the same shall and may be proceeded in by their successor or successors as if such death, resignation, or removal had not taken place. . . .

Sect. 12. If any officer, member, or other person being or representing himself to be a member of a trade-union registered under this Act, or the nominee, executor, administrator, or assignee of a member thereof, or any person whatsoever, by false representation or imposition obtain possession of any moneys, securities, books, papers, or other effects of such trade union, or, having the same in his possession, wilfully withhold or fraudulently misapply the same, or wilfully apply any part of the same to purposes other than those expressed or directed in the rules of such trade union, or any part thereof, the court of summary jurisdiction for the place in which the registered office of the trade union is situate, upon a complaint made by any person on behalf of such trade union, or by the registrar, or in Scotland at the instance of the procurator fiscal of the court to which such complaint is competently made, or of the trade union, with his concurrence, may, by summary order, order such officer, member, or other person to deliver up all such moneys, securities, books, papers, or other effects to the trade union, or to repay the amount of money applied improperly, and to pay, if the court think fit, a further sum of money not exceeding twenty pounds, together with costs not exceeding twenty shillings; and, in default of such delivery of effects, or repayment of such amount of money, or payment of such penalty and costs aforesaid,

the said court may order the said person so convicted to be imprisoned, with or without hard labour, for any time not exceeding three months: Provided that nothing herein contained shall prevent the said trade union, or in Scotland Her Majesty's Advocate, from proceeding by indictment against the said party: Provided also that no person shall be proceeded against by indictment if a conviction shall have been previously obtained for the same offence under the provisions of this Act.

Shearman, K.C. (*Edmond Browne* with him) for the appellant.—The summons was under sect. 12 for "wilfully withholding," and the magistrate took the view that the section dealt only with criminal offences, and that unless there was an allegation that the wilful withholding of these things was with criminal intent he had no jurisdiction, and he based his decision upon the case of *Barrett* v. *Markham* (27 L. T. Rep. 313; L. Rep. 7 C. P. 405). The magistrate was wrong in holding that he was bound by that case, and that the section did not apply where there was no fraud or dishonesty. If the complainant has not this remedy, then he has no remedy at all, as the common law remedy is taken away by sect. 4, under which an action cannot be maintained for breach of any agreement (amongst others) between members of a trade union as to the conditions on which any members shall "transact business"; and sect. 9, which enables the trustees of the union to bring or defend actions, does not give the right to bring an action in such a case as this. Sect. 9 does not refer to disputes between one member and another member of the trade union, but it merely refers to disputes between members and persons who are not members. The policy of the Act is that when there is a dispute between members of trade unions, then if anybody wilfully withholds property, either criminally or civilly, the complainant must go before the magistrate under sect. 12, the object being to provide a summary remedy. Taking the words of sect. 12, the section says if any person "by false representation or imposition obtain possession," &c. That part of the sentence clearly implies fraud, but the "false representation or imposition" does not run on into or govern the next part of the sentence, and does not govern the words "wilfully withhold." One set of facts giving jurisdiction is "by false representation or imposition" obtaining possession of any moneys, but the next part of the sentence is a fresh sentence, and the words "or, having the same in his possession, wilfully withhold," &c., apply if the person has these things in his possession, whether he obtained them by false representation or not. Then taking the words "wilfully withhold or fraudulently misapply the same," they show that the "wilfully withholding" is entirely different from fraudulent withholding. So that on the construction of the section itself it is clear that a person may "wilfully withhold" these things without being guilty of any misrepresentation, fraud, or criminal intent whatever, and the following words "or wilfully apply any part of the same," &c., certainly do not point to a criminal matter. The magistrate dismissed this case on the authority of *Barrett* v. *Markham* (*ubi sup.*), which was decided on sect. 24 of the Friendly Societies Act of 1855 (18 & 19 Vict. c. 63). In that case the treasurer of a friendly society was summoned under sect. 24 for "withholding or misapplying" moneys of the society, and the court held that he could not be convicted unless it were shown that he had been guilty of some fraud or misrepresentation. There are two distinctions between that case and the present. The sections are not quite the same. The section in that case had the words "withhold or misapply the same"—the word "wilfully" which is in the present section not being in that section; but, although there are slight differences, it is conceded that the sections are substantially the same. Secondly, in that case the proceeding was against the treasurer, and there was in a preceding section—sect. 22—a civil remedy given against him, followed by this *quasi*-criminal remedy in sect. 24. In the present Act there is no such civil remedy given in express terms, but there is only a general suing clause given in sect. 9, which does not apply as between members, and sect. 4 really applies to prevent the courts from entertaining any dispute of the present kind, so that there is in effect no other legal remedy, except the remedy taken in this case under sect. 12. That case is therefore distinguishable upon the grounds that there are substantial differences between the two Acts, and that sect. 4 of the Act now in question prohibits disputes between members being dealt with in a civil court. The decision itself is not a very sound decision, and what was done here comes literally within the words "wilfully withholding," and those words ought to be construed literally:

Reg. v. *Stoddart*, 83 L. T. Rep. 538; (1901) 1 K. B. 177.

Herman Cohen, for the respondents, was not called upon.

Lord ALVERSTONE, C.J.—In my opinion the magistrate came to a perfectly right decision. If the case of *Barrett* v. *Markham* (*ubi sup.*) is to be taken to be an authority on the construction of sect. 12 of this statute, it is distinctly in point. That was a decision of Willes, J., in which Keating, J. concurred, that a proceeding under a section, sect. 24 of the Friendly Societies Act of 1855, which is analogous to the section in question in this case—namely, sect. 12 of the Trade Union Act of 1871—can only be taken in respect of a *quasi*-criminal case—that is, in respect of something which is of a criminal character. Looking at the proviso at the end of the section, which, as counsel for the appellant has admitted, was the same proviso as at the end of sect. 24 of the Friendly Societies Act of 1855, and, looking at the nature of the punishment and the coupling of the words immediately preceding referring to "false representation or imposition," and the words immediately following "fraudulently misapply," I should have thought that the words "wilfully withhold" imported something in the nature of conduct which would not admit of an answer in a civil court. If that authority of *Barrett* v. *Markham* (*ubi sup.*) binds us in this case, then we are clearly not entitled to deal with this case upon the basis that a mere civil dispute comes within the section. The principle of that decision seems to me to rest upon two grounds—first, that there was in sect. 22 of the Friendly Society's Act of 1855 an alternative civil remedy; and, secondly, that the language of the section then

in question, sect. 24 of the Friendly Societies Act of 1855, in its enactment pointed to proceedings in the nature of criminal proceedings, and in the nature of misconduct—as Willes, J. says: "a withholding or misapplying under circumstances importing misconduct." Now, that is the language of one of the greatest lawyers who ever sat on the bench. Therefore it would not be wise not to rely on that which is his own test. If counsel for the appellant could have successfully distinguished these two Acts, which he has attempted to do, we should then have been able to say that that decision was not an authority binding upon us in this case. He admits that the language of these two sections is so very much alike that the principle based upon that language in the two cases seems to be the same; but he suggests that there is no alternative civil remedy given by the Trade Union Act 1871, or at all events, that there is not the alternative civil remedy given by the Act of 1871 such as was given by sect. 22 of the Friendly Societies Act of 1855. In my opinion sect. 9 of the Trade Union Act of 1871 certainly gives quite as full a civil remedy as the particular section—sect. 22—in the earlier Act of 1855; and when it is said that that civil remedy given by sect. 9 is taken away by sect. 4, I cannot agree with that contention. As I pointed out in the course of the argument, we must read sects. 4 and 9 together. Sect. 4 has been considered in the Court of Appeal more than once recently, and I think it has been generally considered to be a section applicable as between members of the trade union, and not as between what I may call one trade union against another or one branch of a trade union against another. Therefore, it seems to me that the language of sect. 4 certainly does not point to a dispute of this character. Then, further, there is the point which was indicated to us during the argument by counsel for the respondents, that sect. 9 contemplates disputes between the trustees of a trade union with regard to property and persons who have got possession of property which the trade union claims. Now the claim in the present case is by a trustee of what counsel for the appellant has called the general society, against four persons who are trustees of what is called the branch society. In my judgment, a claim of this kind is directly within the remedy contemplated by sect. 9. Applying these principles, I think that this case fails, and in my judgment the magistrate was right in thinking that the principle of the decision in the earlier case of *Barrett* v. *Markham* (*ubi sup.*) applied. Therefore this appeal must be dismissed.

RIDLEY, J.—I agree.

DARLING, J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Pattinson* and *Brewer*.

Solicitors for the respondents, *Andrews* and *Andrews*.

END OF VOL. XXII.

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